MONOPOLY OF JUSTICE:

A STUDY OF INVESTIGATIVE AND PROSECUTORIAL ARMS OF THE PROSECUTION SERVICE IN THE REPUBLIC OF KOREA

A Thesis Submitted for

The Degree of Doctor of Philosophy to

Kent Law School

University of Kent

By

Daehyun Choe

2012

To my family for their loving support

Abstract

The South Korean criminal justice system is often described as 'Prosecutorial Justice'. Most investigative and prosecutorial powers are exercised only by prosecutors. It is decisions made by prosecutors that usually decide the outcomes of trials. On the basis of its extensive powers, the prosecution service has achieved a conviction rate exceeding ninety-nine per cent, which is one of the highest in the world.

This thesis explores the Korean prosecutor's position and its impact. Three aspects are discussed: the trial which relies heavily on prosecution file and records of interview; the protection of the defendant's constitutional rights; and the relationship between the police and prosecutors. Unlike previous studies, this research has employed quantitative and qualitative empirical methods including content analysis (464 news articles), a survey based on self-completion questionnaires (1,144 police officers), and semi-structured interviewing (20 legal professionals). In addition, in order to gain insight into the Korean criminal procedure, the role, power and accountability of the Korean prosecution service are compared to those of five representative systems in England and Wales, the USA, France, Germany and Japan.

The findings of this study are that a ninety-nine per cent of conviction rate does not demonstrate any great capability of the prosecution service. Rather, it leads to restricted constitutional rights of the defendants and meaningless trials which serve only to confirm the prosecutorial decisions. In addition, this domination over the criminal justice system and the powers of direct investigation increase occupational stress for police officers. This in turn leads to the performance of the police being downgraded, and as a result, inefficiency in the criminal justice system.

Justice cannot be achieved by the monopoly of one legal actor over all criminal proceedings. Rather, the criminal process needs a system of checks and balances. The powers which are currently monopolised by the prosecutors should be separated and their decisions should be reviewed by appropriate monitoring schemes including citizens, judges and independent reviewing mechanisms.

Author's Note

All translations are by the author, unless otherwise stated.

Acknowledgements

First and foremost, I have a very pleasant duty to thank *Professor Steve Uglow* and *Dr Lisa Dickson* for directing and supporting me with trust. From inception to conclusion, they gave me generously of their time, attention, and ideas. In particular, they helped me to stick to the point at every moment with objectivity. Thank you for knowing, liking, and critiquing my work.

I have received invaluable support from many people. I thank *Dr Young Hun Jeong, Dr Mattew Bond, Dr Derek Kirton, and Calgar Evren* who gave me helpful comments on earlier version of this thesis, especially on the results of the statistical analysis. At the Korean Police Agency, *Woon-Ha Hwang, Gap-Ryung Min, Hyun-Taek Shin and Young-Min Nah,* helped me to administer interviews with the legal professionals and an extensive survey on the police officers. Thank you all. I am also indebted to *Togashi Susumu* who provided the information on the Japanese criminal justice system and the statistics as to the Japanese police and prosecution service.

For the financial support, I am grateful to the Korean government. I could not have started and stopped this project without such generous support. The government gave me more money than I deserved and sufficient time to finish this study.

My biggest debt is to the police officers, judges, prosecutors, and defence lawyers whom I encountered, interviewed, surveyed, and argued with during the field work. On the basis of their help, this thesis could be constructed in a collective way. Thank you all.

Finally, I would like to express my gratitude to Kent Law School for the generous provision of the facilities, workshops, and support. Many thanks in particular to *Lynn Risbridger* and *Dylan Williams* who always tried to meet my requests as to the facilities and administrative processes.

Contents

Frequently Used Acronyms

CFA	Confirmatory Factor Analysis
CID	Central Investigation Department
CPS	Crown Prosecution Service
DPP	Director of Public Prosecutions
HMCPSI	Her Majesty's Crown Prosecution Service Inspectorate
JCCP	Japanese Code of Criminal Procedure
KCPA	Korean Criminal Procedure Act
KINDS	Korean Integrated Newspaper Database System
NPA	National Police Agency
PACE	Police and Criminal Evidence Act
PP	Public Prosecutors
PPOA	Public Prosecutors' Office Act
PPS	Public Prosecution Service
SP	Special Prosecutor
SPO	Supreme Prosecutors' Office
USMG	United States Military Government
VIF	Variance Inflation Factor

Monopoly of Justice:

A Study of Investigative and Prosecutorial Arms of The Prosecution Service in the Republic of Korea

Introduction

1. Themes, the Scope of the Study and Research Questions

The Korean[1] system of criminal justice has been often called a 'prosecutorial justice system.'[2] This study explores the dominant position of the prosecution service and its impact on the criminal proceedings not least a ninety-nine per cent conviction rate. In particular, the impact is discussed by focusing on the constitutional rights of the defence and a relationship between the police and prosecutors.[3]

In general, the public prosecutors are viewed as some of the most powerful officials in the government since they can decide 'whether or not to bring criminal charges; who to charge; what charges to bring; whether a defendant will stand trial, plead guilty, or enter a correctional program in lieu of criminal charges; and whether to confer immunity from prosecution.'[4] In other words, the prosecutor in fact has the authority to invoke or deny punishment. In those jurisdictions where the capital punishment exists, such prosecutorial powers, as Gershman put it, may literally determine life and death.[5] Vorenberg described these prosecutorial powers as thus:

> The prosecutor's charge decision determines the extent of the suspect's contact with the criminal justice system. It is also the key to the prosecutor's control over plea bargaining, although prosecutors may also bargain directly about sentence by offering to make

[1] In this thesis, Korea hereinafter refers to the Republic of Korea (South Korea).
[2] Kuk Cho. 'The Unfinished "Criminal Procedure Revolution" of Post-Democratization South Korea' (2002) 30(3) Denver J Int Law Policy 377, 386.
[3] Korean Supreme Court, 'Judicial Statistics in 2007 [*Sabeopyeongam*]' KSC (Seoul) ch 5 Criminal Trials.
[4] Bennett L. Gershman. 'The New Prosecutors' (1991) 53 U.Pitt.L.Rev. 393, 405 n 74.
[5] ibid 405; Because of such an extensive power, many commentators may draw attention to the role of the prosecutors in the criminal proceedings. *See* Julia Fionda, *Public Prosecutors and Discretion: A Comparative Study* ([Oxford monographs on criminal law and criminal justice], Clarendon Press; Oxford University Press, Oxford; New York 1995) 268; Andrew Ashworth. 'Developments in the Public Prosecutor's Office in England and Wales' (2000) 8 European Journal of Crime, Criminal Law and Criminal Justice 257; James Vorenberg. 'Decent Restraint of Prosecutorial Power' (1980) 94 Harv L Rev 1521; Stanley Z. Fisher. 'In Search of the Virtuous Prosecutor: A Conceptual Framework' (1988) 15 Am J Crim Law 197; Stanley Z. Fisher. 'The Prosecutor's Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons From England' (1999-2000) 68 Fordham L Rev 1379; Fred C. Zacharias. 'Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice' (1991) 44 Vand.L.Rev. 45; Wayne R. LaFave. 'The Prosecutor's Discretion in the United States' (1970) 18(3) The American Journal of Comparative Law 532; H. Richard Uviller. 'The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Dispute' (1999) 68 Fordham L.Rev. 1695.

> recommendations to the judge or by agreeing to a plea on condition that a specific sentence is imposed. Prosecutors can reduce a charge for a killing with ambiguous motives from murder to manslaughter, ignore a minor drug offense or charge it to the hilt, or charge a potential "three-time loser" accused of a small theft under a mandatory life sentence statute or a one-year felony statute.[6]

Such examples show the variety of prosecutorial powers in the criminal process.

However, the Korean public prosecutors, as we shall see in Chapter 5, have even more powers than their counterparts in England and Wales, the USA, Japan, France, and Germany. First, the pre-trial proceedings are monopolised by the public prosecutors.[7] Not only can they direct the investigation of the police, but they also conduct investigations with their own investigative units.[8] Second, only the prosecutors have the authority to charge.[9] Unless the prosecutor brings cases to the court, the criminal proceedings in general cannot be initiated. In addition, there is no scheme to review such a prosecutorial decision to charge.[10] Once the prosecutor decides to charge the suspects, they must go through the criminal process without exception. Finally, the decisions taken by the prosecutors have a considerable impact on a trial. Most of all, trials mainly rely on the dossiers, which have been written by the prosecutors in the pre-trial process.[11] The confessions included in such dossiers play a significant role in proving the guilt of the defendants.[12] The statements in the dossier are regarded more important than those in the open court. Consequently, the pre-trial prosecutorial decisions play a role in determining the verdicts and sentences. This is reinforced by their power to recommend a sentence and to appeal against judicial decisions.[13]

Notwithstanding such notable features of the Korean public prosecution service, there are not many studies addressing the impact of the prosecutorial powers on the

---

[6] James Vorenberg. 'Decent Restraint of Prosecutorial Power' (1980) 94 Harv L Rev 1521, 1526.

[7] Jae-Sang Lee, *Korean Criminal Procedure* (2nd edn Park Young Sa, Seoul 2008), 99-102 (Professor Lee indicated that 'in the Korean criminal procedure, the public prosecutor is regarded as "the ruler of the investigation".')

[8] The Ministry of Justice (tr), *Public Prosecutor's Office Act [Keomchalcheongbeop] partially amended on 21 December 2007 No. 8717* (1949) arts 195, 196.

[9] ibid art 246.

[10] Unlike the English, American, German, and French systems of criminal justice, preliminary hearings by courts are not allowed in the Korean criminal procedure. For more details, *see* ch 5.

[11] Presidential Committee on the Judicial Reform, 'Committee Report (IV): From 14th to 27th Conference' PCJR (Seoul January 2005), 267 (The presidential committee stated that 'in the Korean criminal procedure, verdicts and sentences are generally decided in the judge's office based on the investigative dossiers rather than in court.')

[12] ibid 271.

[13] The Ministry of Justice (tr), *Public Prosecutor's Office Act [Keomchalcheongbeop] partially amended on 21 December 2007 No. 8717* (1949) arts 302, 338.

criminal process. For instance, in the study of 'the unfinished criminal procedure revolution of post-democratization South Korea', Professor Cho argued some problems resulted from the monopoly of powers by the public prosecutors.[14] In particular, he mainly researched the abuse of the monopolised power:

> Korean prosecutors have often been criticized for their reluctance to investigate corruption cases involving powerful politicians or high-ranking government officials, or for their politically based investigation of the cases. For the last decade, the opposition party and civic organizations have argued for establishing independent counsel to investigate such cases.[15]

Hee-Kyoon Kim's study of 'The Role of the Public Prosecutor in Korea: Is He Half-Judge?' is another example dealing with the prosecutorial powers.[16] In this study, he chiefly explored the impact of the prosecutorial protocols. He described the Korean criminal process relying on the dossiers written by the prosecutors as follows:

> Worthy of note is that the Korean prosecutors actually interrogated the suspects and the prospective witnesses ... Furthermore, they reported the result to the trial courts, and the courts' decisions were widely based on those reports, as a practical matter. We might be able to say that, in that sense, the Korean prosecutors might be considered half-judges.[17]

It is the considerable power of the Korean prosecutors to determine the verdict and sentence which is mainly investigated in Kim's study.[18]

Unlike these studies, Professor Jong-Gu Kim's study of 'the reform of the Korean criminal justice system' as well as Dong-Hee Lee and others' study of 'investigative systems' explore comparatively the roles of the prosecutors in the criminal procedure.[19] In particular, Dong-Hee Lee and others focused on the relationship between the police

---

[14] Kuk Cho. 'The Unfinished "Criminal Procedure Revolution" of Post-Democratization South Korea' (2002) 30(3) Denver J Int Law Policy 377, 381-393.

[15] ibid 386.

[16] Hee-Kyoon Kim. 'The Role of the Public Prosecutor in Korea: Is He Half-Judge?' (2006) 6 J.Korean L. 163, 163-179.

[17] ibid 163.

[18] Professor Kim stated that 'Even if he [the prosecutor] is not an examining magistrate or district judge, he seems to have the right to compile an authoritative written dossier recording his examinations of witnesses and accused ...[Nevertheless], there was also not any means to stop the prosecutor's misuse of power. All the more horrible was that the courts themselves aggravated this problem by abandoning their duty of control.' *See* ibid 179.

[19] Jong Gu Kim, *The Reform of the Korean Criminal Justice System* (2nd edn BuB-Mun-Sa, Seoul 2004); Dong Hee Lee and others, *Investigation Systems: A Comparative Study [Bigyosusajedoron]* (Pakyoungsa, Seoul 2004).

and prosecutors in the criminal proceedings, whereas Jong-Gu Kim examined general roles of the prosecutors in different jurisdictions.

Those studies mainly addressed the problems resulting from the monopoly of powers by the public prosecutors in the Korean criminal procedure. Much attention was paid to the abuse of powers and the impact of prosecutorial dossiers. However, those studies have not examined the influence of the investigative function of prosecutors upon the criminal proceedings. Studies, which observe the prosecutorial investigative function in a critical way, are very rare.

This thesis focuses on the prosecutorial investigative function in Korea and its impact on the criminal procedure. First of all, it considers two specific aspects of prosecutorial investigation: namely, directing the police investigation and conducting an investigation with their own units. But, the criminal procedure, as Ashworth and Redmayne put it, should be a sequential process:

> [W]ith suspects being identified by the police and the case then moving on to further stages. At various points suspects may drop out of the system, perhaps because the evidence is thought not to be strong enough, or it is decided that the case is suitable for diversion, or because the CPS decides on review that the case should be discontinued. The process potentially continues up to trial, which may result in conviction or acquittal. After trial, there are further stages of the process, involving appeals.[20]

Delmas-Marty categorised this process into four functions with distinctive aims: 'Investigation – gathering proof of the crime and identifying the perpetrator(s); Prosecution – publicly presenting the evidence; Judgment – legally finding guilt or innocence and, in case of the former, imposition of penalty; and Execution of judgment.'[21]

However, these functions are not completely separated from each other, but instead they are interactive elements, which keep influencing other factors, because every function is a part of a consecutive process. Thus, in practice, as Professor Uglow put it, a complete separation between the investigation and prosecution is impossible,[22] although the aims of investigation and of prosecution, as the Report of the Royal

---

[20] Andrew Ashworth and Mike Redmayne, *The Criminal Process* (3rd edn Oxford University Press, Oxford; New York 2005), 19.

[21] Mark A. Summers (tr), Mireille Delmas-Marty, *The Criminal Process and Human Rights: Toward a European Consciousness* (Martinus Nijhoff Publishers, 1995), 10.

[22] Steve Uglow, *Criminal Justice* (2nd edn Sweet & Maxwell, London 2002), 190.

Commission on Criminal Procedure in 1981 stated, are incompatible.[23]

As we shall see in Chapter 5, the involvement of the prosecutors in investigation can be observed mainly in three different ways: giving advice to the police, directing the investigation of the police, or conducting investigations in a direct way.[24] Of such methods, the Korean prosecutors are fully involved in the investigation by use of direct investigation and supervision.

Secondly, the thesis explores the impact of the prosecutorial investigation. As seen above, the criminal procedure is a consecutive process. One variable in the process may have impact on the other elements. In particular, as we shall see in Chapter 3, the Korean prosecution service has the potential to exert much more influence upon the criminal proceedings than that of the other legal professionals. However, it is not possible for this study to explore all prosecutorial impacts on the criminal proceedings because the prosecutors are involved in nearly all stages in the criminal process and have very different influences on them. Therefore, this study examines three impacts of the prosecutorial investigative function: the impact on the rights of the defendants, on the police investigation, and on the trial.

First, the prosecutorial impact on the outcomes of trials is explored by focusing on the prosecutor's interrogation documents. The records written by the prosecutors during the interrogation play a significant role in determining the verdict in the Korean criminal procedure.[25] If the suspects make a confession to the prosecutor at the pre-trial stage, it will be the most important evidence to prove their guilt even if they later argue that such a confession was coerced. The statements of the suspects and witnesses recorded during the prosecutorial investigation are much more important than those in the open court. Professor Shin described this as follows:

> In general, suspects employ a defence counsel after being charged. At this moment, the most important fact to the defence lawyer is whether the defendants have confessed in front of the prosecutors or not. ... If the confessions are recorded in the prosecutorial dossiers, the situation is very serious. The only thing that the defence lawyer can do is to request for lenient sentences.[26]

---

[23] Sir Cyril Phillips, 'The Royal Commission on Criminal Procedure: Report' HMSO (Cmnd 8092, London) para 6.23.

[24] In the English and US criminal procedure, prosecutors are generally involved in the investigation by giving advice to the police, whereas in France and Germany, prosecutors have the right to direct the investigation. *See* ch 5.

[25] *See* ch 6.

[26] Dong-Woon Shin. 'The Reform of the Korean Legal System and the Revision of the Law of Evidence' (2006) 47(1) Seoul Law Journal 107-132, 109; For the reason why suspects employ a defence counsel after being charged, *see* ch 6 pt 5.

Whether or not the defendant's right to a fair trial in Korea is appropriately preserved is obviously an important issue.

Second, this study examines whether the prosecutorial investigative function can be compatible with due process values, which are created to protect the rights of the defendants.[27] As Sanders and Young put it, the rights of the defendants 'to be treated fairly and without discrimination, to be presumed innocent, and of an innocent person not to be convicted should be regarded as having special weight.'[28] However, investigation dominated by the prosecutors may have an adverse influence upon the rights of the defendants. An analogy may be drawn from the situation in England prior to 1986 when the prosecution was dominated by the police.[29]

Finally, the prosecutorial impact on the police investigation is discussed. In most jurisdictions, investigations are in general conducted by the police.[30] However, where the prosecutors monopolise the investigation process and conduct investigations with their own investigative units, the autonomy and responsibility of the police can be decreased, as stated in the Runciman Report.[31] In addition, as Professor Kim put it, direct investigation by the prosecutors 'leads the police to regard the prosecutors as

---

[27] Packer described these elements as 'due process values': 'Each of its successes stages is designed to present formidable impediments to carrying the accused any further along in the process.' *See* Herbert L. Packer, *The Limits of the Criminal Sanction* (Stanford University Press, Stanford, Calif. 1968) 385, 163.

[28] Andrew Sanders and Richard Young, *Criminal Justice* (3rd edn Oxford University Press, Oxford 2007), 28.

[29] In England and Wales, the police had a considerable impact on the prosecution before the establishment of the Crown Prosecution Service. Professor Fionda described the situation as follows: 'In the view of alarming number of directed acquittals in Crown Courts across the country caused by insufficiency of evidence in prosecuted cases and by the potential partiality of police decisions on prosecution ... the Philips Report made proposals to separate the investigative and the prosecution functions of the police.' *See* Julia Fionda, *Public Prosecutors and Discretion: A Comparative Study* ([Oxford monographs on criminal law and criminal justice], Clarendon Press; Oxford University Press, Oxford; New York 1995) 268, 17 and Sir Cyril Phillips, 'The Royal Commission on Criminal Procedure: Report' HMSO (Cmnd 8092, London) paras 6.23, 24, 27; For more details, *see* ch 5.

[30] Apart from the police, administration agencies carry out investigative function in certain fields. For example, Environment Agency in England and Wales investigates and prosecutes the environmental offences. *See* Andrew Sanders and Richard Young op. cit. 360-361; For statistical information on the investigation by the police, *see* ch 5.

[31] With regard to the supervision by prosecutors over the police investigation, the Runciman Report stated that 'we do not consider it appropriate for the CPS to supervise police officers in the investigation. It is the responsibility of the police to investigate crime. There is no reason to believe that another service, whose members are recruited and promoted for their legal skills and experience, would be more proficient at investigating crime or at supervising and monitoring investigations conducted by those specifically trained for the purpose... Such a step would also remove accountability in this area from the police, with whom it most naturally belongs ... the CPS must be in a position to advise on the evidence that is required if the case is to go forward to trial, it should not be in the position of supervising the gathering of the evidence.' *See* Walter G. Runciman, 'The Royal Commission on Criminal Justice: Report' HMSO (Cm 2263, London) ch 2 para 67.

another powerful investigative authority rather than as a director of police investigation to guarantee the rights of the defendants.'[32] Such a situation may both lead the police to reject the direction of the prosecutors and to cause conflicts between the police and prosecution.[33] In short, the direct investigation of the prosecutors seems to decrease the commitment of the front-line law enforcement officers and bring about unnecessary conflicts between them.

In light of the scope of the study, the fundamental questions that this thesis seeks to explore are summarised as follows:

1. To what extent does the prosecution service dominate criminal proceedings in Korea?
2. Is that dominant position of the prosecution service appropriate to preserve the defendant's constitutional rights and to achieve efficiency in the criminal procedure?
3. Do the functions, discretion, and accountability of the Korean prosecution service correspond to the international standards?

2. Research Methods

In order to explore the various functions of the prosecution service and their impact on criminal proceedings, the thoughts and experiences of the legal professionals are very important since they can show what takes place in practice. Thus, this thesis, unlike previous studies, has employed both quantitative and qualitative empirical methods such as content analysis, a survey based on self-completion questionnaires, and semi-structured interviewing.

Firstly, through content analysis, the point of view of the public as represented in the newspaper on the prosecution service in Korea was examined.[34] Content analysis is a technique to make an objective inference by analysing data e.g. document, texts, and

---

[32] Jong Gu Kim, *The Reform of the Korean Criminal Justice System* (2nd edn BuB-Mun-Sa, Seoul 2004), 532-533.

[33] There are two representative cases indicating the conflict between the police and prosecutors. The police officers who challenged the directions from prosecutors were charged. *See 2007 GOHAP 6* (2007) 48 Kakgong 30 April 2007 1713 (Chunchon District Court Kanglung Branch Court) and ibid *2007 GOHAP 4* 51 13 September 2007 2453 (Daejon District Court)

[34] *See* ch 4.

images.[35] Mass media is a good source for content analysis. As Krippendorff argued, the perceptions and opinions of the public can be inferred through the content analysis.[36]

Content analysis of the Korean mass media gave the basic information on the dominant position of the prosecution service and its main function. For this study, all front-page articles published for one year by two newspapers labelled either conservative or progressive bias were reviewed. Of them, 464 valid articles were employed and analysed through the content analysis.[37]

Secondly, using stratified random sampling and self-completion questionnaires, a survey was administered.[38] First of all, in this survey, the sample population was separated into two groups: investigating police officers and non-investigating police officers. They were asked about three categories:

- Their perceptions on the role of the public prosecutors
- The relationship between the police and prosecutors
- Any role conflicts which the police officers experience in dealing with the prosecutors

The results of the survey were compared between those two groups. In this respect, this study is different from the previous studies which focused on the analysis in the same group.[39]

Such a survey based on self-completion questionnaires provided and answered to more specific question than did the content analysis indicating general opinions reflected in the mass media. Nevertheless, this survey did not give detailed information on the thoughts and perspectives of the legal actors.[40] Thus, it was supplemented by in-

---

[35] Bernard Berelson. 'Content Analysis in Communication Research' (1952) New York - Healthcare Related Statutes and Regulations cited from Alan Bryman, *Social Research Methods* (2nd edn Oxford University Press, Oxford; New York 2004) 592, 274; Ole R. Holsti, *Content Analysis for the Social Sciences and Humanities* (Addison-Wesley Reading, MA, 1969), 14.

[36] Klaus Krippendorff, *Content Analysis: An Introduction to its Methodology* (Sage, 2004), 28 (Krippendorff stated that 'A stereotypical aim of mass-media content analysis is to describe how a controversial issue is "depicted" in a chose genre. Efforts to describe how something is "covered" by, "portrayed" in, or "represented" in the media invoke a picture theory of content.')

[37] *See* ch 4.

[38] Stratified random sample means 'A sample in which units are randomly sampled from a population that has been divided into categories (strata).' *See* Alan Bryman, *Social Research Methods* (3rd edn Oxford University Press, Oxford; New York 2008) 748, 173-174, 699.

[39] *See* Hwan-Beom Lee, Soo-Chang Lee and Deog-Bo Shim. 'The Effects of Police Investigator's Role Conflict on Job Stress in Korean Police Investigation Structure' (2007) 45(1) Korea Journal of Public Administration [*Hangjeong Nonchong*] 255 and Mi-Young Hong, *The Relationship between the Police and Prosecutors: A Survey* (Korean National Assembly, Seoul 2005)

[40] The self-completion questionnaires cannot give more precise information than the interview due to some technical limitations: 'There is no one present to help respondents if they are having difficulty

depth interviewing, which was carried out from July to October 2010.

For the in-depth interview, a semi-structured interviewing method was employed. First of all, interviewees were chosen by snowball sampling.[41] A small group of people from four categories – the police officers, public prosecutors, judges, and defence counsel – were initially contacted. Then, these contacts were used to establish new contacts with others in those groups. As a result, twenty legal professionals were interviewed – five persons from each group. In particular, among five prosecutors, three prosecutors were incumbent officers and the others were retired prosecutors. Those interviews not only gave opinions on the results of the survey, but also perspectives on the various issues being raised in this study.

The interview was designed mainly to find various views of the roles, duties, and discretion of the Korean prosecution service. Therefore, there were not many ethical issues. The gathering of personal information was probably the key ethical issue. To protect personal information, confidentiality and anonymity were considered as significant elements. To ensure them, participants' names were all removed from data sources and were, as seen in Appendix, replaced with pseudonyms. In addition, among 20 interviews, two interviews were recorded using note-taking during the interview as the interviewees did not want their sessions to be audio-recorded. Permission of note-taking was also sought as in audio-recording.

The length of each interview was about two hours. The participants were assured of confidentiality and anonymity and that no information about individuals would be given to anyone. Once such issues were resolved, permissions to audio-record was sought and obtained. Indeed, as seen above, the participants could select note-taking instead of audio-recording. Then, participants were reminded once more that they were free to withdraw from the study at any time. The interviews collected in this manner were analysed individually and in groups. Common themes emerged and different views were identified. Then they were organised into key themes and were employed to understand the current situation of the Korean criminal justice system.

In addition to these empirical methods, by comparative study, various roles, powers, and the accountability of the prosecution services were explored. This comparative study was designed not to find an alternative system to transplant into the Korean criminal procedure, but to gain insight into the current situation of the Korean criminal

---

answering a question... There is no opportunity to probe respondents to elaborate an answer...Respondents are more likely than in interviews to become tired of answering questions that are not very salient to them.' *See* Alan Bryman, *Social Research Methods* (3rd edn Oxford University Press, Oxford; New York 2008) 748, 218-219.

[41] ibid 184-185.

justice system.[42] For this comparative study, five jurisdictions – England and Wales, the United States, France, Germany, and Japan – were selected. The systems of criminal justice in those jurisdictions are representative of global criminal justice models. They provide a benchmark of functions of the public prosecution service in the criminal process.[43] In addition, all of them have influenced the establishment of the modern system of criminal justice in Korea.[44] As a result, the comparative study is based on those systems to illustrate the status of the Korean prosecution service.

Finally, such empirical and comparative studies were complemented by other data-gathering methods. For instance, relevant cases in several jurisdictions were explored. Articles and books on prosecution service and related criminal justice subjects were reviewed. Statistical data and official reports also were studied. In addition, there were many informal conversations with police officers, prosecutors, defence lawyers, judges, journalists, suspects, victims, and members of the Parliament which gave different ideas on the issues of this study. Those are based on the author's previous career as a police officer.[45]

The author's career provided fundamental knowledge for this study. However, it might cause any bias unknowingly. To prevent such prejudice, objectivity has been emphasised from the beginning of the research. Terms, research methods, and results of

---

[42] Winterdyk et al. suggested four main grounds for the comparative study: First, 'By examining how different cultures address similar problems...we can gain insight into what might work or not work and under what conditions these differences express themselves.' Second, 'In criminology and criminal justice, as with all social sciences, we strive to be able to explain relevant phenomenon such as why do people kill, why do some people become involved in organized crime, why doesn't imprisonment not seem to work, etc.' Third, 'Sometimes it is just interesting to be able to understand and appreciate other cultures and broaden our understanding of the world.' Finally, 'as the nature of certain [globalised] criminal activity continues to evolve in its breath and complexity, it becomes increasingly necessary to address such problems from al global and international perspective.' *See* John Winterdyk, Philip Reichel and Harry Dammer (eds), *A Guided Reader to Research in Comparative Criminology/Criminal Justice* (Universitatsverlag Dr. N. Brockmeyer, 2009), 21-22.

[43] George F. Cole, Stanislaw J. Frankowski and Marc G. Gertz (eds), *Major Criminal Justice Systems: A Comparative Survey* (2nd edn Sage Publications, Inc, 1987), Francis J. Pakes, *Comparative Criminal Justice* (Willan Publishing, Cullompton; Portland 2004), Mireille Delmas-Marty and John R. Spencer (eds), *European Criminal Procedures* (Cambridge University Press, 2002), and Harry R. Dammer, Erika Fairchild and Jay S. Albanese, *Comparative Criminal Justice Systems* (3rd edn Wadsworth/Thomson Learning, Belmont, CA 2006); For more details on the representative systems, *see* ch 5.

[44] For the in-depth information on the development of the Korean public prosecution service, *see* ch 3.

[45] Such informal conversations mainly resulted from my previous two careers. First, from February 2005 to July 2008, I studied the Korean criminal procedure as a police researcher at the National Police Agency, which is the headquarters of the Korean police. During this period, I had many chances to discuss with scholars, prosecutors, lawyers, judges, and members of the Parliament concerning the status of the police and prosecutors in the criminal procedure. Second, from November 1998 to February 2004, I worked respectively, as an investigator dealing with property crimes at the police station and a detective investigating violent offences at the Police Agency. In this period, unlike the former career, I took practical experiences in the criminal process and opportunities to communicate with suspects, prisoners, victims, police officers, prosecutors, defence lawyers, and prison officers.

analysis have been thoroughly reviewed and amended through the supervision meetings.

3. Plan of Chapters

The following chapters systematically explore prosecutorial powers in Korean criminal procedure and their impact on the basic rights of the defendants, the police investigation, and the outcomes of trials. This thesis unfolds in three sections.

Before moving on to prosecutorial impacts, Chapter 1, 2, 3 and 4 provide basic information for this study. First of all, Chapter 1 gives the theoretical framework for understanding and evaluating the criminal procedures. Chapter 2 describes the contexts for the Korean criminal process. In Chapter 3 and 4, the functions and pre-eminent status of the prosecutors in the Korean system of criminal justice are illustrated. Especially, Chapter 4 includes the content analysis revealing the extent of their investigative function.

Chapter 5 explores the roles, powers, and accountability of the prosecution service in six jurisdictions including Korea. First of all, it introduces the development of modern public prosecution services. Then, the investigative function of the prosecutors, different prosecutorial discretion at the pre-trial stage, and influences upon trials are respectively examined. In the end, the different systems of accountability of public prosecution services are compared. This comparative study proposes a combined model to indicate the direction in which the prosecution services should be developed. Along with the theoretical framework, it provides another significant tool to analyse and critique the prosecutorial roles.

Finally, Chapter 6, 7, and 8 explore the prosecutorial impact on the criminal proceedings. Chapter 6 explores the prosecutorial impact on the outcomes of a trial particularly based on the interrogation records written by the prosecutors. This chapter includes two key issues: the reliability of the confessions recorded during the investigative interview and the consequences caused by trials heavily relying on the prosecutorial dossier. In conclusion, I propose a number of methods to safeguard the suspects in the interrogation room. Chapter 7 examines the impact of the prosecutorial investigation on the rights of the defendants. The issue whether or not the dominant position of the prosecutors can guarantee those rights is addressed. Chapter 8 discusses the impact on the police and their investigation. This chapter, as briefly stated in the research methods set above, is mostly based on a survey of police officers' practices, perceptions, and attitudes regarding the investigation by the prosecutors. Through the

survey, three key issues were examined: the necessity of prosecutorial supervision over the police investigation, the relationship between the police and prosecutors, and the responsibility of the police as front line law enforcement officials.

Chapter 1 Theoretical Framework of the Study

This study is not only descriptive, but also comparative and critical because it analyses the dominant position of the Korean prosecution service and its impact on the criminal process. To this goal, a theoretical framework is required that will guide the analysis.

In this thesis, Packer's models are basically exploited to evaluate criminal proceedings. The two conflicting models of the criminal justice – the crime control and due process models – have been widely regarded as some of the most important contributions to systematic thought about criminal procedure.[1] However, Korea is a developing democracy and this needs to be reflected in the criminal justice system, e.g. public accountability, checks and balances, and separation of powers. Consequently, the correlation between these elements and Packer's models needs to be explored.

1. How to Evaluate Criminal Justice

Criminal justice has many different values and interests. For instance, as Sanders and Young put it, the criminal justice system must 'convict the guilty, protect the innocent from wrongful conviction, protect victims, maintain human rights – the protection of everyone (innocent and guilty) from arbitrary or oppressive treatment, maintain order, secure public confidence in, and cooperation with, policing and prosecution, and pursue these goals efficiently and effectively without disproportionate cost and consequent harm to other public services.'[2]

Those different objectives, as Packer suggested, may be irreconcilable with each other.[3] In the system, for example, where the nature of the political regime weighs heavily on maintaining social order, the protection of human rights may be considered relatively insignificant, and as a consequence, is readily ignored.[4] Thus, it is very

[1] John Griffiths. 'Ideology in Criminal Procedure or a Third Model of the Criminal Process' (1969) 79 Yale LJ 359, 360; Kent Roach. 'Four Models of the Criminal Process' (1998) 89 Journal of Criminal Law and Criminology 671, 671.

[2] Andrew Sanders and Richard Young, *Criminal Justice* (3rd edn Oxford University Press, Oxford 2007), 43.

[3] Herbert L. Packer, *The Limits of the Criminal Sanction* (Stanford University Press, Stanford, Calif. 1968) 385, 153-158.

[4] Sanders and Young stated that 'Many people, especially politicians, like to pretend that ...[various values and interests in the criminal justice] are all equally achievable, but we have seen that this is dangerously misleading.' *See* Andrew Sanders and Richard Young op. cit. 43.

difficult to evaluate certain systems by considering all factors in the criminal justice system. Packer's two models 'permit us to recognize explicitly the value choices that underlie the details of the criminal process.'[5] Different values keep competing for priority.[6] Where crime control values are emphasised, the repression of crimes is considered as by far the most important function.[7] Thus, acting in an informal setting can be permitted for the purpose of efficient investigation and prosecution of crimes. However, the system focusing on due process values is far more deeply impressed within the formal structure of law than is the crime control model.[8] Indeed, the informal and non-adjudicative fact-finding tactics are generally rejected.

These models have been often referred to by many commentators as a useful tool to evaluate the system of criminal justice. Sanders and Young state that Packer's two models can represent extremes on a spectrum of possible ways of doing criminal justice: 'Use of the models enables one to plot the position of current criminal justice practices at each stage, as well as to highlight the direction of actual and foreseeable trends along any given spectrum.'[9] Based on such models, McConville and Baldwin suggested in 1981 that at that time the English system places more emphasis on the crime control values than in the United States. In their study of reliability of the police interrogation, they illustrate:

> '[T]he safeguards available to suspects in police custody are virtually non-existent [in England and Wales]. Yet it is at this stage that the suspect is most vulnerable and where, as Packer rightly argues, the disparity in resources between the state and the accused is greatest. ... The situation is indeed more favourable to the accused in the United States where the courts have striven in recent years to give meaning to his rights.'[10]

However, Packer has been also subjected to a number of criticisms. For example, Ashworth and Redmayne suggest five limitations to the models: unclear explanation of the relationship between models; failure to consider various factors affecting crime rate;

---

[5] Herbert L. Packer, *The Limits of the Criminal Sanction* (Stanford University Press, Stanford, Calif. 1968) 385, 153; Padfield indicated that 'No one would suggest today that these models are entirely satisfactory, but they do allow us to recognize the value choices that underlie the details of the criminal process.' *See* Nicola Padfield, *Text and Materials on the Criminal Justice Process* (4th edn Oxford University Press, Oxford; New York 2008) 536, 10.

[6] Packer op. cit. 153.

[7] ibid 158.

[8] ibid 163.

[9] Sanders and Young op. cit. 19.

[10] Mike McConville and John Baldwin, *Courts, Prosecution, and Conviction* (Clarendon, Oxford 1981) 232, 5.

underestimation of the importance of resource management as an element in the criminal process; no allowance for victim-related matters; and failure to consider delays, which are also a source of considerable anxiety and inconvenience in the criminal process.[11] Padfield also suggested that Packer's models are not sufficient to illustrate all the various aspects in the criminal process.[12]

In addition to those studies, numerous researchers have also developed their ideas based on Packer's models.[13] In particular, Sung analysed the relationship between the development of democracy and the due process model of the criminal process. He suggested that 'the transformation of justice administration in democratizing countries is a transition from a crime control to a due process orientation.'[14] Therefore, in authoritarian states, criminal justice is considered as maintaining social order. As a result, a large law enforcement-punishment apparatus plays a significant role in the criminal process. In contrast, in liberal democracies, the defence of civil liberties is one of the most important values in the criminal justice. Thus, in order to guarantee the due process of law, such systems invest many resources in the judiciary, which consequently leads to a higher rate of case attrition.

Based on Packer's models and Sung's analysis, there is an argument that to guarantee due process values taking place alongside the development of democracy, the roles and powers of the legal actors, in particular of the public prosecution service, need

---

[11] Andrew Ashworth and Mike Redmayne, *The Criminal Process* (3rd edn Oxford University Press, Oxford; New York 2005), 38-40; David J. Smith. 'Case Construction and the Goals of Criminal Process' (1997) 37(3) Br J Criminol 319, 335 (Smith indicated that 'Due process is not a goal in itself'. In other words, 'the Crime Control Model is concerned with the fundamental goal of the criminal justice system, whereas the Due Process Model is concerned with setting limits to the pursuit of that goal.'); John Griffiths. 'Ideology in Criminal Procedure or a Third Model of the Criminal Process' (1969) 79 Yale LJ 359.

[12] Nicola Padfield, *Text and Materials on the Criminal Justice Process* (4th edn Oxford University Press, Oxford; New York 2008) 536, 10 (Padfield stated that 'Packer's models are not enough. There are not just two clear-cut alternative value systems competing for priority in the criminal process.')

[13] Anthony E. Bottoms and John D. McClean, *Defendants in the Criminal Process* (Routledge & Kegan Paul, 1976), 226-232 (Bottoms and McClean introduced a third paradigmatic model, which is different from the Crime Control and Due Process Model: 'The Liberal Bureaucratic Model is the model of the criminal justice process typically held by humane and enlightened clerks to the justices and Crown Court administrators in this country.'); Kent Roach. 'Four Models of the Criminal Process' (1998) 89 Journal of Criminal Law and Criminology 671 (Roach critically assessed Packer's crime control and due process models and suggested two models reflecting victim's rights: 'the crime control model represents our past; the due process and the punitive victims' right models compete in the present and the future depends on whether punitive or non-punitive forms of victims' rights dominate.'); Douglas E. Beloof. 'The Third Model of Criminal Process: The Victim Participation Model' (1999) Utah L.Rev. 289 (Beloof argued that 'The three-model concept, which includes the Victim Participation Model, is more functional than the two-model concept because the law now reflects the significance of genuine values of victim participation, while the two-model concept provides no room for the values of victim participation.')

[14] Hung-En Sung. 'Democracy and Criminal Justice in Cross-National Perspective: From Crime Control to Due Process' (2006) 605(1) Ann. Am. Acad. Pol. Soc. Sci. 311, 311.

to be reformed to be compatible with those values. Due to the Japanese colonial period (1910-1945), the Korean War (1950-1953), and military dictatorship (1961-1993), the Korean system of criminal justice evolved under the influence of an authoritarian state for almost 80 years.[15] Democracy has been established since 1987, when 'the authoritarian regime agreed to carry out a set of democratic reforms including direct presidential elections.'[16] Such reforms have contributed to the partial democratic development of the criminal justice system. For example, a number of provisions to protect the basic rights to a fair trial were introduced in the Korean Constitution.[17]

Notwithstanding such developments, the dominant position of the public prosecution service in the criminal process has never been reformed. In this context, rather than guaranteeing due process values, this study argues prosecutorial monopoly inhibits them from working properly. As a consequence, the protection of the constitutional rights of the individual, as noted in Chapter 7, has been neglected. In addition, ironically, efficient crime control also has been restricted because, as we shall see in Chapter 8, the prosecution service has played a role in decreasing the sense of responsibility among the frontline police officers.

This chapter aims to provide the theoretical framework for this argument. Firstly, Packer's two models are examined. Then, the relationship between two models and democracy are discussed based on Sung's analysis. Finally, the Korean system of criminal justice is evaluated in light of the powers of the public prosecution service and the development of democracy.

2. The Crime Control and Due Process Models

Packer developed the crime control and due process models in order to illustrate two conflicting values systems competing for priority in the operation of the criminal

---

[15] Bruce Cumings, 'Civil society in West and East' in Carles K. Armstrong (ed), *Korean Society: Civil Society, Democracy and the State* (2nd edn Routledge, Oxon; New York 2007) 9, 21-24.

[16] Sun-Hyuk Kim, 'Civil society and democratization in South Korea' in Carles K. Armstrong (ed), *Korean Society: Civil Society, Democracy and the State* (2nd edn Routledge, Oxon; New York 2007) 53, 58.

[17] Kuk Cho. 'The Unfinished "Criminal Procedure Revolution" of Post-Democratization South Korea' (2002) 30(3) Denver J Int Law Policy 377, 377-378 (Professor Cho stated that 'The nationwide June Struggle of 1987 led to the collapse of Korea's authoritarian regime and opened a road toward democratization. Under the authoritarian regime, the 'crime control' value dominated over the 'due process' value in regards to criminal procedure. The Constitution's Bill of Rights was merely nominal, and criminal law and procedure were no more than instruments for maintaining the regime and suppressing those dissident. It was not a coincidence that the June Struggle was sparked by the death of a dissident student tortured during police interrogation.')

procedure.[18] The two models reflect extremes on a scale of feasible ways to conduct criminal justice in criminal proceedings. However, these polarities are not observed in reality. They are not the ideals of the criminal justice. As a consequence, they were presented 'as an aid to analysis, not as a program for action.'[19]

2.1. The Crime Control Model

In the crime control model, the most important function of the criminal process is the repression of the criminal conduct. In order to perform this function, the model focuses on efficiency enabling the criminal process to deal with a large number of offences in an efficient and effective way. Therefore, every stage of the criminal proceedings is conducted on the basis of a standard of efficiency. Packer defined efficiency as 'the system's capacity to apprehend, try, convict, and dispose of a high proportion of criminal offenders whose offences become known.'[20]

For the purpose of successful operation of the criminal process, this model must produce a high rate of apprehension and conviction. As it must deal with many offences with limited resources, speed and finality are regarded as critical elements in this model. In order to increase the speed, the criminal process depends on informality and on uniformity. In addition, by minimising the occasions for challenge, the criminal procedure tries to secure finality.

In the crime control model, the fact-finding process is generally conducted through the informal process in the police station and the prosecutor's office rather than through the formal process in court.[21] However, such informality may not be sufficient for the effective crime control. Thus, the criminal process is supplemented by the uniformity, which plays a role in helping the legal professionals to dispose of large number of cases with limited resources. Such a progress was described as 'an assembly-line conveyor belt' by Packer:

> [It] moves an endless stream of cases, never stopping, carrying the cases to workers who stand at fixed stations and who perform on each case as it comes by the same small but

---

[18] Packer op. cit. 154.
[19] ibid.
[20] *See* ibid 158. Subsequent discussion is based around ibid 158-159.
[21] Fact-finding process is not only limited to the verdict, but it also, as Herman put it, may have an impact on sentencing process: 'Judges historically were afforded fact-finding power at sentencing so that they could play their assigned role in an indeterminate, offender-oriented sentencing scheme.' *See* Susan N. Herman. 'Tail that Wagged the Dog: Bifurcated Fact-Finding under the Federal Sentencing Guidelines and the Limits of Due Process, The' (1992) 66 S.Cal.L.Rev. 289, 305.

> essential operation that brings it one step closer to being a finished product, or, to exchange the metaphor for the reality, a closer file.[22]

In this process, the conviction of the person is de facto decided at an early stage. Police and prosecutors determine the probable innocence or guilt. Those who are probably innocent drop out of the process at an early stage. In contrast, the probably guilty persons are moved quickly through the remaining stages of the process. Indeed, the defendants in this model are presumed guilty rather than innocent. As Packer put it, the presumption of guilt is an important device to enable the system to deal with large numbers of cases in an efficient way.

The significant assumption for this model is that 'screening processes operated by police and prosecutors are reliable indicators of probable guilt':

> Once a man has been arrested and investigated without being found to be probably innocent, or, to put it differently, once a determination has been made that there is enough evidence of guilt to permit holding him for further action, then all subsequent activity directed toward him is based on the view that he is probably guilty. The precise point at which this occurs will vary from case to case; in many cases it will occur as soon as the suspect is arrested, or even before, if the evidence of probable guilt that has come to the attention of the authorities is sufficiently strong. But in any case the presumption of guilt will begin to operate well before the "suspect" becomes a "defendant."[23]

As a result, in this model, the pre-trial fact-finding process is considered more important than any adjudicative process.

2.2. The Due Process Model

Whereas the crime control model looks like a conveyor belt in a factory, the due process model resembles an 'obstacle course'.[24] Formidable impediments are established which play a role in filtering cases for prosecution. The features of the due process model can be illustrated in five aspects: lack of confidence in informal fact-finding process; the

---

[22] ibid 159. Further discussion is based around ibid 160-161.

[23] ibid 160; Packer emphasises that the presumption of guilt is not an opposite concept of the presumption of innocence. Rather, he suggests that 'The presumption of innocence is a direction to officials about how they are to proceed, not a prediction of outcome. The presumption of guilt, however, is purely and simply a prediction of outcome. The presumption of innocence is, then, a direction to the authorities to ignore the presumption of guilt in their treatment of the suspect.' *See* ibid 161.

[24] ibid 163.

rejection of finality; limitations on the official powers; equality between the state and defendants; and scepticism about the morality of criminal sanction.

Firstly, advocates of due process have no confidence in the informal pre-trial fact-finding processes, unlike those of the crime control model. The due process model stresses the limitations resulting from the informal and non-adjudicative fact-finding process:

> People are notoriously poor observers of disturbing events – the more emotion-arousing the context, the greater the possibility that recollection will be incorrect; confessions and admissions by persons in police custody may be induced by physical or psychological coercion so that the police end up hearing what the suspect thinks they want to hear rather than the truth; witnesses may be animated by a bias or interest that no one would trouble to discover except one specially charged with protecting the interest of the accused.[25]

These considerations all lead the due process model to reject informal fact-finding processes and to place emphasis on formal, adjudicative, and adversarial fact-finding process.[26]

Secondly, the due process model rejects the demand for early finality because of the possibilities of human error. There is always a possibility that a case needs to be reopened to examine new facts, which have been discovered since the last public hearing.[27] The due process model stresses that subsequent scrutiny by formal process must be available whenever there is an allegation of factual error.[28]

With respect to such an error, the due process model has a different perspective from the crime control model, in which the probabilities of mistakes are in general accepted because the reliability of the system can be secured by its efficiency. However, the due process model rejects this relationship between the reliability and efficiency. Instead, the model stresses that mistakes in the criminal process must be eliminated to the greatest extent possible in order to achieve the reliability of systems.[29] In sum, in the due process model, 'the aim of the process is at least as much to protect the factually innocent as it is to convict the factually guilty.'[30]

---

[25] ibid.

[26] Packer stated that 'the factual case against the accused is publicly heard by an impartial tribunal and is evaluated only after the accused has had a full opportunity to discredit the case against him.' *See* ibid 163-164.

[27] Andrew Sanders and Richard Young, *Criminal Justice* (3rd edn Oxford University Press, Oxford 2007), 21.

[28] Packer op. cit. 164.

[29] ibid 164-165.

[30] Packer described this feature of the Due Process Model as quality control in industrial technology:

Thirdly, the due process model considers the official powers of the government must be controlled in order to protect the liberty of individuals.[31] The model needs various schemes to control the powers of the state to prevent state officials from exercising their coercive powers in an oppressive manner. In particular, the doctrine of legal guilt is the most far-reaching mechanism to control official power.

According to the doctrine of legal guilt, reliable evidence itself is insufficient to prove the guilt for the accused. Instead, such a factual determination must be supplemented by procedural propriety. For instance, 'the tribunal that convicts [a person] must have the power to deal with this kind of case ("jurisdiction") and must be geographically appropriate ("venue"); too long a time must not have elapsed since the offence was committed ("statute of limitations"); he must not have been previously convicted or acquitted for the same or a substantially similar offense ("double jeopardy"); he must not fall within a category of persons, such as children or the insane, who are legally immune to conviction ("criminal responsibility")'.[32] Packer indicated the abuse of power as the major reason to establish such checking mechanisms:

> Power is always subject to abuse – sometimes subtle, other times, as in the criminal process, open and ugly. Precisely because of its potency in subjecting the individual to the coercive power of the state, the criminal process must, in this model, be subject to controls that prevent it from operating with maximal efficiency. *According to this ideology, maximal efficiency means maximal tyranny.*[33]

Fourthly, the due process model tries to sustain the ideal of equality. This norm does not require the government to provide literally equal opportunities for all criminal defendants to challenge the process. Instead, the norm emphasises the public obligation to ensure that 'financial inability does not destroy the capacity of an accused to assert what may be meritorious challenges to the processes being invoked against him.'[34] Miranda in the USA and duty solicitor in England are examples. The defence lawyers have a significant part to play in checking the operations of the system. In particular, the

---

'tolerable deviation from standard varies with the importance of conformity to standard in the destined uses of the product. *The Due Process Model resembles a factory that has to devote a substantial part of its input to quality control.* This necessarily cuts down on quantitative output.' *See* ibid, 165. (Emphasis added)

[31] Packer indicated that the due process values 'can be expressed in, although not adequately described by, the concept of the primacy of the individual and the complementary concept of limitation on official power.' *See* ibid 165-166.

[32] ibid.

[33] ibid (Emphasis added).

[34] ibid 168-169.

point in time at which the equality norm is introduced into the criminal process determines the impact. For example, the model, which ensures the defence lawyers to become involved in a case at an early stage of criminal process, can have a considerable impact on the result of the case at the trial.

Finally, the due process model is sceptical about the morality and utility of the criminal sanction.[35] The model, as Bator put it, regards such a sanction as an apparatus to be mainly used against 'the psychologically and economically impaired':

> [I]n summary we are told that the criminal law's notion of just condemnation and punishment is a cruel hypocrisy visited by a smug society on the psychologically and economically crippled; that its premise of a morally autonomous will with at least some measure of choice whether to comply with the values expressed in a penal code is unscientific and outmoded; that its reliance on punishment as an educational and deterrent agent is misplaced, particularly in the case of the very members of society most likely to engage in criminal conduct; and that its failure to provide for individualized and humane rehabilitation of offenders is inhuman and wasteful.[36]

Therefore, in this model, the attempts to catch and punish alleged offenders are generally restrained.[37] Packer summarised this feature of the due process model into thus: 'doubts about the ends for which power is being exercised create pressure to limit the discretion with which that power is exercised.'[38]

3. The Relationship between Democracy and Due Process Values

The crime control and due process models are opposite ends of the spectrum and represent simplified models that in practice coexist to various degrees and with different blends.[39] The crime control model places emphasis on the conviction of the guilty. To

---

[35] ibid 170-171

[36] Paul M. Bator. 'Finality in Criminal Law and Federal Habeas Corpus for State Prisoners' (1963) 76(3) Harv Law Rev 441, 442.

[37] Andrew Sanders and Richard Young, *Criminal Justice* (3rd edn Oxford University Press, Oxford 2007), 22.

[38] Packer op. cit. 171.

[39] Hung-En Sung. 'Democracy and Criminal Justice in Cross-National Perspective: From Crime Control to Due Process' (2006) 605(1) Ann. Am. Acad. Pol. Soc. Sci. 311, 313.

this goal, the model accepts some human errors, which may lead the innocent persons to be convicted. In addition, the liberty of the suspects can be limited to the extent that the society accepts. In contrast, the due process model focuses on the need for the acquittal of the innocent. To achieve this value, the model accepts the acquittal of the guilty. In particular, the protection of the civil liberties is regarded as the most crucial value to uphold the whole grounds for integrity of the system.[40]

Both models have their own strong arguments for the importance of their core values, but nevertheless, each model cannot completely exclude the values of the other model. As Packer stated, 'A person who subscribed to all of the values underlying one model to the exclusion of all of the values underlying the other would be rightly viewed as a fanatic.'[41]

Based on Packer's models, Sung suggested that 'the democratization process is characterized and facilitated by a simultaneous transition of the criminal justice system from crime control-oriented structure and operations to due process-oriented organization and functions.'[42] In other words, the quality of a society's democracy can in part be judged by its adherence to values of due process.

Criminal justice systems, which emphasise the crime control values, are generally administered by authoritarian regimes because they give priority to social control.[43] In this context, social control means the 'unilateral suppression of disturbances'.[44] The state powers exceed the claims of the accused. The executive authorities may exercise unrestrained powers, whereas the rights of citizens are extensively regulated.[45] When taken to extremes, such countries are described as 'police states' since the regimes are maintained mainly by the police forces.[46] Similarly, the public prosecution service plays a role as an organ of state coercion.[47] In addition, the judges meticulously apply

---

[40] Andrew Sanders and Richard Young, *Criminal Justice* (3rd edn Oxford University Press, Oxford 2007), 22.

[41] Packer op. cit. 154.

[42] ibid 313; Based on the history of the USA, Packer also acknowledged a gradual progression from the Crime control Model to the Due Process Model. *See* ibid.

[43] ibid, 314; C. Neal Tate and Stacia L. Haynie. 'Authoritarianism and the Functions of Courts: A Time Series Analysis of the Philippine Supreme Court, 1961-1987' (1993) 27(4) Law & Society Review 707, 733-736.

[44] Sung op. cit. 314.

[45] The authoritarianism influences not only the police and prosecutors, but also the judges. *See* n 48 below.

[46] David H. Bayley, *Patterns of Policing: A Comparative International Analysis* (Rutgers Univ Pr, 1990), 202.

[47] Burrage indicated that 'During the 70 years of socialism the law came to play a rather different role in Russian society. It sought less to protect rights of individuals than to instruct and guide the population, to declare the intentions and ideology of the state and, above all, enforce its will. The rights of Soviet citizens were placed in the custody not of the citizens and their advocates but of the prokuratura. The only empirical analysis of procuracy's work in this regard was based on 433 published cases between 1955 and

the laws of the ruler as administrative bureaucrats.[48] In short, as Sung suggested, 'The values and practices found in authoritarian societies fit all the basic traits of Packer's crime control model of justice administration.'[49]

In the crime control-oriented system, fact-finding processes, which are managed by the police and prosecution service, are considered more important than the adjudicative process. Greater statutory powers and discretion are given to the law enforcement agencies in order to maximise the efficiency of the system. Therefore, the investigative authorities have wide powers to determine factual guilt. Almost all cases are passed through the court without particular attrition.

Unlike the crime control-oriented systems, due process-oriented criminal justice prevails in liberal democratic jurisdictions. In these systems, government officials have the 'vertical accountability' to the public through the various channels such as an electoral process, civic organisations, or the news media. In addition, they also have the 'horizontal accountability', which leads legally empowered state agencies to screen other branches of the government and check acts of abuse or neglect by state officials in routine and effective ways.[50] In addition, criminal justice operations are insulated from political interference by a commitment to professionalism and respect for expertise.[51]

Liberal democracies can be characterised by extensive provisions for individual rights and legal restrictions against the intrusion of state powers. For example, unreasonable searches and seizures are restricted generally by the court. Similarly, illegal detention, torture, and cruel punishment also are strictly prohibited. In addition, the system of criminal justice respects the rights to a fair trial e.g., habeas corpus and the right to legal counsel. In short, a liberal democracy, as Sung suggested, 'encourages

---

1974. That study found that 'no published cases exist in which procurators issued protests or representations on behalf of aggrieved citizens and in conflict with the State's interest.' None have come to light since that time, not even since 1985.' *See* Michael Burrage. 'Russian Advocates: Before, During, and After Perestroika' (1993) 18 Law & Soc.Inquiry 573, 588.

[48] Tate and Haynie indicated that 'the fear of coercion causes as least some judges to alter their decisionmaking [sic] in ways pleasing to the ruler(s).' *See* C. Neal Tate and Stacia L. Haynie. 'Authoritarianism and the Functions of Courts: A Time Series Analysis of the Philippine Supreme Court, 1961-1987' (1993) 27(4) Law & Society Review 707, 735.

[49] Sung op. cit. 314-315.

[50] Guillermo O'Donnell. 'Delegative Democracy' (1994) 5 Journal of Democracy 55, 61-62; Diamond stated that 'In addition to regular, free, and fair electoral competition and universal suffrage, ... [democracy] requires the absence of "reserved domains" of power for the military or other social and political forces that are not either directly or indirectly accountable to the electorate. Second, in addition to the "vertical" accountability of rulers to the ruled (which is secured most reliably through regular, free, and fair elections), it requires "horizontal" accountability of officeholders to one another; this constrains executive power and so helps protect constitutionalism, the rule of law, and the deliberative process. Third, it encompasses extensive provisions for political and civic pluralism, as well as for individual and group freedoms.' *See* Larry J. Diamond. 'Is the Third Wave Over?' (1996) 7 Journal of Democracy 20, 23-24.

[51] Sung op. cit. 315.

individual freedom by restraining the intrusion of the state into citizens' lives; this is achieved by insisting on a formal adjudicative fact-finding process, often at the cost of increasing inefficiency and a high rate of case attrition in the criminal justice process.'[52]

By use of a systemic comparison, Sung analysed the relationship between the democratisation and due process values. He hypothesised that 'the organization and operation of criminal justice administration vary according to the attained level of democratization.'[53] In order to examine such propositions, he compared 111 criminal justice systems based on the data from the United Nations Surveys on Crime Trends and the Operations of Criminal Justice Systems.[54]

According to his analysis, higher degrees of democratic achievement are closely related to the development of 'a resourceful criminal justice system characterized by a high rate of case attrition in the criminal justice process.'[55] In other words, liberal democratic countries place more emphasis on due process values than on crime control ones. This feature is mainly reflected in a rate of case attrition.[56] To sum up, in democratising countries, justice administration is gradually transformed from a crime control to a due process orientation. Sung described this transition of the system as follows:

> That the deepening of democratization increases the size, and paradoxically decreases the efficiency, of the criminal justice system highlights the dramatic and interesting changes in the administration of justice that the rule of law can set in motion. The system loses some of its efficiency because different rights of the victims, offenders, and the public at large are taken seriously at different stages of the process.[57]

Although due process values themselves do not create democracy, they can contribute to build and maintain the sense of fairness, which sustains the trust in

---

[52] ibid.

[53] In this study, he employed eight indicators and explored them through the statistics. Of them, 'four (i.e., judicial personnel rate, police contact rate, conviction rate, and incarceration rate) demonstrated statistically significant variations that were consistent with the hypothesis, two personnel categories (i.e., rates of police staff and correctional personnel) showed statistically significant relationships that contradicted the hypothesis, and both prosecutorial variables proved consistently unrelated to the level of democracy. While the personnel indicators provided only partial support to the proposition of structural differences, the operational indicators strongly corroborated the argument of higher criminal case attrition among democratic countries.' *See* ibid 315-326.

[54] ibid 317-318.

[55] ibid 329.

[56] The rates of case attrition were secured based on conviction rate of each jurisdiction. In Sung's analysis, 'Very powerful support was found for the argument that the rate of case attrition in the criminal justice process is lower in more authoritarian countries and higher in more democratic countries.' *See* ibid, 324.

[57] ibid 329.

democratic institutions.[58] People tend to consent and cooperate with criminal justice agencies in a democratic way when they think that their constitutional rights and concerns are guaranteed and respected by the criminal procedure.[59]

4. Korean Criminal Justice Values

The Korean system of criminal justice has been reformed with the development of democracy. Different forms of government have an impact on the legal institutions through different sets of demands and constraints. Recently, the global trend of democratisation has made the systems of criminal justice more transparent and accountable than before.[60] In particular, many countries have succeeded in demolishing authoritarian regimes and replacing them with freely elected governments by the public.[61] However, there are few countries in which criminal justice institutions and practices have been fully reformed to correspond to the democratic ideals of equality, openness, and fairness.[62] Such a limitation is observed in the development of the Korean criminal justice system.

The modern system of Korean criminal justice was established during the Japanese colonial period. In addition, because of the Korean War and military governments, the criminal justice system had developed mostly under authoritarian regimes. In those periods, democracy in Korea was a meaningless title. As Professor Cho stated, the Korean Constitution was described as the 'Emperor's New Clothes.'[63] The police used

---

[58] Tom R. Tyler. 'Procedural Justice, Legitimacy, and the Effective Rule of Law' (2003) 30 Crime & Just. 283, 349-352.

[59] Similarly, Moore stated that 'By building a constituency for ... [due process] values, we not only increase the legitimacy of the criminal justice institutions and enhance their efficiency, we also accomplish the broader goal of reweaving the fabric of a liberal community--"liberal" in the old-fashioned sense. We can teach what we most fundamentally owe to one another. After all, it is in the interstices created by the restraint we impose on ourselves and the wide latitude we give to others that the maximum of liberty and security is found.' *See* Mark H. Moore. 'Notable Speech: Legitimizing Criminal Justice Policies and Practices' (1997) 66(10) FBI Law Enforcement Bulletin 8

[60] Hung-En Sung. 'Democracy and Criminal Justice in Cross-National Perspective: From Crime Control to Due Process' (2006) 605(1) Ann. Am. Acad. Pol. Soc. Sci. 311, 311.

[61] Teresa P. R. Caldeira and James Holston. 'Democracy and violence in Brazil' (1999) 41(04) Comparative Studies in Society and History 691, 691 (Caldeira and Holston indicated that 'Democracy has expanded remarkably throughout the world during the last quarter of the twentieth century. In 1972, there were fifty-two electoral democracies, constituting 33 percent of the world's 160 sovereign nation-states. By 1996, the number had risen to 118 electoral democracies out of 191 states, or 62 percent of the total, for a net gain of 66 democratic states.')

[62] Sung op. cit. 312; Mark Ungar, *Elusive Reform: Democracy and the Rule of Law in Latin America* (Lynne Rienner Pub, 2002), 201-202.

[63] The Korean Constitutional Court (tr), *Constitution of the Republic of Korea [Heonbeop]* (1948); Kuk Cho. 'The Unfinished "Criminal Procedure Revolution" of Post-Democratization South Korea' (2002)

illegal arrest and detention without particular restrictions. In addition, beating, threatening, and torture by water or electricity were often used at the investigation stage. Some high profile cases which took place in the 1980s can illustrate these practices:

> Supporters for [former] President Kim Dae-Jung, a political dissident at that time, were severely tortured when arrested for their alleged conspiracy to overthrow the state in 1980. In particular, those who violated the National Security Law were brutally tortured, and accused of being "pro-enemy leftists." For instance, [former] Presidential Secretary Lee Tae-Bok and Congressman Kim Geun-Tae, who were then leaders of the democratization movement, were brutally tortured when arrested for the violation of the National Security Law in 1980 and in 1983 respectively. In 1987, Professor Kwon In-Sook, then a labor movement activist, was sexually abused by a policeman when arrested, and Park Jong-Chul, a dissident student, was suffocated to death in the bathtub during police torture. Besides political dissidents, ordinary people also had to go through the cruel investigation process. Illegally-obtained confessions and physical evidence were usually admitted by the Court to prove a defendant's guilt. From the standpoint of human rights, it was no more than a "Dark Age".[64]

However, the authoritarian regime was brought down by nationwide protests in 1987.[65] A new road toward democratization opened.[66]

This democratisation process led the Korean Constitution to be reformed, including the protection of the citizen's rights in the criminal procedure. Therefore, the 1987 Constitution is often described as 'a blueprint for the constitutionalization of criminal procedure' in Korea.[67] The general principle of due process in criminal procedure was explicitly incorporated in the Constitution: 'All citizens shall enjoy personal liberty. No person shall be arrested, detained, searched, seized or interrogated except as provided by Act. No person shall be punished, placed under preventive restrictions or subject to involuntary labor except as provided by Act and *through lawful procedures*'.[68] In addition, this principle has been repeatedly emphasised by the Constitutional Court:

30(3) Denver J Int Law Policy 377, 378.

[64] ibid 378-379.

[65] James M. West and Edward J. Baker. 'The Constitutional Reforms in South Korea 1987: Electoral Processes and Judicial Independence' (1988) 1 Harv.Hum.Rts.YB 135, 135; Kuk Cho. 'The Unfinished "Criminal Procedure Revolution" of Post-Democratization South Korea' (2002) 30(3) Denver J Int Law Policy 377, 377.

[66] As seen above briefly, this process is often called the 'June Struggle'.

[67] ibid 379.

[68] The Korean Constitutional Court (tr), *Constitution of the Republic of Korea [Heonbeop]* (1948) art 12 (1).

> The principle of due process requires that both the formal procedure described by the law and the substantial content of the law be reasonable and just ... In particular, it declares that the whole criminal procedure should be controlled from the standpoint of guaranteeing the constitutional basic rights.[69]

Such a judgement ensured that the principle of due process is to guarantee the legality of the procedure.[70]

The Constitution precisely articulates the basic rights of the defendants in the criminal procedure:

- the right not to be tortured[71]
- privilege against self-incrimination[72]
- strict requirements for obtaining judicial warrants for coercive measures[73]
- the right to counsel[74]
- the right to be informed of the reason of arrest or detention[75]
- the right to request judicial hearing for arrest or detention[76]
- exclusionary rule of illegally obtained confession[77]
- protection against double jeopardy[78]
- the right to a fair trial[79]
- the right to speedy and open trial[80]
- presumption of innocence[81]

These rights had been ignored under the authoritarian regimes. Thus, the people's desires to guarantee their human rights were carefully reflected in the Korean

---

[69] *94 HEONBA 1* (1996) 8(2) Panrejib 808 (Korean Constitutional Court) Translated by Kuk Cho. 'The Unfinished "Criminal Procedure Revolution" of Post-Democratization South Korea' (2002) 30(3) Denver J Int Law Policy 377, 379.
[70] *90 HEONBA 35* (1993) 5(2) Panrejib 14 (Korean Constitutional Court)
[71] The Korean Constitutional Court (tr), *Constitution of the Republic of Korea [Heonbeop]* (1948) art 12 para 2.
[72] ibid art 12 para 2.
[73] ibid art 12 para 3.
[74] ibid art 12 para 4.
[75] ibid art 12 para 5.
[76] ibid art 12 para 6.
[77] ibid art 12 para 7.
[78] ibid art 13 para 1.
[79] ibid art 27 para 1.
[80] ibid art 27 para 3.
[81] ibid art 27 para 4.

Constitution. In addition, such constitutional requests have also led the Criminal Procedure Act (KCPA) to be revised to protect the rights of the defendants.

Due to these efforts, for the last twenty years the Korean criminal justice system has steadily developed in the direction of guaranteeing the defendant's rights. A number of convictions were quashed on appeal because the constitutional rights of the defendants were infringed on by the investigative authorities. For instance, in 1992, a landmark decision, which is often called the Korean version of *Miranda*, was taken by the Supreme Court.[82] In this case, the Korean Supreme Court confirmed the importance of the right to silence:

> Article 200 (2) provides that prosecutors or policeman should inform a present suspect of the right to silence before interrogation. The right is based on the privilege against self-incrimination, which is guaranteed by the Constitution. Therefore, the statements elicited without informing of the right to silence in interrogation are illegally obtained evidence, and so should be excluded, even if they are disclosed voluntarily.[83]

In addition, in 1990s, two defendants accused of violation of the National Security Law had been quashed by the Supreme Court which emphasised the right to counsel.[84] In these cases, two suspects arrested by National Security Agency officers made requests for meeting with the defence counsel. However, their demands were rejected and they were interrogated by the public prosecutors. In the end, based on self-incriminating statements, they were charged by the prosecutors. However, the court made it clear that the confessions which do not observe the constitutional rights of defendants cannot be used as evidence:

> Article 12 (4) of the Constitution provides people with the right to assistance from counsel when arrested or detained, accordingly Articles 30 and 34 of the Criminal Procedure Code prescribe the right of suspects or defendants to appoint counsel and communicate with counsel when they are in custody. The right to counsel like this constitutes the nucleus of the constitutionally guaranteed right to assistance from counsel ... The limitation of the right to meet and communicate with counsel violates the constitutionally guaranteed basic right, so the illegally obtained confession of the suspect should be exclude, and the exclusion means a

---

[82] *Miranda v. Arizona* (1966) 384 U.S. 436 (The U.S. Supreme Court); Kuk Cho. 'The Unfinished "Criminal Procedure Revolution" of Post-Democratization South Korea' (2002) 30(3) Denver J Int Law Policy 377, 383.

[83] *92 DO 682* (1992) 926 Panre Gongbo 2316 (Korean Supreme Court).

[84] ibid *90 DO 1285* (1990) 882 2054; ibid *90 DO 1586* 884 2229

substantial and complete exclusion.[85]

The preliminary hearing system for issuing a detention warrant is also a simple example which shows the increased control over the executive power of the investigative authorities by the court.[86] Through the revision of the KCPA in 1995, the judges began to interview suspects before issuing a detention warrant in order to review the propriety of the detention. Prior to 1995, the judges did not have the authority to interview suspects. Thus, they issued a detention warrant only by reviewing the documents referred by the public prosecutors.[87] However, this judicial control was limited again in 1997 as a result of the resistance of the prosecution service.[88] The judges could interview the suspects only when the suspects request judicial review.[89] This limitation to the judicial review has been often criticised by a number of commentators[90], and through the revision of the KCPA in 2007, all suspects began to have the right to challenge the necessity of detention in front of judges.[91] At the same time, the judges have been able to review the cases investigated by the police and prosecutors although such a review is limited only to the facts to find out whether detention is necessary.[92]

Regular cycles of elections are not sufficient to establish a mature democracy. Korean democracy, which is still located between authoritarianism and liberal democracy, as Caldeira and Holston suggested, can be defined as 'disjunctive democracy:'[93]

> By calling democracy disjunctive, we want to emphasize that it comprises processes in the institutionalization, practice, and meaning of citizenship that are never uniform or homogeneous. Rather, they are normally uneven, unbalanced, irregular, heterogeneous, arrhythmic, and indeed contradictory. The concept of disjunctive democracy stresses, therefore, that at any one moment citizenship may expand in one area of rights as it contracts

[85] ibid (translated by Professor Cho, *see* Kuk Cho op. cit. 384)
[86] The judicial control, as Rodigues illustrated, is one of the important indicators to refer to the development of democracy. *See* n 98 and accompanying text.
[87] Kuk Cho. 'The Unfinished "Criminal Procedure Revolution" of Post-Democratization South Korea' (2002) 30(3) Denver J Int Law Policy 377, 385.
[88] ibid 385.
[89] Jae-Sang Lee, *Korean Criminal Procedure* (2nd edn Park Young Sa, Seoul 2008), 251-253.
[90] ibid 252 n 2.
[91] The Korean Ministry of Justice (tr), *Criminal Procedure Act [Hyungsasosongbeop] partially amended on 21 December 2007 No. 8730* (1954) art 201-2.
[92] In Korea, this is the only filter, through which the judges can screen the pre-trial fact finding processes. *See* ch 5.
[93] Teresa P. R. Caldeira and James Holston. 'Democracy and violence in Brazil' (1999) 41(04) Comparative Studies in Society and History 691, 715-718.

> in another. The concept also means that democracy's distribution and depth among a population of citizens in a given political space are uneven. It is in this lack of balance and unevenness that contemporary Brazil exemplifies a disjunction typical of many emerging democracies.[94]

Rodrigues identifies three aspects of this disjunctive democracy.[95] Firstly, the citizens are not able to participate in the public sphere. Therefore, the performance of government does not achieve sufficient public confidence which is critical to increase accountability of the governmental institutions.[96] The jury system and private prosecution are examples showing such citizen's participation. Secondly, the citizens within a disjunctive democracy do not have an equal chance to have access to the judicial system because of financial costs and complexity of the system.[97] Finally, and more important, 'the judicial system is incapable of successfully regulating the practices of citizens or the state.'[98] In short, in the disjunctive democracy, the powers of government are not appropriately controlled due to the lack of monitoring mechanisms although citizens are entitled to participate in free elections.

In contrast, in more matured democracies, the power of elected officials is controlled by constitutional institutions, which are designed to protect the rights and freedoms of individuals and minorities. Similarly, the will of the majority is also constrained to some extent. Sung argued that 'Disjunctive democracies differ from liberal democracies in that they still suffer serious defects in interethnic relations, discrimination against minorities and disadvantaged groups, an unrestrained executive power, and/or a subdued press.'[99] In this respect, the separation of powers as well as checks and balances are significant elements in matured democracies. As Maravall and Przeworski stated, 'Divided and limited powers can be stable and avoid the constrained will of

---

[94] ibid 717.

[95] Corinne D. Rodrigues. 'Civil Democracy, Perceived Risk, and Insecurity in Brazil: An Extension of the Systemic Social Control Model' (2006) 605(1) Ann Am Acad Pol Soc Sci 242, 247-248 (Rodrigues stated that 'In a disjunctive democracy, while citizens participate in free elections and associations, civil democracy is limited.')

[96] Rodrigues suggested that 'levels of civic participation have been linked to government performance, particularly in terms of effective social policy and reduced corruption as well as to increased confidence in state institutions and the maintenance of democracy.' *See* ibid 247.

[97] ibid 248 (Rodrigues argued that 'the poor suffering criminal sanctions from which the rich are generally immune, while the rich enjoy access to private law (civil and commercial) from which the poor are systematically excluded. This process discredits the judicial system as a viable means of obtaining justice.')

[98] ibid (In particular, Rodrigues indicated the powers of the police as an example in Brazil.)

[99] Hung-En Sung. 'Democracy and Criminal Justice in Cross-National Perspective: From Crime Control to Due Process' (2006) 605(1) Ann. Am. Acad. Pol. Soc. Sci. 311, 312.

ruler.'[100]

The modern doctrine of separation of powers can be traced from the Glorious Revolution (1688) in England. John Locke (1690) and Charles de Montesquieu (1748) are eminent commentators who specified the separation of powers on the basis of a system of checks and balances. In 'Two Treaties of Government', Locke suggested the separation of two powers - legislative and executive power.[101] Montesquieu developed the ideas of Locke by presenting the separation of three powers - legislative, executive, and judicial power.[102] In the constitutional tradition, the legislature exercises general powers of legislating; the executive administer the laws and matters of the state; and the courts interpret the law with an independent status.[103]

However, a mere separation of powers cannot guarantee the democratic ideals of equality, openness, and fairness. Such a separation may leave unlimited latitude to the legislature and the executive.[104] Their decisions can be implemented by the branches of government without an appropriate limitation. In this sense, a system of checks and balances should be performed along with the doctrine of separation of powers. As Manin argued, any particular authority should not undertake actions unilaterally without the cooperation or concent of some other authorities.[105] The means and incentives to check one another have to be given to the several agencies. As Manin conceptualised, 'unchecked checkers', agencies which can check others without being checked by them, should not exist in the democratic government.[106]

A number of commentators state that Korea remains at some distance from a mature democracy. [107] Professor Lim suggested 'Despite three consecutive civilian governments through the peaceful transfer of power, democracy has not matured, in that representation from the people does not go hand in with government's accountability. Civil society is not strong enough to act against the state; political parties as a main

---

[100] Jose Maria Maravall and Adam Przeworski (eds), *Democracy and the Rule of Law* (Cambridge University Press, 2003), 10.

[101] John Locke, *Two Treaties of Government* (Cambridge Texts in the History of Political Thought, Cambridge University Press, 1998)

[102] Charles de Secondat Montesquieu, *The Spirit of the Laws* (Cambridge Texts in tr he History of Political Thought, Cambridge University Press, Cambridge 1989).

[103] John Alvey and Neal Ryan, 'The Separation of Powers in Queensland' (Australasian Political Studies Association Conference 2006).

[104] Maravall and Przeworski op. cit. 10.

[105] Bernard Manin, 'Checks, Balances and Boundaries: The Separation of Powers in the Constitutional Debate of 1787' in Biancamaria Fontana (ed), *The Invention of the Modern Republic* (Cambridge University Press, Cambridge 1994) 27 quoted in Jose Maria Maravall and Adam Przeworski (eds), *Democracy and the Rule of Law* (Cambridge University Press, 2003), 10.

[106] ibid.

[107] Yunhan Zhu (ed), *How East Asians View Democracy* (Columbia University Press, New York; Chichester 2008); Yun-Shik Chang, Hyun-Ho Seok and Donald L. Baker (eds), *Korea Confronts Globalization* (Routledge, New York; Abingdon 2009).

organ of political society do not properly function to mediate conflicting interests among diverse classes and groups in the process of policy information.'[108] In particular, as we shall see in following chapters, when considering the extensive and monopolised powers of the prosecutors as well as the lack of monitoring mechanisms to check prosecutorial decisions, the Korean prosecution service can be described as an 'unchecked checker'. This leads the Korean society to be far nearer to a disjunctive democracy than to a mature democracy.[109]

Making provision for protecting the basic rights of the defendants is not enough to fully preserve the values of due process. Such a provision itself cannot protect the constitutional rights for the defendants. For instance, the suspect has the constitutional right to counsel. However, if there are not sufficient numbers of defence lawyers or legal aid, and the prosecutors as well as the police easily limit the participation of the counsel during the interrogation, the right to counsel is of little practical value.[110]

To date, most of the efforts to guarantee due process have been concentrated on the establishment of individual provisions to protect the basic rights of the defendants. By contrast, the roles and powers of the legal actors, in particular, of the public prosecution service, have not drawn much attention. As a result, even in the democratisation period the powers of prosecutors, as Professor Cho described, have been considerably increased without an appropriate monitoring mechanism:

> Although democratization after 1987 led to the weakening of the police and the intelligence agency's powers, the power of the prosecutors has not been damaged under the Kim Young-Sam and Kim Dae-Jung governments. *This is probably because, like the authoritarian government, the two civilian governments were not free of the temptation to use the prosecution for their political purpose.*[111]

However, such powers and expanded functions of the prosecution service, as we shall see in the remaining chapters, are inappropriate to protect the constitutional rights of the defendants. At the same time, the efficiency of the process cannot be achieved as the legal actors, in particular police officers, do not have sufficient ownership of their roles.

---

[108] Hyun-Chin Lim, 'Stumbling Democracy in South Korea: The Impacts of Globalization and Restructuring' in Yun-Shik Chang, Hyun-Ho Seok and Donald L. Baker (eds), *Korea Confronts Globalization* (Routledge, New York; Abingdon 2009), 159.

[109] *See* ch 3 and ch 5.

[110] For further discussion about the right to counsel in the Korean criminal process, *see* ch 6.

[111] Kuk Cho. 'The Unfinished "Criminal Procedure Revolution" of Post-Democratization South Korea' (2002) 30(3) Denver J Int Law Policy 377, 381 (Emphasis added); For more details on the prosecutorial powers, *see* ch 3.

In conclusion, when considering the development of democracy in Korea, Packer's two models and Sung's analysis provide a significant theoretical framework to compare and critique the roles and powers of the Korean prosecution service. In particular, the due process values should be important indicators showing the direction to which the Korean system of criminal justice flows. On the basis of this theoretical framework, the dominant position of the prosecution service and its impact both on the constitutional rights of the defendants and on the relationship between the police and prosecutors are explored in the following chapters.

Chapter 2 The Korean Criminal Justice System

1. Introduction

This chapter describes the Korean criminal justice system. In the context of this thesis, it focuses on the role of the prosecutor because one of the significant aspects in the Korean system is various roles of the prosecution service. From the investigation to the execution of judgements, the prosecutor has an impact on the process at the every stage by carrying out following functions: investigating offences; supervising the police investigation; charging the offenders; maintaining, suspending, and withdrawing prosecutions; recommending sentences; appealing against acquittals; supervising execution.[1] The Korean criminal justice system can only be understood by exploring the prosecutorial roles and powers.

2. Historical Development of the Criminal Justice System

The modern system of criminal justice was introduced to Korea by the Gap-O Modernizing Reformation 1895 [*Gap-O Gae-Hyuk*].[2] Koreans had a traditional legal system based on monarchy before that time. During the Joseon dynasty (1392-1897), petty civil and criminal cases were handled by local heads of administration. The governor of each province took care of the first instance trials of serious criminal cases and the appellate cases. Citizens who lost an appellate case against a governor could appeal to the Ministry of Justice. The Ministry dealt with civil and criminal trials as the final appeals court. The functions of the judiciary were not distinct from the administration.

This traditional system was reformed by Gap-O Reformation embracing the concept of separation of powers, which led judicial affairs to be separated from the administration. In 1895, five different courts were established by the Court Organization

---

[1] Wan Kyu Lee, *The Status of the Korean Public Prosecutor* (Sungmin, Seoul 2005), 264-404; Jae-Sang Lee, *Korean Criminal Procedure* (2nd edn Park Young Sa, Seoul 2008), 99-103.

[2] Peter H. Lee and William Theodore De Bary, *Sources of Korean Tradition: Volume II from the Sixteenth to the Twentieth Centuries* (Introduction to Asian civilizations, Columbia University Press, New York; Chichester 1997), 272-274.

Act: Local Courts (first instance tribunals); Hanseong and Port Courts; Special Courts; Circuit Courts (second instance tribunals); and High Court (supreme court).

However, during the Japanese colonial period (1910-1945), the Korea system of criminal justice was distorted as a tool to exploit and control the colony. Japanese judges and prosecutors took over from native Korean legal professionals in all judicial matters. The criminal procedure largely focused on effective ruling rather than the protection of human rights.[3] A three-tier system was introduced in 1912. However, the right to a fair trial was not guaranteed. The judges just confirmed the statements of the interview documents recorded and translated into Japanese by the police since they did not understand the statements of the Korean defendants. Employing interpreters was simply regarded as extravagance for the colonial citizens.[4] Accordingly, the statements at the pre-trial stage were more important than those in courts. This tradition, as we shall see in detail in Chapter 4, has continued to the modern system.

Another noticeable aspect in the colonial system was the concentration of power in the hands of the Japanese prosecutors. The colonial government combined the prosecution service and the police force by use of an intensive order-obedience relationship.[5] Most powers to direct the prosecution service were concentrated on the chief of colonial government [*Jo-Sun Chong-Dok*]. He appointed the public prosecutors and they followed his orders according to 'the principle of uniformity of prosecutors.'[6]

After independence from Japan in 1945, the relationship between the police and prosecutors significantly changed. The US Military Government (USMG) (1945-1948) which was installed in the South Korea after the World War II reformed the function of the police and the prosecution service as well as their relationship. The USMG abolished the prosecutorial authority to investigate crimes and limited the function of the prosecution service to prosecution.[7] Moreover, the hierarchical relationship changed into a more co-ordinate structure with defined separate roles.[8]

---

[3] Bung Jik Cha. 'The Development, Characters, and Problems of Korean Legal Profession' (2006) 77 Critical Review of Korean History 46-66, 51.

[4] For more details, *see* ch 3.

[5] I will refer to the relationship between the police and prosecutors as order and obedience. This concept will be discussed further in the following chapters; Dong-Woon Shin. 'An Historical Study on the Competence of Criminal Investigation between the Police and Prosecution' (2001) 42(1) Seoul Law Journal 178-230, 181.

[6] ibid; For more details on the principle of uniformity of the prosecutors, *see* ch 4.

[7] Rule No. 3 of the Bureau of Justice art. 1 'The function of the public prosecutor is to prosecute in court.' cited from ibid 209.

[8] There was no provision for the relationship between prosecutors and the police in the Rule of the Bureau of Justice. However, it could be assumed by article 2(e) of the rule. The article stipulated that '(the public prosecutors) can request the police to conduct routine works in terms of investigations. The investigation is the function of the police. It is not a role of the prosecution service.' cited from ibid 210.

However, this relationship ended in 1954 when the Korean Criminal Procedure Act was enacted.[9] The members of the Assembly set up the order-obedience relationship and gave the prosecutors superior status. This change seems to stem from public distrust in the police. After independence from Japan, Korean society was very chaotic. Because of the lack of an independent police force, the government employed a large number of police officers who had worked for the Japanese colonial government. Such a police force could not command trust from the people as a result of misconduct such as the torture employed during the colonial period.[10] It was considered necessary for the police to be supervised by the prosecution service.[11] Sang-Seop Um,[12] the Chair of the National Assembly Committee on Legislation and Judiciary, said:

> We have a centralized police force. So, if the police have the right to investigation without a proper monitoring mechanism, they can be used as a tool to oppress citizens. It could cause more serious problems than the other situation in which the prosecutors monopolise the investigation process. As a result of the discussion, we have decided that the prosecutors should have exclusive authority over the investigation. ... But, in the near future, I think it would be better to separate the investigative function from the prosecution service.[13]

He suggested that the prosecutors should be responsible for the investigation as in Germany. He noted the reason why the prosecutors must have authority over the investigation process. Both the police and prosecution service can be used for political ends. However, the drafters of the KCPA were more concerned that the police would be employed in this way. Accordingly, the Committee decided to give the prosecutors the authority to control the police and investigation process. Nevertheless, Sang-Seop Um noted the possible problem and suggested the necessity of the functional separation between the investigation and prosecution in the criminal process.

---

[9] For further discussion, *see* ch 3.

[10] ibid 212; Kuk Cho. 'The Ongoing Reconstruction of the Korean Criminal Justice System' (2006) 5(1) Santa Clara Journal of International Law 100, 117.

[11] Similaryly, prosecutor's interview documents obtained a special evidentiary impact to safeguard the suspects against inappropriate police interrogation. For further discussion about the prosecutorial interview records, *see* ch 3 and 5.

[12] Sang-Seop Um played an important role in making Korean Criminal Procedure Act 1954. He was a prosecutor from 1941 to 1949 and elected as a member of Korean Assembly in 1950.

[13] Korean Institute of Criminology, *Source Book on the Establishment of Korean Criminal Procedure Code* (Korean Institute of Criminology, Seoul 1990), 109.

3. Judicial Police and Investigation

'Judicial police' is a legal term embracing all law enforcement personnel, who can conduct investigations of crimes.[14] They are generally categorised into three groups: the police officers of the National Police Agency (NPA), special judicial police officers, and the criminal investigators of the prosecution service.[15]

Firstly, there are police officers of the NPA who belong to the Home Office which is distinct from Ministry of Justice.[16] The NPA is a centralised hierarchical organisation dealing with crime prevention, public safety, criminal investigation, traffic affairs, and public security. It has 16 local agencies and 244 police stations affiliated to the local agencies. At present, there are 100,460 police officers in Korea.[17] Of these, about fifteen per cent conduct investigations.[18] Officers who are involved in investigation of crimes are legally known as 'judicial police', and investigate most offences under prosecutorial direction. In 2009, all investigation authorities dealt with 1,917,052 criminal cases. Of those cases, about ninety per cent of offences (N=1,761,252) were initially investigated by the judicial police officers of the NPA.[19]

Secondly, there are special judicial police officers who investigate designated crimes such as those involved wild animals, forests, taxes, the military, etc. They are distinct from the police officers in the NPA. They mostly work for the local governments and are appointed by the prosecution service. Their powers for investigation are limited by law as well as the prosecutor's direction.[20]

Finally, the prosecutor's offices have approximately 5,000 criminal investigators, about one third of the NPA judicial police.[21] They are recruited and trained by the Ministry of Justice. As an assistant of the prosecutor, they deal with about one per cent of all criminal cases (N=16,514) from the beginning as well as supplement investigations being conducted by the police.[22]

---

[14] The Korean Ministry of Justice (tr), *Criminal Procedure Act [Hyungsasosongbeop] partially amended on 21 December 2007 No. 8730* (1954), art 196.
[15] ibid arts 196-197.
[16] *Korean Administrative Organisation Act [Jeongbu-Jojik-Beop] partially amended on 4 June 2010 No. 10339* (1948), art 29.
[17] *See* ch 8.
[18] Kuk Cho. 'The Ongoing Reconstruction of the Korean Criminal Justice System' (2006) 5(1) Santa Clara Journal of International Law 100, 117.
[19] Korean Supreme Prosecutors' Office, 'Analytical Report On Crimes' SPO (Seoul), 108-207.
[20] The Code for Judicial Police Officers and their Authorities 1956 partially amended on 13 June 2008 No.9109; KCPA arts 196-197.
[21] Kuk Cho op. cit.
[22] For further discussion about supplementary investigation by the prosecution service, *see* ch 3.

Investigation in general starts from the report of a victim or interested parties, but may also start from self-denunciation or information obtained by the authorities. A large number of criminal cases are investigated without the need for arrest and detention.[23] Investigative authorities generally summon suspects as well as witnesses in order to both interview them and gather evidence.

Once a crime is reported, the police officers of NPA in general begin the investigation. They deal with most criminal cases such as thefts, robberies, frauds, and murders. When they finish an investigation, they have to send all files and evidence in relation to the case to the public prosecutor's office.[24] If the police need to conduct additional investigation on the same case, they carry out supplementary investigation under the direction of the prosecutors. The involvement by the police ends at this stage.

However, the investigation continues to be carried out by the prosecutors even when the criminal case is very trivial. Only the public prosecutors can decide when an investigation ends. As we shall see in Chapter 6, the public prosecutors themselves interrogate the suspects again in order to obtain confessions and record them on their dossiers. They interview witnesses.[25] In addition, they examine the documents and occasionally collect further evidence. The prosecutors argue that such additional investigation tests the sufficiency of evidence, and as a result, increase the conviction rate.[26]

However, additional investigation is conducted mainly because of the impact of interview records written by the prosecutors, which enables them to readily prove the guilt of defendants.[27] For instance, the defendants can easily retract their confessions

---

[23] According to the Korean National Statistical Office, 46,020 (1.8%) of all suspects were detained by warrants in 2007. *See* Korean National Statistical Office. 'The Issuance of Detention Warrants' http://www.index.go.kr/egams/stts/jsp/potal/stts/PO_STTS_IdxMain.jsp?idx_cd=1727&bbs=INDX_001

[24] The Korean Ministry of Justice (tr), *Criminal Procedure Act [Hyungsasosongbeop] partially amended on 21 December 2007 No. 8730* (1954) art 238 'When a judicial police officer receives a complaint or accusation, he shall investigate the relevant document and evidence matter pertaining thereto promptly and transfer them to a public prosecutor.'; The Rule for the Judicial Police Investigation 1959 Instruction of the Ministry of Justice 2007/629 art 54.

[25] Yong Se Kim. 'The Problems of the Current Investigation System' (2000) 19(1) Daejon Social Sciences Journal 77, 82.

[26] Young-Chul Kim. 'The Effective System of Criminal Investigation and Prosecution in Korea' (2003) 60 UNAFEI Annual Report For 2001 and Resource Material Series 77-93, 79; Hae-Chang Chung. 'The Criminal Justice System in Korea: The Role of Public Prosecutor' (1982) 10 Korean Journal of Comparative Law 53-69, 61.

[27] Dong-Woon Shin. 'The Reform of the Korean Legal System and the Revision of the Law of Evidence' (2006) 47(1) Seoul Law Journal 107-132, 118; Dong-Hee Lee. 'The Reform of Korean Criminal Procedure and Its Impact on the Role of the Police and Prosecution Service' (2005) 9 Korean Police Journal 45-75, 63; Kyoung-Moon Kye. 'Evidential Capacity of Protocol About Suspect Examination Written by the Prosecutor' (2005) 17 Kukmin Law Journal 141, 163-164.

made before the police in courts because of article 312 of the KCPA.[28] However, if they confess before the public prosecutors, the situation would be very different. Such confessions are very hard to dispute. Hence, the public prosecutors need to re-interview the suspects and to record their statements in the prosecutorial dossiers.

Any coercive investigative measures rely on the prosecution service. The Korean Constitution has provisions that any restriction on the right to liberty and security of person as well as the right to privacy must be executed based on a warrant being issued by a judge.[29] Warrants can be issued only at the request of the prosecutors.

In an investigation, suspects are in principle arrested by arrest warrants. According to the KCPA, there are two exceptions: an arrest *in flagrante delicto* and an emergency arrest. The KCPA stipulates that 'Any person may arrest a flagrant offender without a warrant.'[30] In addition, in an emergency, police can arrest a suspect without a warrant. However, such an arrest can only be carried out under limited conditions.[31]

After arresting suspects, investigation authorities can detain the suspects for 48 hours. However, they must have a detention warrant in order to detain them more than 48 hours.[32] The suspect detained by the police must be transferred to the public prosecutor's office or be released in 10 days.[33] During this detention, the police can investigate additional offences and supplement investigations. In addition to the police, the prosecutors have the authority to detain a suspect for 20 days in order to carry out their investigations.[34]

Search and seizure is also conducted, in principle, on warrants issued by a judge.[35] The procedure is similar to that of warrants of arrest and detention. Hence, the public prosecutor requests a search warrant for a judge. However, the police cannot request a

---

[28] For detailed information, *see* chs 3 and 6.

[29] The Korean Constitutional Court (tr), *Constitution of the Republic of Korea [Heonbeop]* (1948) art 12(1) 'warrants issued by a judge through due procedures upon the request of a prosecutor shall be presented in case of arrest, detention, seizure or search'; For article 16 of the Korean Constitution, *see* n 36 below.

[30] The Korean Ministry of Justice (tr), *Criminal Procedure Act [Hyungsasosongbeop] partially amended on 21 December 2007 No. 8730* (1954), art 212.

[31] ibid art 200-3(1) 'In cases where there are good reasons to suspect that any suspect commits crimes punishable with death penalty, imprisonment for life or imprisonment or imprisonment without prison labor for a maximum period of three years or more, and he falls under any of the following subparagraphs, a public prosecutor or judicial police officer may, if it is not possible to obtain a warrant of arrest of a judge of the district court because of urgencies, arrest the suspect without the warrant, upon statement of reasons therefore. The urgencies means the cases where issue of warrant of arrest is pressed for time, such as the suspect is found by chance, etc.: (amended by Act No. 8496, Jun. 1, 2007) If the suspect is likely to destroy evidence; and If the suspect escaped or is likely to escape.'

[32] KCPA, art 200-4.

[33] ibid art 202.

[34] ibid art 205; For the discussion why prosecutors repeatedly interrogate a suspect, *see* ch 6.

[35] ibid art 215.

warrant, but instead, as we shall see below, can simply ask the prosecutors to do so. Only the public prosecutors have the authority to demand a warrant.[36]

As this outline shows, the Korean prosecutors have the main responsibility for any investigation.[37] By contrast, the police can conduct an investigation only under the direction of the prosecutors.[38] There is no exception to this principle so that the police themselves cannot investigate offences and must follow the instructions from the prosecutors at every stage in the investigation process. As a consequence, the police act as an assistant to the public prosecutors.[39]

The Public Prosecutor's Office Act [*Keomchalcheongbeop*] provides that 'judicial police officers shall obey any official order issued by the competent public prosecutor in a criminal investigation.'[40] In addition, the public prosecutor has the authority to request internal disciplinary action against police officers.[41] Those provisions establish 'order and obedience relationship' between the police and prosecutors.[42] Professor Cho illustrated the investigation procedure under such a relationship as follows:

> Prosecutors can not only request police officers to supplement the investigation after the police investigation is completed, but can also intervene in a police investigation and stop the police investigation. Prosecutors can order the investigation transferred even before the investigation is finished by the police.[43]

Such a superior status may help the public prosecutor to efficiently direct the police

---

[36] The Korean Constitutional Court (tr), *Constitution of the Republic of Korea [Heonbeop]* (1948) art 16 'All citizens shall be free from intrusion into their place of residence. In case of search or seizure in a residence, a warrant issued by a judge upon request of a prosecutor shall be presented.' translated by the Constitutional Court; Young-Lan Lee. 'Korean Investigation System' (1995) 7 Korean Criminal Justice Journal 187-205, 197.

[37] KCPA art 195 'A public prosecutor shall, where there is a suspicion that an offense has been committed, investigate the offender, the facts of the offense, and the evidence.'

[38] ibid art 196 (1) 'Investigators, police administrative officials, police superintendents, police captains or police lieutenants shall investigate crimes as judicial police officers under instructions of a public prosecutor.'

[39] Wan Jung and Jin Kuk Lee. 'The Analysis of the Relocation of Investigative Power' (2003) 14(2) Korean Criminal Justice Journal 157, 163; Jin Ho Chun. 'A Study on the Efficient Investigation System' (2005) 9 Korean Police Journal 9-44, 14; Kuk Cho. 'The Unfinished "Criminal Procedure Revolution" of Post-Democratization South Korea' (2002) 30(3) Denver J Int Law Policy 377, 381.

[40] The Ministry of Justice (tr), *Public Prosecutor's Office Act [Keomchalcheongbeop] partially amended on 21 December 2007 No. 8717* (1949), art 53. This provision is abolished from 1st Janunary 2012. However, this does not have an impact on the relationship as the other articles still exist. The impact of the abolition of article 53 needs to be discussed in the future study.

[41] ibid art 54; Violence Act [*PokCheoBeop*] 1961 partially amended on 24 March 2006 No. 7891 art 10.

[42] I refer to such a relationship as order-obedience. This is discussed in detail in Chapter 8.

[43] Kuk Cho. 'The Ongoing Reconstruction of the Korean Criminal Justice System' (2006) 5(1) Santa Clara Journal of International Law 100, 117.

investigation. However, it has often functioned as one of the elements causing conflicts between the police and prosecution service.[44] Moreover, the order and obedience relationship leads the police to be subject to the prosecution service, and consequently, as we shall see in Chapter 8, may play a role in weakening the sense of responsibility of the police.[45] The dominant position of the prosecutors is guaranteed by a number of measures. Such features have intensified the order-obedience relationship between the police and prosecutors. Under these circumstances, the police in general serve as a subsidiary of the prosecution service, rather than as an autonomous investigation body.

4. The Prosecution Service

The Korean prosecution service is a centralised organisation which belongs to the Ministry of Justice. It consists of the Supreme Prosecutors' Office, five high prosecutors' offices, 18 district offices, and 39 branch prosecutors' offices.[46] In Korea, only the prosecution service has the legal authority to conduct an investigation. The prosecutors can directly investigate crimes with their own investigative units and supervise the police investigator.[47]

Other criminal investigation organisations can conduct an investigation only under the direction of the prosecutors.[48] In theory, the police cannot begin and carry out an investigation under their own initiative.[49] In practice, however, police officers generally conduct investigations without direction from the prosecutors because complete supervision over all police investigations is almost impossible.[50] Nevertheless, when the police need a warrant in order to conduct coercive actions, they must obtain this from the prosecutors.[51]

After finishing the investigation, only the public prosecutors can charge the suspects when they decide that they have sufficient evidence to prove the guilt and other requirements for a trial are satisfied.[52] In addition, they can choose a summary

---

[44] Woong Suk Jung, *A Study on the Public Prosecutor's Supervision over the Police Investigation* (Dae Myung Press, Seoul 2007), 648.
[45] For further discussion about the relationship between the police and prosecutors, *see* ch 8.
[46] For the organisational features, *see* ch 4.
[47] KCPA arts 195-196.
[48] ibid 'Investigators, police administrative officials, police superintendents, police captains or police lieutenants shall investigate crimes as judicial police officers under instructions of a public prosecutor.'
[49] Wan Jung and Jin Kuk Lee. 'The Analysis of the Relocation of Investigative Power' (2003) 14(2) Korean Criminal Justice Journal 157, 163.
[50] Wan Kyu Lee, *The Status of the Korean Public Prosecutor* (Sungmin, Seoul 2005), 362.
[51] *See* ch 3.
[52] KCPA art 246.

indictment rather than formal charge.[53] The summary indictment is filed for the summary trial which can be conducted only based on documents written by the prosecutors. Such a procedure is designed for a prompt trial. In principle, the cases punishable by fine can be charged by summary indictment. This part briefly illustrates the prosecutorial functions for outlining the system of criminal justice in Korea. More specific features will be explored in subsequent chapters.

5. Criminal Courts and Trials

There are six types of courts in Korea: Supreme Court, High Court, District Court, Patent Court, Family Court, and Administrative Court. Criminal trials are conducted at three levels: district courts, the high courts, and the Supreme Court. The district courts are first instance courts, i.e. trial courts. The high courts and Supreme Court are courts dealing with two levels of appeal. A district court may establish branch courts and municipal courts, if additional support is necessary to carry out their tasks.

As in the recruitment of prosecutors, graduates of the Judicial Research and Training Institute immediately become judges. Young lawyers at the beginning of their careers decide whether they will serve as judges, prosecutors, or defence lawyers. Unlike the English system, there is no jury in criminal cases in Korea. Hence, verdicts as well as sentences are determined by those professional judges alone.

Criminal proceedings begin when prosecutors institute criminal actions unless otherwise provided by law. The prosecutor may request a regular trial or bring a case before the court by summary proceedings for the case punishable by fine. For the summary cases, the judges generally issue the summary order without holding a trial. If they deem it inappropriate, they can refer the case to regular trial proceedings.

According to the Korean Criminal Procedure Act, a criminal trial consists of approximately six stages. Firstly, a trial begins with a question by a judge about the personal identification of the accused.[54] Secondly, the public prosecutor states the nature of the accusation.[55] Then, there is the examination of evidence.[56] After finishing the investigation of evidence, the public prosecutor questions defendants as well as witnesses, and a defence counsel examines them.[57] Then, at the last stage, the public

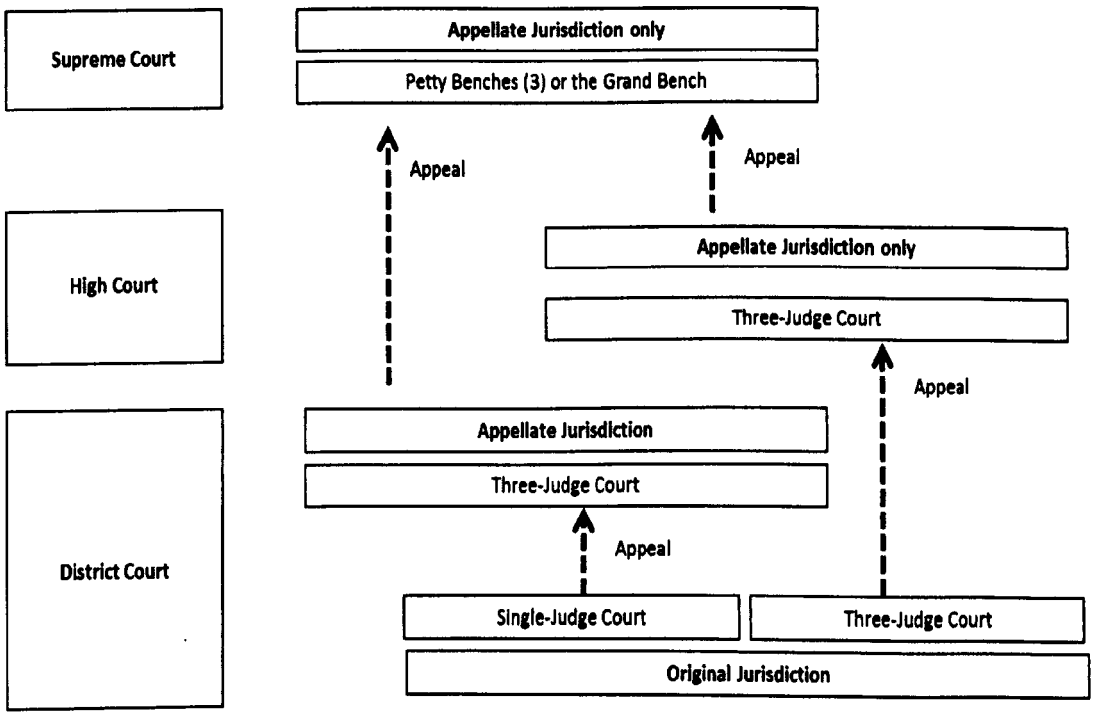
[53] ibid art 449.
[54] ibid art 284.
[55] ibid art 285.
[56] ibid arts 290-296.
[57] ibid art 296-2.

prosecutors state their opinion and recommend a sentence to the judge.[58] A defence lawyer as well as the accused also delivers a closing argument.[59] Finally, the judge makes a decision whether or not a defendant is guilty.

If the prosecutor cannot prove the guilt beyond a reasonable doubt, the judge will declare that the defendant is not guilty.[60] However, if evidence is sufficient for conviction, the judge will find the accused guilty.[61] Once the defendant is convicted, the judge imposes a punishment. These include the death penalty, imprisonment, and deprivation of qualifications, suspension of qualifications, fine, penal detention, and minor fine. The imprisonment can be either for life or for a specified term.[62]

After sentencing, not only the accused but also the prosecutors can bring an appeal against the judgement given by the trial court within seven days from the judgement. Appeals against the judgement of appellate jurisdiction of the High Courts may be filed with the Supreme Court also within seven days. This appellate process can be summarised as Figure 2.1.

Figure 2.1: Appellate Process in the Korean Judiciary



Source: The Korean Supreme Court

[58] ibid art 302.
[59] ibid art 303.
[60] ibid art 325.
[61] ibid art 321.
[62] ibid art 5.

Korean law provides an open trial, but the trial is often called '*Jo-Seo Jae-Pan*' which indicates a trial mainly depending on dossiers.[63] Judges in general decide the guilt and innocence in their offices by examining the dossiers which are prepared by the public prosecutors. However, in practice, the prosecutorial dossiers play a major role in determining the verdicts and sentences of the courts.

Even if the trial is defined by law, this bears little resemblance to a real trial. Even experts in criminal law sometimes cannot readily understand what goes on.[64] A real trial will begin with a question about the identification of a defendant by judges. In addition, they inform a defendant of the right to silence. The public prosecutor in general skips statements about the accusation in most cases and moves on to the examination of defendants. At this stage, the public prosecutor asks the defendants whether or not they received and read the indictment. If the defendant says "Yes", the public prosecutor begins examination based on the indictment. The public prosecutor asks about the offence and the defendant in general answers 'Yes' or 'No'. They just confirm the facts that they already know. In these circumstances, the audience rarely understands what goes on.[65]

After the examination by the public prosecutor, a defence counsel questions the defendant. In general, they prepare questionnaires and give them to the judge before the examination. Then, they question the defendant. However, this does not consist of a short question and a long answer, but instead, a long question and a short answer. Such a way of questioning has developed in order to include the statements favourable to the defendant into the judicial documents because these dossiers play an important role in determining the verdicts as well as sentences.[66]

Following the examination by both the public prosecutor and the defence counsel, judges question the defendant. This examination by a judge is neither detailed nor long when compared to the examination by the lawyers.[67] The judges often state that they act as an umpire in the trial, and as a result, it is the public prosecutor as well as defence

---

[63] The Korean Constitutional Court (tr), *Constitution of the Republic of Korea [Heonbeop]* (1948) art 27 para 3 'All citizens shall have the right to a speedy trial. The accused shall have the right to a public trial without delay in the absence of justifiable reasons to the contrary'; ibid art 109 'Trials and decisions of the courts shall be open to the public: Provided, That when there is a danger that such trials may undermine the national security or disturb public safety and order, or be harmful to public morals, trials may be closed to the public by court decision.' translated by KCC.

[64] Presidential Committee on the Judicial Reform, 'Committee Report (IV): From 14th to 27th Conference' PCJR (Seoul January 2005), 267.

[65] Jin-Su Jung and others, *21C The Direction for the Reform of the Criminal Justice System and the Development of Judicial Service [II]* (Korean Institute of Criminology, Seoul 2004), 66.

[66] ibid 66.

[67] Presidential Committee op. cit. 267.

counsel who have the major role.[68]

After the examination of the defendant, the court begins to examine evidence. The public prosecutor submits additional evidence apart from the interview documents. The judge asks the defendants whether or not they have an objection to such evidence. If the defendants consent and do not give additional evidence to the court, the examination of evidence ends at this stage. For the most part, the audience can hardly know about the evidence which is presented to the court because the most important part is contained in the documents written by the prosecutors.[69]

Korean law requires the judges to read the prosecutorial dossiers or explain the key aspects in open court.[70] However, at a real criminal trial, those methods are rarely used. Even senior judges have hardly any experience of conducting such a close examination.[71] In general, the examination of prosecutorial dossiers ends with the submission by the public prosecutors in court. The judges take those documents to their chambers and examine them by themselves behind closed doors.

The next stage is public prosecutor's recommendation on sentencing. Except for some important cases, most recommendations are very concise. Accordingly, in general, there is no particular explanation for their recommendation. After listening to the recommendation, the judge announces the date for a judgement in two or three weeks. The trial is over. The audience have scarcely heard the evidence, which plays an important role in the judgment. The court is not considered as a place to discover the truth, but instead, an agency to deliver a predicted and predictable result.

Distrust in the Korean criminal justice system stems from this point. According to the result of survey in 2003, 83.7 per cent of people stated that 'the criminal trials are unfair'.[72] Rather than hearing in the open court, the outcomes of criminal trials are in general decided based on dossiers read in the judge's room, and these practices are critically called '*Jo-Seo Jae-Pan*'.[73] As mentioned, the Korean Constitution provides for the right to an open trial,[74] but the trials mainly depending on dossiers cannot

---

[68] Jin-Su Jung and others, *21C The Direction for the Reform of the Criminal Justice System and the Development of Judicial Service [II]* (Korean Institute of Criminology, Seoul 2004), 66.

[69] Presidential Committee on the Judicial Reform, 'Committee Report (IV): From 14th to 27th Conference' PCJR (Seoul January 2005), 271.

[70] The Korean Ministry of Justice (tr), *Criminal Procedure Act [Hyungsasosongbeop] partially amended on 21 December 2007 No. 8730* (1954) art 292.

[71] Jung et al. op. cit. 88.

[72] *See* Presidential Committee on the Judicial Reform, 'Committee Report (III): From 1st to 13th Conference' PCJR (Seoul May 2004), 259.

[73] Jung et al. op. cit.

[74] The Korean Constitutional Court (tr), *Constitution of the Republic of Korea [Heonbeop]* (1948) art 109 'Trials and decisions of the courts shall be open to the public: Provided that when there is a danger that such trials may undermine the national security or disturb public safety and order, or be harmful to public

guarantee any monitoring by press or public.[75]

The Presidential Committee on the Korean Judicial Reform suggests that the historical background such as the period of Japanese colonisation as well as the impact of interview records written by the public prosecutors have mainly contributed to this distortion of a criminal trial.[76] The drafters of the Korean Criminal Procedure clearly considered that the evidentiary impact of the prosecutorial dossiers may result in the trials relying on documents.[77] However, they hesitated to adopt a completely new system, which would rely on full oral hearings, because of the unstable social situation after the independence from Japan and the Korean War. Subsequently, as noted in detail in Chapter 6, in order to increase the efficiency of criminal trials, they made a decision to allow the interview records written by the public prosecutors to have an intensive evidentiary impact at the court.[78]

This provision was designed to permit the dossiers as exceptional evidence employed to supplement the hearings in the open court.[79] However, unlike the drafters' intention, the exception has taken the place of the principle. This has led the Korean investigation procedure to focus on obtaining confessions and recording them.[80] In addition, the examination of evidence by judges has been degraded into an action to routinely accept the interview records written by the public prosecutors as evidence.[81] Such a measure may contribute to increasing efficiency of trials, but it has led to a number of unanticipated consequences in the Korean criminal process, such as an infringement of defendant's rights and the functional distortion of the prosecution service as well as the police.[82]

---

morals, trials may be closed to the public by court decision.' translated by KCC

[75] Susan Dente Ross. 'Secrecy's Assault on the Constitutional Right to Open Trials' (2004) 40(2) Idaho Law Review 351, 355.

[76] Presidential Committee on the Judicial Reform, 'Committee Report (IV): From 14th to 27th Conference' PCJR (Seoul January 2005), 271.

[77] Dong-Woon Shin. 'The Reform of the Korean Public Prosecution' (1988) 29(2) Seoul Law Journal 39, 45, 46.

[78] Another important reason is to safeguard suspects against inappropriate police interrogations. For more details on the historical background for this decision, *see* ch 3.

[79] The Korean Ministry of Justice (tr), *Criminal Procedure Act [Hyungsasosongbeop] partially amended on 21 December 2007 No. 8730* (1954) art 312; Dong-Woon Shin op. cit. 45-46.

[80] Presidential Committee op. cit.

[81] ibid.

[82] For further discussion about these unanticipated consequences, *see* ch 6.

6. Conclusion

The Korean criminal process can only be understood by examining the role of the prosecution service. At every stage, it plays a key role in determining the fate of the suspects. Firstly, although the investigation is conducted by the police and prosecutors, their legal status is very different. The prosecutors monopolise most powers in the process as the 'ruler of the investigation'. [83] In contrast, the police can carry out their investigations only under the instruction of prosecutors as a 'subsidiary organ of the prosecution service'.[84] Secondly, the prosecution have considerable discretion. They can decide whether or not to charge, whom to charge, and what charges to bring. In addition, as we shall see in subsequent chapter, the prosecution can be suspended and withdrawn at the discretion of the prosecutors. Finally, criminal trials are determined based on the interrogation documents written by the prosecutors. The trial judges simply confirm the evidence in the prosecutorial dossier. As a consequence, the defendant's right to a fair trial is hardly guaranteed in the Korean criminal process as the verdicts are virtually determined by the prosecutors in their closed room.[85] This reflects in Packer's crime control model where there is absolute confidence in the pre-trial process.

---

[83] Jae-Sang Lee, *Korean Criminal Procedure* (2nd edn Park Young Sa, Seoul 2008), 99.

[84] ibid 100.

[85] As the Supreme Prosecutors' Office (SPO) illustrated, ninety-nie per cent of conviction rate is a good example indicating the contexts of the Korean criminal process. The SPO introduced the prosecutor's responsibilities and achievements as follows: 'The workload for prosecutors is continuously increasing every year. As of February 2009, one prosecutor handles cases averaging investigation of approximately 10 suspects a day. In addition to investigation work, prosecutors are spending considerable amount of time reviewing requests of warrants and providing direction to the police in regard to the progress of "accusation cases." Out of the total number of cases, the ratio of instituting prosecution is roughly 50%, and *approximately 99.9% of the accused are being found guilty.*' *See* Korean Supreme Prosecutors' Office. 'Introduction to the Korean Prosecution Service' <http://www.spo.go.kr> accessed 26 November 2010, (Emphasis added by the author); For the statistics of conviction rate, *see* ch 7.

Chapter 3 The Functions of the Prosecution Service in Korea

1. Introduction

It has been argued in the preceding chapter that due to the influence of the colonial experiences, the Korean War and military governments for three decades, the Korean criminal process has tended more heavily toward crime control than due process values.[1] Korean law concentrates most powers in criminal proceedings on the prosecution service, which is a centralised hierarchical bureaucratic organisation.

This chapter aims to explore the legal position and powers of the prosecution service in Korea. First of all, the legal position of the public prosecutor is described. Then, various powers of the prosecutors are examined. Part 3 examines the trial work of the prosecutors. Part 4 focuses on the investigative arm of the Korean public prosecutors as it is an extraordinary function for the prosecution service, which is rarely observed in other criminal justice systems.[2]

2. The General Role of the Korean Prosecutor

The Korean law requires the prosecutor to play various roles. The powers and specific functions of the Korean prosecution service, as we shall see in detail in Chapter 5, are different from those in other jurisdictions. However, the general role of the prosecution service seems to be similar even if they are in different contexts.

The general role of the public prosecutor can be separated into three categories: the 'quasi-judicial', 'adversarial', and 'administrative' roles.[3] Alschuler described the role of the public prosecutor as 'administrator', 'advocate', and 'minister of justice', who acts like a judge and legislator.[4] There are slight differences in the expression, but these

---

[1] *See* Introduction and ch 1; Herbert L. Packer, *The Limits of the Criminal Sanction* (Stanford University Press, Stanford, Calif. 1968) 385, 149-246.
[2] *See* ch 5.
[3] Stanley Z. Fisher. 'In Search of the Virtuous Prosecutor: A Conceptual Framework' (1988) 15 Am J Crim Law 197, 215.
[4] Albert W. Alschuler. 'Prosecutor's Role in Plea Bargaining' (1968) 36 U.Chi.L.Rev. 50, 52-53.

three main roles of the public prosecutor can be noted in a number of studies and codes.[5]

First, the public prosecutor has a quasi-judicial role, which is to seek justice as a representative of public interests.[6] Ashworth described the 'quasi-judicial' role of the prosecutor as follows:

> [P]rosecutors should be bound by a strict ethical code, which directs them to act in the spirit of impartial officers who uphold not merely the letter of the criminal law but also those legal values which belong to fundamental human rights and the idea of a Rechtsstaat.[7]

As an example, in the English system, the Code for Crown Prosecutors provides such a role in a specific way:

> Prosecutors must be fair, independent and objective. They must not let any personal views about the ethnic or national origin, gender, disability, age, religion or belief, political views, sexual orientation, or gender identity of the suspect, victim or any witness influence their decisions. Neither must prosecutors be affected by improper or undue pressure from any source. Prosecutors must always act in the interests of justice and not solely for the purpose of obtaining a conviction.[8]

This quasi-judicial role requires the public prosecutors to act impartially like a judge. As Delmas-Marty has said, the prosecutors should be neutral when they present evidence in

---

[5] There are different descriptions on the public prosecutor's function. LaFave explains that the public prosecutor has four functions: trial counsel for the police, house counsel for the police, representative of the court and mirror of community opinion. Meanwhile, Blumberg describes five main roles of the prosecutor: collection agent, dispenser of justice, power broker fixer, political enforcer and overseer of the police. *See* Fisher op. cit. 215 n 97. The Standards for Criminal Justice (SCJ) of American Bar Association also indicated three roles of the public prosecutors in the criminal process: 'administrator of justice', 'advocate', and an 'officer of the court' *See* American Bar Association, *Standards for Criminal Justice: Prosecution and Defense Function* (3rd edn ABA, New York 1993) Standard 3-1.2 The Function of the Prosecutor (b) 'The prosecutor is an administrator of justice, an advocate, and an officer of the court; the prosecutor must exercise sound discretion in the performance of his or her functions.' For the discussion about the roles of Crown Prosecutor in England and Wales, *see* n 8 below.

[6] Kenneth Bresler. 'Pretty Phrases: The Prosecutor as Minister of Justice and Administrator of Justice' (1995) 9 Georgetown Journal of Legal Ethics 1301, 1305; Fisher op. cit. 216; Alschuler op. cit. 53.

[7] Andrew Ashworth. 'Developments in the Public Prosecutor's Office in England and Wales' (2000) 8 European Journal of Crime, Criminal Law and Criminal Justice 257, 281-282.

[8] The Code for Crown Prosecutors 2010, para 2.4; Similarly, Bresler suggested five duties of the prosecutor as a quasi-judicial officer: 'protect the innocent as well as to convict the guilty; guard the rights of the accused as well as to enforce the rights of the public; refuse to measure prosecutorial effectiveness by the severity of the sentences imposed; after conviction, accord a defendant continued procedural justice and a fair sentence; reveal exculpatory information to the sentencing judge.' *See* Bresler op. cit. 1303.

court.[9]

The quasi-judicial role can be an ideal for prosecutors to aim at,[10] but it is very difficult for them to carry out such a role effectively because they have another contrasting role, i.e., to prove the defendant's guilt as an advocate.[11] On the one hand, the public prosecutors should bear in mind the interest of the defendant, but on the other hand they should try to secure convictions because the public want them to punish criminals. Under these ambiguous circumstances, why should the prosecutor seek justice? As Green argued, 'doing justice' is an important objective of the state in terms of enforcing the criminal law, and the public prosecutor should seek justice as a representative of the state.[12]

The next function is the adversarial role.[13] According to Sanders and Young, the prosecutors have a duty to prove the guilt of the defendants and to enforce the criminal law.[14] The adversarial role, as Fisher stated, is an opposite function to the quasi-judicial role. The prosecutors have to attack the defendant and defend their position on behalf of the state.[15] In the adversary system, the public prosecutors should simply be a party who is equal to the defendants. In this context, there is a possibility that the two roles of the public prosecutor - quasi-judicial and adversary - can conflict with each other. However, prosecutor's ethics still require they only adduce relevant and reliable

---

[9] Mark A. Summers (tr), Mireille Delmas-Marty, *The Criminal Process and Human Rights: Toward a European Consciousness* (Martinus Nijhoff Publishers, 1995), 10 (Delmas-Marty described the aims of each function as follows: 'Investigation – gathering proof of the crime and identifying the perpetrator(s); Prosecution – publicly presenting the evidence; Judgment – legally finding guilt or innocence and, in case of the former, imposition of penalty; and Execution of judgment.').

[10] Andrew Ashworth. 'Developments in the Public Prosecutor's Office in England and Wales' (2000) 8 European Journal of Crime, Criminal Law and Criminal Justice 257, 282 (Ashworth stated that 'This approach [to the 'quasi-judicial role] is not consistent with the notion of a prosecutor who aims for convictions above all.'); Leslie Griffin. 'Prudent Prosecutor' (2000) 14 Georgetown Journal of Legal Ethics 259, 286 (Griffin argues that 'The prosecutor's duty is to seek justice.'); Abbe Smith. 'Can You Be a Good Person and a Good Prosecutor' ibid 355, 376-377; Fred C. Zacharias and Bruce A. Green. 'Uniqueness of Federal Prosecutors' (1999) 88 Georgetown Law J 207, 226-228.

[11] George T. Felkenes. 'Prosecutor: A Look at Reality' (1975) 7 Sw.UL Rev. 98, 117-119; David T. Johnson, *The Japanese Way of Justice: Prosecuting Crime in Japan* (Studies on law and social control, Oxford University Press, Oxford; New York 2002), 29.

[12] Bruce A. Green. 'Why Should Prosecutors Seek Justice' (1998) 26 Fordham Urban Law J 607, 634.

[13] Felkenes op. cit. 109-110; Fred C. Zacharias. 'Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice' (1991) 44 Vand.L.Rev. 45, 56; C. Ferguson-Gilbert. 'It Is Not Whether You Win or Lose, It Is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors' (2001) 38 California Western Law Review 283, 284; Stephanie Beck. 'Under Investigation: A Review of Police Prosecutions in New Zealand's Summary Jurisdiction' (2006) 12 Auckland University Law Review 150, 153; Susan Bandes. 'Loyalty to One's Convictions: The Prosecutor and Tunnel Vision' (2006) 49(2) Howard Law J 475, 483-492.

[14] Andrew Sanders and Richard Young, *Criminal Justice* (3rd edn Oxford University Press, Oxford 2007), 14.

[15] Stanley Z. Fisher. 'In Search of the Virtuous Prosecutor: A Conceptual Framework' (1988) 15 Am J Crim Law 197, 216.

evidence and any attack on the defence or their witnesses is within ethical and legal boundaries.[16]

Finally, the public prosecutor plays an administrative role in the criminal process. This role, as Alschuler pointed out, is related to the efficiency of the administrative procedure. In other words, for the benefit of the prosecution service and the court, the public prosecutor should deal with the case in an efficient and effective way so as not to cause delay.[17]

Inevitably, the prosecutor has difficulty in striking a balance between these roles because each role has a different aim. In particular, a quasi-judicial role and an adversarial role, as Johnson argued, are 'anchored in a contradiction'.[18] The prosecutors are expected to be objective as a quasi-judicial officer. They have to disclose exonerating evidence for the defendants. However, at the same time, they have to obtain convictions on behalf of the state and victims.[19]

The Korean prosecutors have been regarded as one party in the adversarial structure.[20] They have a role to play in proving the guilt of defendants in courts as an adversary.[21] The Korean Supreme Court and Constitutional Court clearly confirmed the role by stating that 'the public prosecutor's status is an adversary in a trial, who has to prove the guilt of the defendant.' [22]

At the same time, the Korean prosecutors have a duty to protect defendants as a representative of public interests.[23] They are not only an adversary, but also a minister of justice.[24] They have to disclose evidence which is favourable to the defendants and appeal for the defendant's interest.[25] The Public Prosecutor's Office Act provides the

---

[16] Steve Uglow, Comments at the Supervision Meeting (4th November 2011)

[17] Alschuler op. cit. 52.

[18] David T. Johnson, *The Japanese Way of Justice: Prosecuting Crime in Japan* (Studies on law and social control, Oxford University Press, Oxford; New York 2002), 29.

[19] ibid; George T. Felkenes. 'Prosecutor: A Look at Reality' (1975) 7 Sw.UL Rev. 98, 117-119.

[20] Korean Supreme Court and Constitutional Court stated that Korean criminal procedure is based on the adversary system. *See 84 DO 796* (1984) Panre Gongbo 12 June 1984 1322 (Korean Supreme Court); *92 HEONMA 44* (1995) 7(2) Panrejib 646-676 (Korean Constitutional Court).

[21] Sanders and Young op. cit. 13-14.

[22] *See* n 20 above.

[23] Jong Gu Kim, *The Reform of the Korean Criminal Justice System* (2nd edn BuB-Mun-Sa, Seoul 2004), 60.

[24] Fisher op. cit. 198 ; American Model Rules of Professional Conduct 2009 Rule 3.8 Special Responsibilities of a Prosecutor – Comment 'A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.'

[25] ibid Rule 3.8 (g) 'When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall: (1) promptly disclose that evidence to an appropriate court or authority'; In England and Wales, Criminal Procedure and Investigations Act 1996 chap. 25 ss.1-21 Disclosure.

duty as follows:[26]

> As a representative of the public interests, the public prosecutor shall have following duties: takes measures necessary for investigation of crimes as well as filing and maintaining of prosecution; directs and supervises the police and other law enforcement agencies concerning investigations of crimes; requests the court for appropriate application of laws; directs and supervises the execution of criminal judgments; and, files, directs and supervises civil and administrative litigations in which the government or government agency is a party or a participant.

The powers of the public prosecutor should be exercised under a duty as a representative of the public interests. Accordingly, if the prosecutors' operations are conflicted with their duty to protect the public interest, the quasi-judicial role must take precedence over other actions.

3. Trial Decisions

The Korean law gives the prosecutors a pre-eminent position by allowing them to be involved in all stages with significant powers. The public prosecutors monopolise most powers which are necessary to enforce criminal law. In addition, they have a considerable impact on trials by recommending a sentence and appealing against verdict. As this section will demonstrate, the prosecutor exercises a wide discretion which is seldom scrutinised.

In Korea, only the prosecutors can decide whether or not to file an indictment.[27] It is called 'the monopoly of indictment by the prosecutor' [*Kisodokjumjui*]. However, there is one exception to the monopoly. The chief of the police station can prosecute some minor offences, which are punishable by fines of not more than KRW 200,000 (approximately equal to GBP 100) or detention for less than thirty days.[28]

---

[26] The Ministry of Justice (tr), *Public Prosecutor's Office Act [Keomchalcheongbeop] partially amended on 21 December 2007 No. 8717* (1949) art 4.

[27] KCPA, art 246.

[28] Speedy Trial Procedure Act [*Jeukkyeolsimpan Jeolchabeop*] 1957 partially amended on 21 December 2007 No. 8730 art 2 'According to article 14, the defendant is entitled to request a regular trial if the defendant is not satisfied with the judgment in the Speedy Trial' Translated by Professor Cho See Kuk Cho. 'The Unfinished "Criminal Procedure Revolution" of Post-Democratization South Korea' (2002) 30(3) Denver J Int Law Policy 381; In terms of the exclusive charging power, there are two exceptions in Korea. First, the chief of the police can bring minor offences to the criminal court without a formal indictment. Second, the court can direct the prosecutors to charge criminals when the court decides that

This means that prosecutors have discretion not to charge the offenders.[29] Even if the prosecutors have sufficient evidence and a confession, they can decide not to prosecute by considering a number of conditions such as age, character, and circumstances of the offender.[30] Due to such discretion, a number of offenders who committed petty crimes may avoid the stigma of criminal conviction. In addition, by these means, prosecutors can reduce the workload of the court.[31] This authority is called the 'suspension of prosecution [*Kisoyuye*] and the extent of this prosecutorial discretion can be seen in Table 3.1. In the period 2005-2009, prosecutors charged forty-eight per cent of suspects. About fifteen per cent of prosecution are suspended. No action was taken in the remaining thirty-seven per cent were presumably there was insufficient evidence.[32]

Table 3.1 The number of suspects charged or uncharged [33]

Year	Total	Charged	Uncharged		
			Sub-Total	Suspension of Prosecution	Others
Average	2,471,291	1,194,151	1,277,139	357,341	919,797
	100%	48.3%	51.7%	14.5%	37.2%
2009	2,675,224	1,196,776	1,478,448	471,680	1,006,768
	100%	44.7%	55.3%	17.6%	37.6%
2008	2,620,373	1,316,987	1,303,386	370,031	933,355
	100%	50.3%	49.7%	14.1%	35.6%
2007	2,442,231	1,217,284	1,224,947	331,456	893,491
	100%	49.8%	50.2%	13.6%	36.6%
2006	2,320,730	1,094,113	1,226,617	322,056	904,561
	100%	47.2%	52.9%	13.9%	39.0%
2005	2,297,895	1,145,597	1,152,298	291,484	860,814
	100%	49.9%	50.2%	12.7%	37.5%

the prosecutor's decision not to charge is inappropriate. However, Professor Lee states that these exceptions are conducted very partially and most indictments are conducted exclusively by the prosecutor. *See* Ho Joong Lee. 'Reformation and Democratic Control of the Public Prosecution Service' (2008) 9(2) Seo-Kang Law Journal 43, 43 n 1.

[29] KCPA, art 247.

[30] Criminal Act [*Hyungbeop*] 1953 partially amended on 29 July 2005 No.7623 art 51.

[31] Presidential Committee on the Judicial Reform, 'Committee Report (III): From 1st to 13th Conference' PCJR (Seoul May 2004), 173.

[32] For the discretion exercised by prosecutors and comparisons to other jurisdictions, *see* ch 5.

[33] Korean Supreme Prosecutors' Office, *The Annual Report of the Public Prosecutors' Office in 2009 [Keomchalyeongam]* (KSPO, Seoul 2010), 454-455.

Along with those powers, the prosecutors have the authority to withdraw a prosecution, which is called '*Kongsocheuisokwon*.' [34] They can retract an indictment at any moment before judgment without giving a reason.[35] In principle, the prosecutors cancel an indictment when there is a significant change of circumstances which suggest that the prosecution is inappropriate. Insufficiency of evidence, lack of formal accusation proceedings, and generation of reasons for the suspension of prosecution are examples of such a change.[36]

Not only do the public prosecutors exercise exclusive powers over the decision to prosecute, but they also have a substantial impact on judgements. This is based on two main elements. Firstly, the Korean prosecutors can recommend a sentence to the judge, and the judges generally follow those recommendations [*KeomsaKuhyung*]. In the KCPA, there is no provision requiring the judges to follow the recommendation.[37] The judgment does not need to comply with the recommendation.[38] However, in practice, the judges usually do not give a sentence exceeding the recommendation. In case study, Il-Jun Yu analysed 574 criminal cases of Seoul Pukbu District Court in 1994 and found that no judgments exceeded the recommendation of prosecutors.[39]

This can also apply to the judgments of 'stay of execution [*Jiphaingyuye*]' where judge orders that the sentence is suspended. In 2003, Byung-Ju Oh analysed 550 criminal cases which were recommended a 'stay of execution' by prosecutors. No sentence exceeded the recommendation of the prosecutors. Furthermore, in ninety-three per cent of cases (N=512), stay of execution was recommended by the prosecutors.[40]

Secondly, only the public prosecutors can decide the scope of a trial, in other words, the form and nature of the charges.[41] The judges can make a judgement based on the indictment as filed by the prosecutors. Even if the judges find out new facts or offences

---

[34] The Korean Ministry of Justice (tr), *Criminal Procedure Act [Hyungsasosongbeop] partially amended on 21 December 2007 No. 8730* (1954) art 255.
[35] Jae-Sang Lee, *Korean Criminal Procedure* (2nd edn Park Young Sa, Seoul 2008), 355.
[36] ibid.
[37] KCPA, art 302. This provision articulates the prosecutor's duty to present an opinion including recommendation for the sentence: 'After the examination of the defendant and evidence, the prosecutor should present an opinion about the fact and the application of a law.'
[38] *83 DO 1789* (1984) Panre Gongbo 945 (Korean Supreme Court). Justice Yun stated that 'the prosecutor's recommendation for a sentence is an opinion about sentencing and the judges do not have to conform to this advice.'
[39] Il Jun Yu. 'An Analysis of the Relationship between the Prosecutor's Recommendation for a Sentence and the Judgments' (1994) 18 Korean Journal of Criminal Justice [*Hyungsajungchaikyeongu*] 227, 237.
[40] Byung Ju Oh, *An Examination about the Rationalization of Judgments* (Pusan High Prosecutors' Office, Pusan 2003), 113.
[41] KCPA, art 298.

during the trial, they cannot alter the indictment on their own initiative.[42] In a recent case, a trial judge advised the prosecutor to modify the indictment but the prosecutor did not accept the recommendation. As a consequence, the defendants charged with bribery were acquitted, and there was much public criticism.[43] This again shows prosecutorial influence upon the trial.

Prosecutors also direct the execution of judgments.[44] They can issue warrants in order to arrest and imprison guilty persons on the basis of sentences and order the clerks to collect fines or confiscate properties of the defendants found guilty.[45] Exceptionally, the judges can direct the execution of a warrant to detain and search.[46] However, in principle, the KCPA gives the power to direct the execution of judgments to the prosecution service. As Professor Lee stated, this can guarantee the speedy execution of judgments by the prosecutor.[47] However, Professor Shin argued that 'the execution of judgments has to be supervised by the judges rather than prosecutors in order to protect human rights by guaranteeing due process.'[48]

In short, the Korean prosecutors have the power to charge, suspend, maintain, and retract a prosecution. They can recommend a sentence to the judges and appeal against their decisions. In addition, they decide the scope of a trial. Finally, they are in charge of the execution of sentences.

4. The Investigative Function

Unlike other jurisdictions, the Korean prosecutors are directly and closely involved in conducting an investigation.[49] As seen briefly in Chapter 2, Korean law provides them with the legal authority to conduct investigations and to direct investigation agencies. In

---

[42] Jae-Sang Lee stated that such a limitation to the judicial power can protect the rights of defence by limiting a scope of a trial. *See* Jae-Sang Lee, *Korean Criminal Procedure* (2nd edn Park Young Sa, Seoul 2008), 412.

[43] Hung-Kyo Jang and Hung-Du Park. 'Why did not the public prosecutors change the charges?' *Kyung-Hyang* (9 January 2010)

[44] The Korean Ministry of Justice (tr), *Criminal Procedure Act [Hyungsasosongbeop] partially amended on 21 December 2007 No. 8730* (1954) art 460 'The executions of judgments are directed by the prosecutor. However, exceptionally the judges can direct the execution according to the characteristics of judgments.'

[45] ibid arts 473 and 477(1).

[46] ibid arts 81 and 115

[47] Jae-Sang Lee op. cit. 103-104.

[48] Hyun Ju Shin, *Korean Code of Criminal Procedure* (2nd edn Parkyoungsa, Seoul 2002), 101 cited from Sang Jin Park. 'Suggestions for Reforming the Prosecution of Organization and Prosecution of Power' (2002) 15 Kun Kuk Journal of Social Science 75, 79 n 8.

[49] For the comparative study, *see* ch 5.

particular, they have sufficient resources to carry out an investigation on their own initiatives.

4.1. The Authority to Investigate

The Korean Criminal Procedure Act gives the power to investigate crimes only to the prosecutors.[50] As an investigator, they interview suspects and witnesses. They conduct coercive measures such as arrest, detention, search, and confiscation by themselves. Without exception, all investigations are conducted directly or indirectly by the prosecutors. As seen below in Table 3.2, approximately 26,000 cases (1.6 per cent of all cases) are directly investigated and prosecuted by the prosecutors.[51]

Table 3.2 The number of cases investigated by the prosecution service and the police[52]

Year	Total	Prosecution Service	Police
Average	1,618,872	26,108	1,592,764
	100%	1.6%	98.4%
2009	1,777,766	16,514	1,761,252
	100%	0.9%	99.1%
2008	1,780,588	19,451	1,761,137
	100%	1.1%	98.9%
2007	1,587,015	23,620	1,563,395
	100%	1.5%	98.5%
2006	1,439,546	30,792	1,408,754
	100%	2.1%	97.9%
2005	1,509,449	40,164	1,469,285
	100%	2.7%	97.3%

Note 1. In this table, the police include the police investigators of the NPA and Special Judicial Police Officers. For more information on these law enforcements, *see* Chapter 2.

2. The cases being investigated by the police are all sent to the prosecutor's office for additional investigation by the prosecutors.

The prosecutors begin the investigation by themselves and charge the suspects on the basis of the results they extract from the investigation. Apart from them, around 98.4 per cent of investigations are carried out by the police, but only under the direction of the

[50] The Korean Ministry of Justice (tr), *Criminal Procedure Act [Hyungsasosongbeop] partially amended on 21 December 2007 No. 8730* (1954) art 195.

[51] As we shall see in below, there is no limitation to the prosecutor's investigation. Therefore, they are directly involved in most types of crimes.

[52] Korean Supreme Prosecutors' Office, 'Analytical Report On Crimes' SPO (Seoul) (Published from 2005 to 2010).

prosecutors.

The police are not an independent investigation authority. They simply support the prosecutor's investigation.[53] They have a statutory duty to follow the instructions from the prosecutors.[54] The prosecutors also initiate their own investigation. For the prosecutor's effective investigation, KCPA allows the prosecutors to ask the court to preserve evidence and to examine the witnesses before the formal trial.[55] Only prosecutors can obtain judicial warrants to arrest, detain, or search and police officers must go through the prosecutors to employ any such coercive measures.[56] Professor Shin and Lee argued that 'the monopoly of the authority to request a warrant was mainly created to increase the prosecutor's domination in the criminal process, and as a result, expanded the prosecutorial control over the police.'[57]

This may help to reduce unnecessary arrests, detentions, or searches by the police. However, it has produced two adverse impacts. Firstly, the pre-eminent position of the prosecutors has been intensified as other investigation agencies cannot carry out an investigation on their own initiative without the prosecutorial approval. For instance, in 2003, the Young-San Police Station in Seoul asked Jung-Ang Public Prosecutor's Office to request a warrant for search and seizure in order to investigate a corruption case involving public prosecutors and defence lawyers. However, the request was rejected three times by the prosecution service. As a result, the police could not carry out the investigation. But as a result of media criticism, the prosecution service itself began an investigation and found accusations of corruption.[58] However, the prosecution service

---

[53] KCPA art 196; Sang Jin Park. 'Suggestions for Reforming the Prosecution of Organization and Prosecution of Power' (2002) 15 Kun Kuk Journal of Social Science 75, 78 (Park stated that 'the police are not an independent investigation agency, but a subsidiary organization to prosecutorial investigation.'); Jae-Sang Lee, *Korean Criminal Procedure* (2nd edn Park Young Sa, Seoul 2008), 100;Wan Jung and Jin Kuk Lee. 'The Analysis of the Relocation of Investigative Power' (2003) 14(2) Korean Criminal Justice Journal 157, 163; Jin Ho Chun. 'A Study on the Efficient Investigation System' (2005) 9 Korean Police Journal 9-44, 14; Kuk Cho. 'The Unfinished "Criminal Procedure Revolution" of Post-Democratization South Korea' (2002) 30(3) Denver J Int Law Policy 377, 381.

[54] The Ministry of Justice (tr), *Public Prosecutor's Office Act [Keomchalcheongbeop] partially amended on 21 December 2007 No. 8717* (1949) art 53'police officers shall obey the orders issued by prosecutors [in relation to the investigation].' translated by Professor Cho *See* Kuk Cho. 'The Ongoing Reconstruction of the Korean Criminal Justice System' (2006) 5(1) Santa Clara Journal of International Law 100, 117.

[55] ibid arts 184 and 221-2.

[56] The Korean Constitutional Court (tr), *Constitution of the Republic of Korea [Heonbeop]* (1948) art 12(1) 'warrants issued by a judge through due procedures upon the request of a prosecutor shall be presented in case of arrest, detention, seizure or search'; The Korean Ministry of Justice (tr), *Criminal Procedure Act [Hyungsasosongbeop] partially amended on 21 December 2007 No. 8730* (1954) arts 200-2, 201.

[57] Dong-Woon Shin. 'The Reform of the Korean Public Prosecution' (1988) 29(2) Seoul Law Journal 39, 45; Young-Lan Lee. 'Korean Investigation System' (1995) 7 Korean Criminal Justice Journal 187-205, 197.

[58] Hee-Kyung Hwang. 'The Investigation into Lawyers' Corruption by the Police' *Yun-Hap News* (23rd April 2003); Ju An Kang. 'Internal Disciplinary Action to the Senior Public Prosecutors' *Jung Ang Ilbo*

did not charge the offenders, but instead dealt with the matter internally. Even today, there is still no external agency to investigate the criminal offences by the prosecutors.[59]

Secondly, the public prosecution service uses the power in order to control the police. The prosecutors can demand the police to obtain significant evidence when the police ask a request for a warrant.[60] Such a high demand, as Professor Shin stated, 'leads the police officers to face with the dilemma that they should obtain much evidence under a pressing situation in which the police need to conduct urgent measures such as an arrest and search.'[61] As a consequence, the police focus on obtaining a confession from a suspect. Although such a confession may be easily retracted by the defendant in court, it enables the police to obtain a warrant. Indeed, under this circumstance, the police often use inappropriate interrogation tactics such as torture and threats.[62]

Once the investigation is finished, only the prosecutor can decide whether or not to charge.[63] Accordingly, the police send all investigative dossiers and evidence to the prosecutor's office.[64] They review the results and charge the suspect if there is sufficient evidence to prove guilt. If the public prosecutors need more evidence and information, they direct the police to investigate further or investigate the case with their own investigative units. However, for the most part, the public prosecutors re-interview suspects before charging them because of the evidentiary impact of the interview records.[65]

Taken together, most statutory powers for investigation are concentrated in the hands of the public prosecutor in Korea.[66] Even if criminal investigation authorities are categorized into two groups – public prosecutors and judicial police officers, only the public prosecutors have the power to investigate crimes as well as control other

---

(12 July 2003)

[59] For more details on reviewing mechanisms in Korea, *see* ch 5 and 7.

[60] Dong-Woon Shin. 'The Reform of the Korean Public Prosecution' (1988) 29(2) Seoul Law Journal 39, 45.

[61] ibid.

[62] For further discussion about the inappropriate interrogation methods by the police and prosecutors, *see* ch 6.

[63] The Korean Ministry of Justice (tr), *Criminal Procedure Act [Hyungsasosongbeop] partially amended on 21 December 2007 No. 8730* (1954) arts 246, 247.

[64] ibid art 238.

[65] Dong-Woon Shin op. cit. 55 (Professor Shin stated that 'if there is a confession in the interview records written by the public prosecutors, it is almost impossible to expect a judgement of acquittal.'); Dong-Hee Lee. 'The Reform of Korean Criminal Procedure and Its Impact on the Role of the Police and Prosecution Service' (2005) 9 Korean Police Journal 45-75, 63; Kyoung-Moon Kye. 'Evidential Capacity of Protocol About Suspect Examination Written by the Prosecutor' (2005) 17 Kukmin Law Journal 141, 163-164.

[66] Jae-Sang Lee, *Korean Criminal Procedure* (2nd edn Park Young Sa, Seoul 2008), 100; Ho Joong Lee. 'Reformation and Democratic Control of the Public Prosecution Service' (2008) 9(2) Seo-Kang Law Journal 43, 43; Woong Hyuk Lee. 'The Analysis of Multiple Organizational Outcome of the Public Prosecution Service' (2006) 15(1) Korean Journal of Public Administration 3, 8; Young-Lan Lee. 'Korean Investigation System' (1995) 7 Korean Criminal Justice Journal 187-205, 192.

investigation authorities.

4.2. Human Resources for Investigation

According to the Public Prosecutors Personnel Management Act, 1,724 public prosecutors work for the prosecution service in Korea.[67] They are recruited immediately after the National Judicial Examination and two-year training at the Judicial Research and Training Institute. In addition to prosecutors, there is 7,524 support staff including prosecutorial investigators (about 5,000), administrative clerks, and secretaries.[68]

Despite relatively small population size, the number of personnel of the Korean prosecution service is larger than, for example, that in England and Wales.[69] Furthermore, there is a major difference in their main function. As we shall see in detail in Chapter 5, the Crown Prosecution Service in England and Wales serves as the second filter to screen the police investigation and is mainly in charge of prosecution of crimes at trial. But the Korean prosecution service focuses its attention on the investigation. This is noted in managing human resources of the prosecutors' offices.

The prosecutor's offices have their own investigators supporting the prosecutor's investigation. The number of the investigators reaches around 5,000 which is approximately one third of police investigators of the National Police Agency.[70] Interestingly, such prosecutorial investigative units are not to be found in other jurisdictions.[71] Table 3.3 shows the number of the investigators in the prosecutor's offices, which had increased by one hundred and ten per cent from 1986 to 2002.[72]

---

[67] Public Prosecutors Personnel Management Act [*Kumsa-Jeongwon-Beop*] 1956 amended on 21 December 2007 No.8716. The figure is the maximum number provided in the Act.

[68] Korean Supreme Prosecutors' Office. 'Manpower of Korean Prosecution' <http://www.spo.go.kr/user.tdf?a=user.pm.PmApp&seq=1100&chungcd=02000000&catmenu=020100&c=2001&catmenu=m02_01>, accessed 28 February 2011.

[69] The population of South Korea is around 48 million. England and Wales have combined population of around 53 million. In the English system, 8316 staffs including around 2900 qualified prosecutors work for the prosecution service. *See* The Crown Prosecution Service. 'Facts about the CPS' <http://www.cps.gov.uk/about/facts.html>, accessed on 7 March 2011.

[70] Woong Hyuk Lee. 'The Analysis of Multiple Organizational Outcome of the Public Prosecution Service' (2006) 15(1) Korean Journal of Public Administration 3, 16.

[71] For more details on the prosecutorial investigation in other jurisdictions, *see* ch 5.

[72] ibid (Professor Lee analysed the correlation between the increase of investigators as well as investigative budget and the conviction rate. He found a negative correlation between those variables.)

Table 3.3 The number of the investigators in the prosecution service

Year	Investigators *N*	Cumulative Percentage %	Year	Investigators *N*	Cumulative Percentage %
1986	2,323	0.00	1995	4,335	86.61
1987	2,490	7.19	1996	4,455	91.78
1988	2,590	11.49	1997	4,572	96.81
1989	3,247	39.78	1998	4,619	98.84
1990	3,546	52.65	1999	4,609	98.41
1991	3,921	68.79	2000	4,746	104.30
1992	4,022	73.14	2001	4,766	105.17
1993	4,102	76.58	2002	4,892	110.59
1994	4,189	80.33			

A large number of prosecutors are assigned to the investigation departments. Eighty-seven per cent (*N*=1,243) of prosecutors (*N*=1,427 in 2004) work on investigation.[73] In contrast, only thirteen per cent (*N*=184) take charge of trials.[74] For instance, in the Seoul Central District Prosecutors' Office, 17 of 20 departments are in charge of investigations and only one department takes up trials.[75] This shows that the Korean prosecutors focus their attention on the investigation rather than the prosecution as well as trials:

> [*J2-RS*] The prosecutors are interested simply in conducting an investigation because it's closely related to preserving their powers. Therefore, the most capable prosecutors and staffs are working for the investigation departments. In general, the junior prosecutors carry out an adversarial role in court.[76]

> [*PP3-RC*] At the present time, the prosecutors draw their attention to carrying out an investigation. Most resources of the prosecution service are used for the investigation. Maintaining a prosecution at trial is regarded as a worthless work by the prosecutors.

---

[73] Presidential Committee on the Judicial Reform, 'Committee Report (III): From 1st to 13th Conference' PCJR (Seoul May 2004), 76 (This was presented to the Presidential Committee on the Korean Judicial Reform by the Public Prosecutors' Office in 2004.)

[74] ibid 76.

[75] Dong-Hee Lee. 'A Comparative Study on the Structure of Crime Investigation Authorities in Korea and the Reform Strategy' (2004) 7 Korean Police Journal 146, 164.

[76] For information on the interviewees, *see* Appendix.

Conducting an investigation seems to be the most important work for the prosecutors. By contrast, handling a trial is considered as 'a worthless work', which is mainly carried out by junior prosecutors. This tendency has been reflected on the allocation of human resources in the prosecution service.

4.3. Types of Prosecutorial Investigation

In practice, public prosecutors investigate all offences from high-profile corruption to traffic accidents.[77] There is no limitation to the prosecutorial investigation. In addition, they have sufficient investigators and budget to support their investigative operations. The investigation administered by the prosecutors can be categorized into three groups.

First, the public prosecutors conduct investigations by depending on the information which they obtain by themselves. High-profile corruption and complex fraud are examples of those investigations.[78] However, as Jong Gu Kim pointed out, the prosecutorial initiatives have expanded into all offences, which are normally regarded as an objective of police investigation, e.g. minor violations of administrative procedure, water pollution, and illegal construction.[79] Such an expansion increases the workload of the service and leads it to be regarded as another investigation agency.[80]

Second, the public prosecutor investigates crimes reported by the victims, public organisation, and other interested citizens. In Korea, most people regard the public prosecution service as another investigation authority.[81] This can be also noted in the interviews with the legal professionals:

> [*J4-IC*] Judges often say, in Korea there is no prosecution service. Only two investigative agencies carry out their duties. The Korean prosecution service is another investigation agency. The prosecutors don't care for trial works. They regard their role is finished when

---

[77] Jong Gu Kim, *The Reform of the Korean Criminal Justice System* (2nd edn BuB-Mun-Sa, Seoul 2004), 534 (Kim stated that 'for last 10 years [1991-2000] most investigations by prosecutors were mainly involved with illegal constructions, counterfeit goods, air pollution, and violation of food hygiene.')

[78] Dong Hee Lee stated that 'the Central Investigation Department (CID) of the Korean Supreme Prosecutors' Office is one example indicating the prosecutor's direct investigation. The CID deals with high-profile corruption cases under direction of the Prosecutor General.' *See* Dong-Hee Lee. 'A Comparative Study on the Structure of Crime Investigation Authorities in Korea and the Reform Strategy' (2004) 7 Korean Police Journal 146, 164.

[79] Jong Gu Kim op. cit. 534.

[80] *See* ch 8.

[81] Dong-Hee Lee op. cit. 181.

> they arrest the suspects and get confessions from them.[82]
>
> [*PO3-IS*] The Korean prosecutors absolutely focus their attention on conducting an investigation themselves. They think of the investigation itself as a significant power.
>
> [*DL3-IS*] In Korea, the conviction rate is 99 per cent. If something is differently determined in court, the prosecutors probably have some interests in maintaining a prosecution. But, now, they don't need to do so.

The only difference between the police and prosecutorial investigation is the public prosecutors have much more powers than the police.[83] This leads the people to prefer a direct investigation by the public prosecutors and results in the increase of crimes reported to the prosecution service:[84]

> [*DL2-IS1*] Under the current system, the prosecutors actually make almost all decisions in the criminal process. So, the citizens generally want the prosecutor to be directly involved in their cases.
>
> [*PP2-RS*] The prosecution service is an investigative organisation. In particular, many people believe that only the prosecutors can successfully conduct investigations of corruption cases. So, the citizens want the prosecution service to completely crack down on corruptions. Consequently, because of such a request from the public, the prosecutors have to conduct an investigation themselves.

Finally, the public prosecutors spend time in supplementing investigations originally conducted by the police.[85] The public prosecutors who receive the cases from the police do not only review the cases, but they also investigate the offences by interviewing suspects and witnesses. This is called 'supplementary investigation' [*Bo-Gang Su-Sa*]. The process is almost the same as the police investigation except for that the documents are written by the prosecutors. Why do the public prosecutors investigate the cases in a repetitive way? The answer, as we shall see in detail in the subsequent section, can be found in the different evidentiary impact of the interview records written by the police

---

[82] For more relevant statements of this judge, *see* ch 8.
[83] Jong Gu Kim, *The Reform of the Korean Criminal Justice System* (2nd edn BuB-Mun-Sa, Seoul 2004), 532-533.
[84] The crimes, which are reported to the prosecution service, were 89,224 in 2000. *See* ibid 495.
[85] ibid 529.

and those of the prosecutors. In order to maximise the evidentiary impact of the prosecutorial dossier, the public prosecutors have to investigate all cases again even if the police have already finished investigation.

To sum up, the Korean public prosecutors directly investigate crimes with their own resources. In addition, only they have the power to charge the offenders. Both the investigative and prosecutorial arms are legally and practically exercised only by the prosecutors.

5. The Prosecutor's Focus on Investigation

The public prosecutor's focus on investigation can be explained by three aspects. Firstly, prosecutors regard the prosecution as a delivery service transporting the cases from the police station to courts.[86] This leads the prosecutors to find their institutional and occupational identity in the investigation. After the establishment of the Republic of Korea in 1948, the Public Prosecutors' Office Act (PPOA) was enacted in 1949. The PPOA had an important change when it was compared to the Act of the US Military Government. The PPOA had a provision that permits the installation of its own investigative units in the Supreme Prosecutors' Office (SPO).[87] Sung Ryul Kwon, the Minister of Justice in 1949, stated at the National Assembly as follows:[88]

> The public prosecutors cannot work unless the police arrest the criminals. ... Under the current system, the public prosecution service has only a head without hands and legs. However, if you provide us with hands and legs, we can walk ourselves. ... Otherwise, the public prosecution service would be an organization that just delivers the criminal cases from the police station to the court. In this situation, the public prosecutor's mission can't be completed. In this regard, I strongly want you to allow the establishment of the Investigation Department in the Public Prosecutors' Office.

Apparently, prosecutors did not find their identity or job satisfaction in trial work. The

---

[86] This is noted in the records of the National Assembly. *See* Sung Ryul Kwon's statement at n 88 and accompanying texts.

[87] The Ministry of Justice (tr), *Public Prosecutor's Office Act [Keomchalcheongbeop] partially amended on 21 December 2007 No. 8717* (1949) art 29 'The investigation department may be installed in the Supreme Prosecutors' Office. It may deal with the study on criminal investigation and investigate crimes which are considered to be important by the chief of the Supreme Prosecutors' Office.'

[88] Korean Supreme Prosecutors' Office, *The History of Public Prosecutors' Office Law* (KSPO, Seoul 1996), 213.

prosecution service without a direct investigative function was described as 'the body without hands and legs'. This is still very much the case. One prosecutor, whom I interviewed, compared the prosecutors dealing with supervisions over the police investigation to the machine:

> [*PP3-RC*] Perhaps, all prosecutors want to investigate significant crimes themselves. Most prosecutors want to work for the Special Investigation Department. Honestly, the prosecutors dealing with the cases sent from the police are almost machines. They mainly talk as this: "I have finished 50 cases, but I still have another 50 cases". Prosecutors actually don't want to do such a work. They want to aggressively achieve something by conducting an investigation.

The public prosecutors regard the prosecutorial investigation as one of their important missions and need their own investigative units to conduct investigations.

Secondly, the investigation is considered as one of important indices to test for the job performance of the prosecutors. [89] The public prosecutor who successfully investigates a crime leading to a conviction is highly reputated:[90]

> [*PP2-RS*] Prosecutors generally prefer conducting investigations to both maintaining prosecution and supervising police investigation. The Special Investigation Department in the prosecutors' office is the most popular place for the prosecutors. In fact, we feel self-esteem and achievement when we investigate corruption cases while working in the Special Investigation Department. To be honest, conducting an investigation and showing capability are absolutely useful for the promotion.

> [*PP3-IS2*] Indeed, the prosecutors want to investigate a crime with their own investigative units. Such an investigation is actually one of the best ways to show their abilities.

In contrast, the prosecutors who focus on trial work and dropping the weak cases do not

---

[89] On 21 February 2009, there was a nationwide personnel shift of the Prosecutors' Office. 426 prosecutors swapped their posts. Popular positions were all related to the investigation: e.g., Director of the Office of Investigation Planning (OIP) in Supreme Prosecutors' Office, 2nd and 3rd Chief Prosecutor in Seoul Central District Prosecutors' Office. In particular, the Director of the OIP, who belongs to the Central Investigation Department, was regarded as the most significant post by prosecutors. *See* Hye Mi Seong. 'The Prosecution, Medium Rank Prosecutors' Personnel Shifts' *Yun-Hap News* (21 January 2009); Jae Seop Yun and Sun Sik Jeong. 'New Personnel. Who are Big Three?' *Herald Business* (22 January 2009).

[90] Bung Duk Jeon. 'Central Investigation Department In the Korean Supreme Prosecutors' Office' *Mae-Il Financial* (30 January 2009).

have a chance to show their ability.[91] For instance, if public prosecutors directly investigate a high profile public servant and prove his guilt, their reputation is enhanced. However, finding a drawback in a criminal case, which has been investigated by the police, correcting those errors, and charging [or not] the suspects do not often provide the prosecutors with improved status.

Third, most importantly, the evidentiary impact of the investigative dossiers written by the public prosecutors has helped them to be routinely involved in the criminal investigations.[92] The interview records written by the public prosecutor have such evidentiary weight that they are generally accepted as proof regardless of the statements of defendants in court. In contrast, the interview records written by the police are not accepted into evidence unless the defendant agrees with the facts in the interview records.[93] As a result, not only does this difference enable the prosecutors to prove guilt, but it also leads them to conduct investigations by themselves.[94]

Since 1954, the prosecutorial documents, instead of police interview records, have come to be employed as robust evidence to prove confessions or admissions in the Korean criminal process. This safeguard was suggested by the National Assembly Committee on Legislation and Judiciary (Chair: Sang-Seop Um) in 1954:

> In terms of investigation, there was an important issue how to prevent torture and coerced confessions. The prosecutors and police officers told me that they never use torture. However, everybody knows that such tactics are still used during the interrogation. Therefore, in order to prevent those problems, interrogation reports should not be used as evidence under any circumstance. ... This would be good in terms of protecting defendants. But, the trials will be delayed and a number of problems may take place. So, we made a decision that although the defendants deny their statements of the documents in court, prosecutorial documents can be admissible into evidence because the quality of prosecutors is higher than that of the police officers. Then, the confessions being made in the police station can be easily abolished. In this situation, even though torture is not completely removed from the police investigation, I believe that we can at least reduce those illegal

---

[91] Jong Gu Kim, *The Reform of the Korean Criminal Justice System* (2nd edn BuB-Mun-Sa, Seoul 2004), 531-532.

[92] ibid 529.

[93] The Korean Ministry of Justice (tr), *Criminal Procedure Act [Hyungsasosongbeop] partially amended on 21 December 2007 No. 8730* (1954) art 312. For further discussion, *see* ch 6.

[94] Dong-Woon Shin. 'The Reform of the Korean Legal System and the Revision of the Law of Evidence' (2006) 47(1) Seoul Law Journal 107-132, 118; Dong-Hee Lee. 'The Reform of Korean Criminal Procedure and Its Impact on the Role of the Police and Prosecution Service' (2005) 9 Korean Police Journal 45-75, 63; Kyoung-Moon Kye. 'Evidential Capacity of Protocol About Suspect Examination Written by the Prosecutor' (2005) 17 Kukmin Law Journal 141, 163-164.

practices.[95]

This suggestion seems to stem from both the chaotic situation in Korea in 1950s and the experiences of the colonial system of criminal justice. In 1950s, South Korea was very unstable. After a 35-year colonial period (1910-1945), before the independent legal system was fully established, it had to face another disaster in history, 'the Korean War (1950-1953)'.[96] Thus, in 1954, one of the most important factors in the formation of criminal justice system, as Professor Shin stated, was to secure efficiency necessary to stabilise the state.[97] For the legislators, the prosecutorial interview document was probably considered as a significant alternative to both safeguard the suspects and achieve efficiency with a minimal effort.

In particular, the experiences of the colonial period might have an impact on creating such an idea. During the Japanese colonial period, the criminal trials mainly relied on the interview records written by the police.[98] In the colonial criminal justice system, most judges and prosecutors were Japanese.[99] Indeed, the language barrier was one of the significant problems for the trials. The courts needed much resource and time in order to preserve the value of an open trial. For instance, they had to employ a large number of interpreters who can deliver the statements of the defendants and witnesses. However, the right to a fair trial, as Professor Shin stated, was regarded as 'extravagance for the colonial people'.[100] Subsequently, in order to maximise the efficiency in the colony, the criminal trials were conducted on the basis of interview documents being recorded and translated into Japanese by the police.

The role of the prosecution service was largely limited to review the results of the police investigation and to maintain the prosecution in court. As the police interview

---

[95] Korean Institute of Criminology, *Source Book on the Establishment of Korean Criminal Procedure Code* (Korean Institute of Criminology, Seoul 1990), 290 quoted in Dong-Woon Shin op. cit. 115.

[96] Bruce Cumings, 'Civil society in West and East' in Carles K. Armstrong (ed), *Korean Society: Civil Society, Democracy and the State* (2nd edn Routledge, Oxon; New York 2007) 9, 21-24; Gi-Wook Shin and Michael Edson Robinson, *Colonial Modernity in Korea* (Harvard East Asian monographs, Harvard University Asia Center : Distributed by Harvard University Press, Cambridge, Mass. 1999) 466, 466; Peter H. Lee and William Theodore De Bary, *Sources of Korean Tradition: Volume II from the Sixteenth to the Twentieth Centuries* (Introduction to Asian civilizations, Columbia University Press, New York; Chichester 1997); Dong-Woon Shin, 'An Analysis of the Korean Criminal Procedure during the Japanese Occupation' in *Korean Legal History Review* (Parkyoungsa, Seoul 1991) 401-417.

[97] For further information on historical background, *see* chs 2 and 3.

[98] Dong-Woon Shin. 'The Reform of the Korean Legal System and the Revision of the Law of Evidence' (2006) 47(1) Seoul Law Journal 107-132, 112.

[99] For instance, 150 judges and 72 prosecutors were Japanese in the colonial criminal justice system in 1930. By contrast, the numbers of Korean judges and prosecutors were very small, i.e. respectively 38 and 7. *See* Jun Young Mun, *The Establishment of the Court and Prosecution Service in Korea* (Yuksa Bypyung Sa, Seoul 2010) 976, 451.

[100] Dong-Woon Shin op. cit. 111-112.

records were routinely accepted into evidence by the colonial law, the prosecutors, unlike in the current system, did not have to re-interview the suspects in order to confirm the confessions.[101] The criminal trials in the colony can be described thus:

> When the prosecutors charged the suspects, they provided the court with a file of investigative documents. Before the trial, the judges read those documents written in Japanese. In court, the judges just confirmed whether or not the statements in the documents had been correctly recorded by the police. The trials were conducted in Japanese by Japanese-speaking judges and prosecutors. They did not have to consider the Korean accused and audience. The fairness resulting from the right to an open trial was not a significant requirement for the colonial defendants.[102]

Under these circumstances, the colonial police, who were mostly Korean, focussed on drawing a confession from the suspects because it was the most certain and easiest way to prove the guilt. Indeed, inappropriate methods such as threats and tortures were largely used during the interrogation.[103] As a result, the public had no confidence or trust in the police.[104]

However, this distrust in the police, as seen in the previous chapter, continued to exist after the independence from Japan since most colonial police officers were again employed by the independent government. After independence, Korea was in the very chaotic situation. In particular, the new government did not have sufficient resources to recruit new police officers and educate them. Thus, unlike judges and prosecutors, the new government made use of the same police forces as under the colonial government.[105] There was no sufficient public in those police forces.

In contrast, the public did trust the prosecutors because a large number of lawyers, who had defended the Korean people and tried to achieve the independence during the colonial period, were employed as the public prosecutors.[106] They were very popular among the Korean people, and themselves had much self-esteem and integrity.[107] Based

---

[101] Dong-Woon Shin. 'The Reform of the Korean Public Prosecution' (1988) 29(2) Seoul Law Journal 39, 45.
[102] Dong-Woon Shin op. cit. (2006) 112-113.
[103] Dong-Woon Shin op. cit. (1988) 45.
[104] Kuk Cho. 'The Ongoing Reconstruction of the Korean Criminal Justice System' (2006) 5(1) Santa Clara Journal of International Law 100, 117-118; Dong-Woon Shin. 'An Historical Study on the Competence of Criminal Investigation between the Police and Prosecution' (2001) 42(1) Seoul Law Journal 178-230, 211-212.
[105] Kuk Cho op. cit. 117-118.
[106] Dong-Woon Shin. 'An Historical Study on the Competence of Criminal Investigation between the Police and Prosecution' (2001) 42(1) Seoul Law Journal 178-230, 212.
[107] ibid.

on this public trust, the prosecution service began to be regarded as an important organisation to both control the police investigation and conduct an investigative interview for safeguarding the suspects.[108]

In the 1950s, the role of the Korean prosecution service was mainly limited to supplement police investigations by interviewing suspects repeatedly and recording the results in their documents. In particular, most resources of the prosecution service were used for charging the suspects and maintaining the prosecution.[109] In addition, with the development of democracy, there was an attempt to achieve public confidence in the prosecution service by reducing the prosecutor's tenure to 10 years and allowing the external people to participate in the personnel assignment of the prosecutors.[110] However, due to the military coup by Jung Hee Park on 16th May 1961, all those reforms could not be implemented.

Rather, under the military government (1961-1993), the prosecution service significantly developed its powers. Professor Mun described that 'the "1960s" provided a great opportunity for the Korean prosecution service to develop to its fullest potential.'[111] In the 1960s, one of the emphasised factors for the prosecution service was the 'aggressive involvement in the investigation.' The investigation was regarded as a method to show the capability of the prosecution service, and subsequently, the prosecutors were required to play a key role in the direct investigation and the supervision over the police investigation.[112]

In 1962, the Central Investigation Department (CID) was created in the Supreme Prosecutors' Office.[113] Then, the functions and powers of the CID were extensively expanded in 1969 by the amendment of the Public Prosecutor's Office Act.[114] In addition, the district prosecutors' offices had expanded their own investigative units.[115] Particularly, in order to consolidate their role as a ruler of the investigation, the

---

[108] For more details on the prosecutorial control over the police investigation, *see* ch 2.

[109] Jun Young Mun, *The Establishment of the Court and Prosecution Service in Korea* (Yuksa Bypyung Sa, Seoul 2010) 976, 895-900.

[110] In particular, such an attempt included the reform of the relationship between the police and prosecutors. The National Assembly Committee on Internal Affairs suggested that the police should conduct investigations without the supervision from prosecutors. The committee noted that 'the police investigation can be manipulated by the instructions from prosecutors.' Thus, it argued that basic investigation should be carried out by the police on their own initiatives. *See* ibid 890-891.

[111] ibid 897.

[112] ibid 898.

[113] *Public Prosecutor's Office Act [Keomchalcheongbeop] partially amended on 20 August 1962 No. 1130* (1949), art 29 para 3.

[114] *Public Prosecutor's Office Act [Keomchalcheongbeop] partially amended on 16 January 1969 No. 2078* (1949), art 29 and *The Code for the Public Prosecutor's Office Organisation [Keomchalcheong Samukiku Kyujeong] amended on 20 March 1969 No. 3810* (1962), art 4.

[115] In 1969, the Seoul and Pusan District Prosecutors' Offices created the Great Investigation Departments. *See* Jun Young Mun op. cit.

prosecutors had been advised to conduct a direct investigation rather than supervise the police investigation.[116] Such a development of the Korean prosecution service can be well observed in the Prosecutor Jeong's illustration presented in 1970:

> The prosecution service has significantly developed. The prosecutor is not a person who does simply and boring jobs for the police any more. The number of investigations being conducted by the prosecutors has remarkably increased. New investigative functions have been created for the CID and investigation departments in the district offices. In terms of cracking down on administrative offences, the prosecution service has made an accomplishment worthy of note. On the basis of this change of prosecutorial functions, the prosecution service should develop a new scope of work. The visual angle of the prosecutorial enormous potential has been expanded from 50 degrees to 100 degrees, from 100 degrees to 150 degrees. Now, the prosecution service needs to have a concern about the prevention of crimes.[117]

In addition to the expansion of the prosecutorial function and power, during this period, various schemes to screen prosecutorial decisions had been removed from the draft of the KCPA on the basis of the suggestion from the prosecutors.[118] Firstly, the judicial power to review the prosecutorial discretion not to charge was almost eliminated by the amendment of the KCPA in 1973.[119] As a result, the prosecution service, as Professor Shin stated, could exclude external control over the prosecutorial decisions.[120] Secondly, through this amendment, the judges lost their power to question the suspects for examining the propriety of detention.[121] Accordingly, they had to issue a warrant simply by relying on the documents written by the prosecutors.[122] Furthermore, the prosecutors came to have a power to appeal against the judicial decisions to release the detained defendants by bail and cancellation of detention.[123]

---

[116] ibid 898 n 449.

[117] Ik Won Jeong. 'Prosecutorial Role for the Prevention of Crimes' (March 1970) Prosecution Service [Keomchal] 36, 36-37 quoted in Jun Young Mun, *The Establishment of the Court and Prosecution Service in Korea* (Yuksa Bypyung Sa, Seoul 2010) 976, 898-899.

[118] ibid 899-900 and n 453.

[119] *Criminal Procedure Act [Hyungsasosongbeop] partially amended on 25 January 1973 No. 2450* (1954), art 260.

[120] With respect to this amendment, Professor Shin stated that 'through this amendment, the prosecution service excluded the external control over the prosecutors. However, it maintained the control over the police by preserving exceptions for unlawful activities of the police.' *See* Dong-Woon Shin. 'The Reform of the Korean Public Prosecution' (1988) 29(2) Seoul Law Journal 39, 43.

[121] Jae-Sang Lee, *Korean Criminal Procedure* (2nd edn Park Young Sa, Seoul 2008), 16.

[122] This limitation to the judicial review continued over 30 years in the Korean criminal process and was reformed partially through the amendment of the KCPA in 2007. *See* ibid, 16-20.

[123] ibid 15.

In short, as Professor Mun noted, 'various mechanisms leading the prosecutors to feel uncomfortable had been improved and abolished by the amendment in 1973 from the perspectives of the prosecution service.'[124] However, those revisions have been often criticised as 'a change for worse' in the Korean legal history.[125]

The changes in favour of the prosecution service continued to emerge during the military government for over 30 years.[126] The prosecutorial investigation had been made routine. The supervision over the police investigation had been firmly established. In addition, the prosecution service had expanded their roles in the prevention of crimes, the control over the administrative offences, and the inspection into the state affairs. Moreover, the Ministry of Justice had been manipulated by the prosecutors. A number of mechanisms for guaranteeing the defendant's rights had been abolished in the KCPA.[127]

Taken together, the prosecutor's interview with suspects seems to emerge because of various elements in the Korean legal history: concerns about the coercive police interrogation being experienced in the colonial period; low public trust in the police; experienced efficiency of the trials based on interview documents; and high trust in the prosecution service after independence. Given those elements, the proposal for article 312 was perhaps considered as an alternative to maintain the efficiency of criminal process as well as to safeguard the defendants, and in the end, was provided in the KCPA.[128]

However, with the development of the prosecutorial investigation under the military governments, such a safeguard has been turned into a significant method to uphold the investigations being directly conducted by the prosecutors. Consequently, the prosecution service has become another powerful investigative agency employing, as we shall see in Chapter 6, torture and threats to elicit confessions and admissions. In particular, because of the considerable evidentiary power of the documents, the result of a trial is mostly determined in the prosecutor's office, not in open court.[129]

---

[124] Jun Young Mun, *The Establishment of the Court and Prosecution Service in Korea* (Yuksa Bypyung Sa, Seoul 2010) 976, 899.

[125] ibid; Dong-Woon Shin op. cit. 42;Jae-Sang Lee op. cit. 16 (Professor Lee stated that 'a number of measures to protect the defendant's rights were abrogated by the amendment in 1973.')

[126] Jun Young Mun op. cit. 900.

[127] Professor Mun stated that such 'changes are very similar to those in Japan under the militarism in 1930s and 1940s.' *See* ibid.

[128] Dong-Woon Shin. 'The Reform of the Korean Legal System and the Revision of the Law of Evidence' (2006) 47(1) Seoul Law Journal 107-132, 113.

[129] Presidential Committee on the Judicial Reform, 'Committee Report (IV): From 14th to 27th Conference' PCJR (Seoul January 2005), 337-342.

6. Conclusion

The Korean prosecutors, as we shall see in Chapter 5, have general roles as an advocate and a minister of justice as in other jurisdictions. They are regarded as one party in the adversarial structure. At the same time, they have a duty to protect defendants as a quasi-judicial officer. However, they have extensive discretion for trial works. Only prosecutors can charge the suspects in Korea. They can suspend and retract the prosecution without judicial intervention. The form and nature of a trial is decided only by prosecutors. They also recommend a sentence to the judge.

Particularly, in relation to the investigation, not only they direct the police, but also investigate offences on their own initiatives. They have sufficient resources to conduct such a function. Most resources are concentrated on the investigation rather than trial works. The prosecutorial investigation has been increased by several elements. Prosecutors seek their institutional and occupational identity in the investigative actions. Investigative ability is regarded as a significant factor to assess the reputation of the prosecutors. More importantly, the evidentiary impact of the prosecutorial dossier has led the prosecutors to be routinely involved in the investigation, but it also enables them to maintain superior status.

Chapter 4 The Organisation and Social Authority of the Korean Prosecution Service

1. Introduction

This chapter aims to examine the organisational features of the Korean prosecution service and its social authority. Firstly, several organisational characteristics are explored stemming from the centralised authority. This discusses not only the internal aspects, but also the relationship between the prosecution service and Ministry of Justice. Then, the level of influence of the prosecution service and its functions are assessed. This is based on content analysis of newspapers and the influential power is comparatively measured.

2. Organisation: Centralised Authority

The Korean prosecution service is a centralised authority based on the 'principle of unity of prosecutors [*Kumsa-dongilche-wonchik*],' which was created to secure the fairness of the investigative and prosecutorial affairs conducted nationwide.[1] Because of the principle, 'the prosecutors shall obey the prosecutors in higher office in prosecutorial affairs.' It has developed as a hierarchical organisation.[2] Citizens consider the prosecution service as 'one closed and dominant elite faction'.[3]

As we shall discuss later, a monopoly of power can lead to abuse.[4] Where there is no proper system to monitor their operations, the organisational characteristics of the

---

[1] Kuk Cho. 'The Unfinished "Criminal Procedure Revolution" of Post-Democratization South Korea' (2002) 30(3) Denver J Int Law Policy 377, 381; This may be a significant feature of continental legal tradition – centralised authority. *See* ch 5.

[2] The Ministry of Justice (tr), *Public Prosecutor's Office Act [Keomchalcheongbeop] partially amended on 21 December 2007 No. 8717* (1949) art 7(1).

[3] Ho Joong Lee. 'Reformation and Democratic Control of the Public Prosecution Service' (2008) 9(2) Seo-Kang Law Journal 43, 43.

[4] Professor Cho described this problem as follows: 'In the cases involving powerful politicians or high-ranking government officials, prosecutors in charge had to unwillingly quit their investigation, often facing pressure or persuasion from prosecutors in higher office, and through the Supreme Prosecutor's Office, the ruling political party has kept a substantial influence on the prosecutors in charge of the cases. Consequently, public distrust of the prosecution has increased.' *See* Kuk Cho op. cit. 381-382.

service - centralised authority based upon the principle of unity - have occasionally caused the prosecutorial power to be manipulated by external political influence and internal direction by superiors.[5] This results in distrust in the operations by the prosecution service. According to the results of the survey by Woo, a member of National Assembly, 69.4 per cent of citizens answered that 'the prosecution service has dominant position'. In addition, 71.6 per cent of respondents considered that 'the prosecution service is unfair and unjust'.[6]

2.1. Ministry of Justice

The Korean prosecution service is part of the Ministry of Justice. However, it exists as an independent agency to prevent the office from being used in a political way. In addition to the structural independence, the Public Prosecutors Office Act prohibits the Minister of Justice from directing the prosecutor in relation to a specific case.[7] They can enunciate general policy and direct only the prosecutor general. This was created to cut off unjust interference by government, and consequently, to secure the political neutrality of the prosecution service.[8]

However, in the face of such a measure, the prosecution service does not have sufficient independence from political influence due to its characteristic as a centralised authority. This can be noted in three aspects. Firstly, prosecutors seek to be actively involved in the affairs of the Ministry of Justice rather than to be independent from them. Most actions of the Ministry of Justice are directed and decided by the prosecutors since the key posts of the ministry are occupied by incumbent and retired prosecutors. For instance, the Minister of Justice is a cabinet member, and with few exceptions, as seen in Table 4.1, former prosecutors have been assigned to this job.

In addition to the minister, one of the incumbent chief prosecutors is always

---

[5] Bo Hak Seo. 'Political Independence and Checks on the Public Prosecutor's Powers' (2004) Next 9, 10 (Professor Seo argued that 'the independence of the prosecution service is guaranteed by a number of measures. However, there is no proper system to check the monopolised power of the prosecution service.'); Ho Joong Lee. 'Reformation and Democratic Control of the Public Prosecution Service' (2008) 9(2) Seo-Kang Law Journal 43, 44 (Professor Lee pointed out that 'the prosecutors tend to refuse any monitoring systems by arguing that those measures can infringe on the independence of the prosecution service.'); Sang Jin Park. 'Suggestions for Reforming the Prosecution of Organization and Prosecution of Power' (2002) 15 Kun Kuk Journal of Social Science 75, 76 (Professor Park stated that 'whereas the prosecutors monopolise most powers in the criminal proceedings, there is no reviewing system to control prosecutorial powers. This leads to the abuse of power and corruptions of prosecutors.').

[6] *See* Tae Jong Kim. 'Unjust Prosecution Service' *Yun-Hap News* (19 October 2008).

[7] The Ministry of Justice (tr), *Public Prosecutor's Office Act [Keomchalcheongbeop] partially amended on 21 December 2007 No. 8717* (1949), art 8.

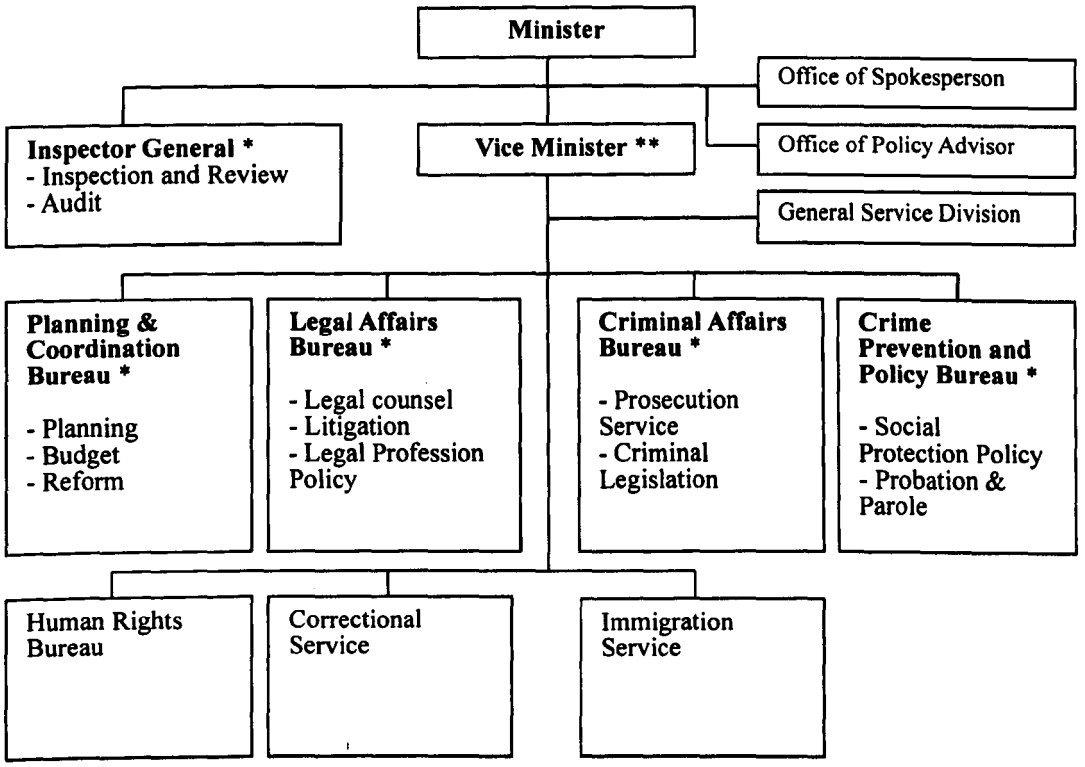
[8] Jae-Sang Lee, *Korean Criminal Procedure* (2nd edn Park Young Sa, Seoul 2008), 98.

allocated as vice-minister.[9] As shown in Figure 4.1, key posts in the ministry are also filled by the prosecutors. This is required by the Executive Order 21350.

Table 4.1 The previous careers of ministers of justice (1992 – 2011)[10]

Main Career	Total	Judge	Prosecutor	Defence Lawyer	Politician
N	22	3	18	0	1
Percentage	100%	14%	82%	0%	4%

Figure 4.1 The organisation chart of the Ministry of Justice[11]



Note. * The five posts - Inspector General; Director of Planning and Coordination Bureau; Director of Legal Affairs Bureau; Director of Criminal Affairs Bureau; Director of Crime Prevention Policy Bureau - must be filled only by the prosecutors according to the executive order.[12]

---

[9] The profiles of 23 Vice-Ministers of Justice from 4 March 1993 to 28 February 2011 show that the vice-ministers have been appointed from the chief prosecutors without exception. *See* The Ministry of Justice. 'The Profiles of the Previous Vice-Ministers of Justice' accessed on 3 March 2011.

[10] This is a result of the research on personnel records of the Ministers of Justice from 9 October 1992 to 28 February 2011. *See* The Ministry of Justice. 'The Profiles of the Former Ministers of Justice' <http://www.moj.go.kr/HP/MOJ03/menu.do?strOrgGbnCd=100000&strRtnURL=MOJ_50204030> accessed on 3 March 2011.

[11] This has been cited from the web page of the Ministry of Justice. *See* The Ministry of Justice. 'The Organization Chart' <http://www.moj.go.kr/>, accessed 3 March 2011.

[12] Executive Order 21350 on the Organization of the Ministry of Justice [*Beopmubu-wa-Sosokkikwan-*

** Vice Minister has been occupied by the prosecutor without any exceptions.[13]

The prosecutors can occupy other ministry positions as well without limitation.[14] In a sense, prosecutors run the Ministry of Justice making policies, rules, and laws[15]:

> [*DL2-IS1*] In fact, the prosecutors run the Ministry of Justice. Do you know this anecdote? If the prosecutors are asked whether they will be the Prosecutor General or the Minister of Justice, all of them answer that they want to be the Prosecutor General. The Ministry of Justice is another prosecutor's office in Korea which is run by the prosecutors.

This has helped develop the pre-eminent position of the prosecutors. However, at the same time, it means that the prosecution service is controlled by the Minister of Justice through the prosecutors working in the ministry. The prosecution service can be easily manipulated by political interests.[16]

Secondly, independence of prosecutors is jeopardised by the extraordinary practice of reallocating prosecutors every two year. Personnel assignment is one of the major concerns of the Korean prosecutors.[17] This is determined by the Ministry of Justice.[18] According to the PPOA, the president decides the personnel assignments on the basis of advice from the Minister of Justice. The minster himself will rely on the opinion of the prosecutor general.[19] However, this process involves redeployment in a nation scale. As

---

Jikge] 2009 partially amended on 18 March 2009, arts 4-3, 8(2), 9(2), 10(1), 11(1).

[13] *See* n 9 above.

[14] Executive Order op. cit. arts 4-2, 4-4, 11-2, 12, 13.

[15] This circumstance may be similar to Japan. *See* David T. Johnson, *The Japanese Way of Justice: Prosecuting Crime in Japan* (Studies on law and social control, Oxford University Press, Oxford; New York 2002); About thirty per cent (*N*=563) of legislations, which were passed into law through the National Assembly from 2004 to 2008, were initiated and drafted by government. *See* Korean National Assembly. 'Legislation Statistics (2004-2008)' <http://likms.assembly.go.kr/bill/jsp/StatFinishBill.jsp>; Tae-Hun Ha. 'Political Prosecutor [*Jungchi Kumchal*]' (2008) (9) Participatory Society [*Chamyusahoi*]; Sang Hee Han. 'The Change of the Prosecution Service' ibid; In Seop Han, 'Legal Control on High Profile Corruption: the Public Prosecutor's Role and Limitation' in *A Vision for the New Millennium: The Establishment of Transparent Society* (The Korean Association for Public Administration, Seoul 1999), 109 n 12 (Professor Han pointed out that 'many prosecutors wants to work in the Ministry of Justice or the Supreme Prosecutors' Office because this can give them benefits in terms of the personnel assignment and promotion.').

[16] Sang Hee Han. 'The Change of the Prosecution Service' (2008) (9) Participatory Society [*Chamyusahoi*].

[17] In Seop Han op. cit. 109 (Professor Han stated that 'the personnel assignment is one of the important methods to control the prosecution service by the politicians. Where most prosecutors hope to work in Seoul, the personnel movement can be a significant factor to influence the prosecution service.'); Ku Ho Choe. 'The Personnel Assignments and Promotion of the Prosecutor' (2008) 504 The Law Journal.

[18] *See* n 21 below and accompanying texts.

[19] The Ministry of Justice (tr), *Public Prosecutor's Office Act [Keomchalcheongbeop] partially amended on 21 December 2007 No. 8717* (1949), art 34 para 1.

Goodman pointed out, this can help to maintain a high-level of bureaucracy nationwide and to obtain uniformity. It can also prevent 'the development of unwholesome relationship' between the prosecutors and the populace.[20] But, as Ku-Ho Choe stated, there is no principle for such a personnel assignment in Korea. The prosecutors cannot predict the next position to which they will move. This is of a significant concern to the prosecutors:[21]

> [*PP2-RS*] The main reason why I stepped out of the prosecutor's office is the personnel movement. The prosecutors often have to work at the different provinces. It was quite difficult for me because I had to live away from my family. So, I decided to resign the post. Now, I'm very happy even though I have an obligation to find a case.

> [*PP3-IS2*] I think personnel assignment is the most stressful factor for the prosecutors. Depending on my personnel assignment, the whole family has to move to a new place. Children have to be transferred to a new school.... Most prosecutors would like to work in Seoul. One of my colleagues experienced serious depression when he was posted to the island of Jeju.

The consequence of this is that to obtain a good position, the prosecutors may try to please politicians and civil servants who can influence their personnel assignments, e.g. the Minister of Justice, the senior secretary to the president for civil affairs, and the leader of the political party in power.[22] In Korean society, as Professor Park stated, such a relationship between the prosecutors and politicians is an open secret, i.e. 'the politicians exercise their influence on the personnel assignments of the prosecutors and the prosecutors seek to find proper politicians who can provide them with a good post.'[23]

Finally, lack of independence occurs because of the concentration of power on the Supreme Prosecutors' Office (SPO), which is the headquarters of the Korean prosecution service.[24] As discussed in Chapter 3, prosecutors have considerable

---

[20] Marcia E. Goodman. 'Exercise and Control of Prosecutorial Discretion in Japan' (1986) 5 UCLA Pac.Basin LJ 16, 22.
[21] Ku Ho Choe op. cit.
[22] Sang Jin Park. 'Suggestions for Reforming the Prosecution of Organization and Prosecution of Power' (2002) 15 Kun Kuk Journal of Social Science 75, 85.
[23] ibid 85-86.
[24] In Seop Han op. cit. 109.

discretion in Korea. However, local prosecutors' offices are subject to the decisions of the SPO rather than make autonomous decisions:[25]

> [*J3-IS*] Centralised power is one of the big problems of the prosecution service. At present, the offences violating social security are controlled by the Supreme Prosecutor's Office. However, because the prosecutor's office is a part of the government, the decisions are virtually made by the presidential office. It's very hard for the prosecutors in the field to carry out their duties with their own accountability.

Most significant decisions are made by a small number of high ranking officials in the SPO.[26]

This seems to be compatible with the political interest of the party in power. Professor Han argued that 'in practice, the party in power cannot control every prosecutor's activity. Therefore, they communicate with a small number of high ranking officials in the SPO in order to make a decision on the direction of investigations as well as personnel assignments of the prosecutors.'[27] Similarly, one defence lawyer whom I interviewed pointed to the manipulation of investigation by the political influence:

> [*DL2-IS1*] Under the current system, the whole investigation process can be easily manipulated by the politicians. All investigation agencies construct one body based on order-obedience relationship between the judicial police and prosecutors. Indeed, the head is the prosecution service. Once the politicians control the prosecution service, they can manipulate all investigation process because the prosecutor monopolises most powers and controls the police.

---

[25] This centralised decision-making was one of the significant issues in England and Wales. With respect to the establishment of the Crown Prosecution Service at the national level, there was a debate on the integrated national system: 'The only other country with a unitary constitution which to our knowledge has established a fully integrated prosecution service on a comparable scale is Japan; and because of the scale of service that would be required in England and Wales many commentators are concerned about the risk of overloading the central headquarters. Such fears could be realised if an integrated national service did not contain appropriate safeguards against unnecessary centralisation of decision-making.' *See* Home Office/Law Officers' Department, 'An Independent Prosecution Service For England and Wales' HMSO (Cmnd 9074, London), 20.

[26] According to Executive Order for the Prosecutors Personnel Management, 47 of 1,847 prosecutors work in the SPO to support the operations of the Prosecutor General. *See* Executive Order 21273 for Public Prosecutors Personnel Management [*Kumsa-Jeongwon-Beop Sihaengryung*] 2009 amended on 23 January 2009, annex.

[27] In Seop Han, 'Legal Control on High Profile Corruption: the Public Prosecutor's Role and Limitation' in *A Vision for the New Millennium: The Establishment of Transparent Society* (The Korean Association for Public Administration, Seoul 1999) 99, 109.

Political influence is a fact of life for prosecution service. The prosecutor general has been unable to disconnect the line between the prosecution service and politicians. Institutional independence is still a long way away.

2.2. The Hierarchy

The Prosecutor General ranks at the top of the hierarchical organisation. The basic rule is called 'the principle of unity of the prosecutors [*Kumsa-dongilche-wonchik*].'[28] All public prosecutors form a hierarchical organisation and act as one body which cannot be separated.

This principle of unity is maintained to produce the uniformity among individual prosecutors and regions.[29] The decisions by the prosecution service needs to be consistent nationwide to guarantee fairness. The principle of unity helps the service to be consistent and not depend on individual characteristics of prosecutors or regions. Professor Lee argued that 'for the efficient investigation, the criminal justice system needs a unified investigation structure. In particular, the principle of unity of the prosecutors has a part to play in integrating different investigative circumstances'.[30]

The PPOA articulates two elements in order to preserve the principle. First, prosecutors are bound to obey orders from their superiors.[31] An order and obedience relationship exists between the superior and subordinate prosecutors. This is regarded as the fundamental element to guarantee the principle of unity.[32] In particular, the relational hierarchy is emphasised more in the eastern Asian cultures - China, Korea, and Japan - than in other parts of the world because of the influence of Confucianism.[33] The order and obedience relationship of the Korean system should be stricter than the

---

[28] Jae-Sang Lee, *Korean Criminal Procedure* (2nd edn Park Young Sa, Seoul 2008), 95.

[29] Sang Jin Park. 'Suggestions for Reforming the Prosecution of Organization and Prosecution of Power' (2002) 15 Kun Kuk Journal of Social Science 75, 81; Marcia E. Goodman. 'Exercise and Control of Prosecutorial Discretion in Japan' (1986) 5 UCLA Pac.Basin LJ 16, 56 (Goodman indicated that 'review by superiors, customary practice emerging from tradition and experience in dealing with cases, as well as the principle of unity of the procuracy' are three elements to preserve the uniformity of the prosecutors' office in Japan.')

[30] Jae-Sang Lee op. cit. 95; Ho Joong Lee. 'Reformation and Democratic Control of the Public Prosecution Service' (2008) 9(2) Seo-Kang Law Journal 43, 56; Sang Jin Park op. cit. 82.

[31] The Ministry of Justice (tr), *Public Prosecutor's Office Act [Keomchalcheongbeop] partially amended on 21 December 2007 No. 8717* (1949), art 7 para 1.

[32] Jae-Sang Lee op. cit. 95-96.

[33] Xiaoge Xu, 'Asian Values Revisited: In the Context of Intercultural News Communication' (1998) 25(1) Media Asia 37; Yan Bing Zhang and others, 'Harmony, Hierarchy and Conservatism: A Cross-Cultural Comparison of Confucian Values in China, Korea, Japan, and Taiwan' (2005) 22(1/4) Communication Research Reports 109; Danny Lam, Jeremy T. Paltiel and John H. Shannon, 'The Confucian Entrepreneur? Chinese Culture, Industrial Organization, and Intellectual Property Piracy in Taiwan' (1994) 20(4) Asian Affairs 205.

line management in other jurisdictions.

Second, the prosecutor general and the chief of prosecutors can take over the cases from the subordinate prosecutors when the cases are considered to be improperly dealt with [*Jikmu-Sungkye-Kwon*].[34] They can also transfer such a case to other prosecutors [*Jikmu-Leejeon-Kwon*].[35] These are based on the order and obedience relationship. However, such measures may limit prosecutor's independence.[36] In sum, the principle of unity has a basic role to play in managing the Korean prosecution service. This can increase fairness by balancing the prosecution service nationwide through the uniformity. However, the independence of the prosecutors can be limited by leading the prosecutors to obey the orders from the superiors.

The principle of unity, as Johnson stated, provides 'all prosecutor managers with authority to direct their subordinates in any work-related area, whether investigation, trial, or the decision to charge.'[37] The Minister of Justice, a member of cabinet and politician, can lawfully influence the outcome of a case by this principle even if they are not a prosecutor. For the purpose of protecting the political independence of the prosecutor, the PPOA limits the Minister of Justice to direct only the prosecutor general in relation to a specific case. This has an impact on the outcome because the prosecutor general can give orders to all prosecutors.[38]

For instance, on 13th October 2005, justice minister Jung-Bae Chun ordered the prosecutor general to investigate Professor Kang of Dongkuk University without detention.[39] This caused a significant debate in the Korean society. Most of all, it was the first case for a minister to direct the prosecutor general on a specific case with an official document. Such a direction was legally preserved but had never been used because of the concerns over the independence of the prosecution service. The case also caused a conflict between the progressive and conservative camp. The Grand National

---

[34] The Ministry of Justice (tr), *Public Prosecutor's Office Act [Keomchalcheongbeop] partially amended on 21 December 2007 No. 8717* (1949), art 7-2 para 2.

[35] ibid art 7-2 paras 1-2.

[36] Jae-Sang Lee op. cit. 96.

[37] David T. Johnson. 'Organization of Prosecution and the Possibility of Order' (1998) 32 Law & Society Review 247, 260; Ho Joong Lee. 'Reformation and Democratic Control of the Public Prosecution Service' (2008) 9(2) Seo-Kang Law Journal 43, 55 (Professor Lee stated that 'four articles of the Prosecutors' Office Act play a main role in making the hierarchical organization in which the prosecutor general ranks at the top: article 7(1) – 'all prosecutors should obey orders from superiors'; article 12(2) – 'the prosecutor general may deal with affairs of the Supreme Prosecutors' Office and direct prosecutors in the office'; article 17 and 21 – the Chief of prosecutors may deal with affairs of the High Prosecutors' Office as well as the District Prosecutors' Office, and direct prosecutors in the office.')

[38] Johnson op. cit. 260.

[39] Rahn Kim. 'Prosecutor Accepts Minister's Order' *Korea Times [Hankukilbo]* (14 October 2005); Joo Hee Lee. 'Justice minister's move over professor ignites ideological and political strife' *Korea Herald* (14 October 2005).

Party, which has a conservative bias, argued that the progressive forces 'tainted the nation's ideology' by encouraging the hands of radical leftists.[40] In particular, prosecutors rose up in major opposition. The minister was not a former prosecutor. As discussed in the previous section, this was very rare in the Korean system. Nevertheless, he had sought to reform the prosecution service before this case. For the prosecutors, the direction from the minister, who was a former politician, was perhaps regarded as political interference in their work. As a consequence, the prosecutor general resigned after fulfilling just six months of his two-year tenure amid a controversy over the independence of the service.

In the case, Professor Kang was investigated because of his remarks allegedly glorifying North Korea's 1950 invasion of the South. He wrote an article said 'Korean War was part of a crusade by North Korea to reunify the two Koreas' and that 'the United States is the archenemy, not a benefactor' of the South.[41] This would be in violation of the National Security Law. Suspects who violate the National Security Law are in general detained by a warrant issued by the court at the request of the prosecutor. However, the minister directed the prosecutor not to request a detention warrant, and consequently, the suspect was interviewed as well as charged without detention. Prosecutors claimed that such involvement infringed their independence. The prosecutor general raised his concern:

> The prosecution accepts the minister's order. But it is regretful that the Justice Minister issued an ordered on whether to detain a suspect in a specific case, because that violates the prosecution's political neutrality. However, if I don't follow the order due to its impropriety, I, the prosecutor general, will be in violation of the law. And the prosecution could be criticized as an uncontrollable body.[42]

However, Professor Lee argued that 'the direction from the Minister of Justice can have a positive role to play in controlling the prosecutorial investigation infringing the defendant's basic rights by abusing detention.'[43] The prosecutors occasionally overuse their powers under the pretext of preserving independence. In a sense, this can be controlled by direction from the Minister of Justice. However, under current circumstances where prosecutors have the key posts in the Ministry of Justice including

---

[40] Joo-Hee Lee, 'President accepts chief prosecutor's resignation' *The Korea Herad* (17 May 2005).
[41] ibid.
[42] Rahn Kim. 'Prosecutor Accepts Minister's Order' *Korea Times [Hankukilbo]* (14 October 2005).
[43] Ho Joong Lee. 'Reformation and Democratic Control of the Public Prosecution Service' (2008) 9(2) Seo-Kang Law Journal 43, 64.

the Minister, the direction from the Minister may mainly play a role in jeopardising the independence of the prosecution service.

The case was made public because the Minister used an official way to direct the prosecutor general. However, as Professor Lee pointed out, the directions over the prosecutorial affairs are generally conducted through the informal methods such as discussions and instructions. The power of the minister to direct the actions of the prosecutor has been mainly used to exercise political influence on the prosecution service rather than control the power of the prosecutors.[44]

2.3. Political Interference and Abuse of Power: Case Examples

Prosecutors increase their pre-eminence by running the Ministry of Justice where policies, rules, and laws are made. However, this also weakens their political independence. As a result, the operations of the prosecution service have been often manipulated by the external pressure. The order and obedience relationship between superiors and subordinates makes the Korean prosecution service more susceptible to external and internal influence.

On 14th June 2007, the Korean Supreme Court found Sung-Nam Shin, the former prosecutor general, guilty of wrongful exercise of authority.[45] According to the judgement, he ordered the chief of prosecutors of the Ulsan Prosecutors' Office to discontinue the investigation of a corruption case involving the mayor of Ulsan. Because of the order, the prosecutors stopped the investigation even though they had obtained sufficient evidence to prove the guilt of the suspects.[46]

In particular, the prosecutor general told the chief of Ulsan Prosecutors' Office that 'you have to help the company because someone "who is close to the influential politician" made a request.'[47] He wrongfully ordered him to discontinue the investigation. The case of corruption could not be investigated any more even by other law enforcements because only the prosecutor has the power to investigate offences in Korea.

Another prosecutor who was ordered to stop an investigation was Jin-Su Eun. He was working in the Seoul Dong Bu Prosecutors' Office and pointed out a number of elements impeding the political independence of the prosecution service in Korea. He

---

[44] ibid 63.
[45] *2004 DO 5561* (14 June 2007) 278 Panre Gongbo 1108 (Korean Supreme Court).
[46] ibid; *2003 NO 3391* (20 August 2004) (Seoul High Court).
[47] *2003 NO 3391* (20 August 2004) (Seoul High Court); Yong Woo Jo. 'The Former Prosecutor General, Sung-Nam Shin, Found Guilty' *Dongailbo* (16 June 2007).

wrote about the problems of political interference in an article and in relation to bribery case, suggested a method to reform the current system. He described the unlawful involvement of the Minister of Justice as follows:

> The justice minister ordered me to discontinue the investigation into the corruption case of a member of the National Assembly even though there was sufficient evidence to prove his guilt of accepting bribes in return for recommending a post. In addition, in another case, the minister ordered not to detain a member of the National Assembly while saying that "he is one of the poor politicians and how can you arrest such a person?"[48]

Prosecutor Eun argued that 'for the political independence of the prosecution service, the rule of ministry of justice demanding the prosecutor to receive a permission in order to arrest a politician or a high profile public servant should be abolished.'[49] In particular, he stated that 'the justice minister can protect corrupted politicians by ignoring the Public Prosecutors' Office Act as he has the power to manipulate the personnel assignments of the prosecutors.'[50] As Professor Park suggested, this indicates a structural problem leading prosecutors to reluctantly follow wrongful orders from their superiors.[51]

The third case was related to an episode of PD Notebook - a popular news magazine programme of Munhwa Broadcasting Corporation (MBC). On 29th April 2008, the MBC reported the risk of 'mad cow' disease in the USA and the decision by the government to resume the import of American beef without an explanation.[52] Due to the influence of the programme, many people criticised the government in relation to that

---

[48] Jin Gu Kang. 'An incumbent prosecutor requesting for the political independence of the prosecution service' *Kyunghyanshinmun* (17 July 2000).

[49] ibid; Kwang Seop Jung. 'The argument of an incumbent prosecutor about the political independence' *Hankyoreh* (16 July 2000); However, Such an instruction was abolished in 2001, in order to preserve the political independence of the prosecution service. *See* Won Myung No and Yong Sik Kim. 'The conflict between the Ministry of Justice and Prosecutors' Office' *Hankukilbo* (29 March 2004).

[50] Jin Gu Kang op. cit. (In addition, he illustrated that 'the personnel appointments and promotions relying on favouritism rather than on the ability of performance are another problem in the Prosecutors' Office.').

[51] Sang Jin Park. 'Suggestions for Reforming the Prosecution of Organization and Prosecution of Power' (2002) 15 Kun Kuk Journal of Social Science 75, 81-82 (With respect to the personnel assignment of the prosecutors, Professor Park described the problem as follows: 'The prosecutor must challenge the wrongful orders from the superiors and perform their duties based upon law and conscience. However, it is far away from reality. For the prosecutors, the personnel assignment is a significant issue like some expressions well known in the Prosecutors' Office - "There is nothing for the prosecutors except for the personnel assignment" and "No Hercules in relation to the personnel assignment." In this context, it is very difficult for the prosecutors not to follow the orders').

[52] Si-Soo Park. 'Prosecutor quits amid probe of PD Notebook' *Korea Times [Hankukilbo]* (8 January 2009).

decision. The criticism led to the massive street protests from May to September and the presidential approval rating was just ten per cent.[53]

In this situation, the Minister of Agriculture reported six people who were involved in the production of the programme to the prosecution service by claiming that the programme defamed the minister and other government officials by airing wrong information.[54] This was investigated by Su-Bin Lim, the prosecutor of the Seoul Central Prosecutors' Office. However, Prosecutor Lim tendered his resignation on 8th January 2009.

The main reason for this resignation was the conflict with his superiors. He argued that 'the intentional mistranslation and exaggeration of some contents of the programme were done at a tolerable level', and refused to initiate any prosecutorial action against the suspects in the face of the chief prosecutors' request to take a hard-line approach.[55] For a similar reason, he refused to arrest the programme directors even when the Minister of Justice required him to do so.[56] That is to say, the prosecutor in charge of the investigation did not follow the orders from the superiors, and subsequently, resigned from his post. In Korean legal history, it is very rare for the prosecutor to turn down the superior's order and to resign because of such a conflict.[57]

The case, as the People's Solidarity for Participatory Democracy [*Chamyuyundae*] pointed out, indicates the problems caused by the hierarchical organisation based upon the order-obedience relationship. The prosecutors are often forced to conduct investigations and prosecutions by depending on orders from the superiors as well as the Minister of Justice rather than on law and conscience.[58]

Due to the considerable power of the prosecution service, its political independence is an important issue. The prosecutors belong to the Ministry of Justice, which is one of

---

[53] ibid.

[54] Rahn Kim. 'Four 'PD Notebook' Staff Apprehended' ibid (28 April).

[55] Si-Soo Park op. cit.

[56] People's Solidarity for Participatory Democracy, *Political Prosecutors* (PSPD, Seoul 2009) 100, 29-30; Jong-Seok Yun. 'The Concerns of the Prosecutors' Office about the Investigation on the PD Notebook' *Yun-Hap News* (7 September 2008).

[57] Kyung Eun Kim. 'Prosecutor Su-Bin Lim's resignation is disobedience [Hangmyung].' (2009) 809 Weekly Kyunghang.

[58] The Japanese prosecution system, which is based upon the principle of unity of the procuracy as in Korea, shows a similar situation. Johnson described the situation as follows: 'The law says that in the procuracy those above command and those below obey. We call this "the unity of prosecutors." ... I am sorry to employ such a plebeian example, but if we compare a criminal investigation to basic construction work, then the front-line investigating prosecutor is like a human wheelbarrow used for flattening the earth. The managing prosecutor wields a stick to direct the front-line prosecutor to "carry mud here" and "place a stone there," and then goes off to the next construction site to do more of the same. The human wheelbarrow then works very hard to carry dirt and pound cement as directed. The only job left to the human wheelbarrow is how to pound the concrete and to what depth.' *See* David T. Johnson. 'Organization of Prosecution and the Possibility of Order' (1998) 32 Law & Society Review 247, 261.

the branches of government. Thus, the prosecutorial independence is not as strong as judicial autonomy.[59] In particular, the hierarchical order-obedience relationship has been deemed as another important factor.[60] Professor Cho stated this problem as follows:

> In the cases involving powerful politicians or high-ranking government officials, prosecutors in charge had to unwillingly quit their investigation, often facing pressure or persuasion from prosecutors in higher office, and through the Supreme Prosecutor's Office, the ruling political party has kept a substantial influence on the prosecutors in charge of the cases. Consequently, public distrust of the prosecution has increased.[61]

This incomplete independence has often led the public prosecution service to be used as a political tool to both control individuals and oppress political opposition. It can be argued that it is happening more regularly than what is exposed in the media. In particular, as the prosecution service monopolise investigation as well as prosecution, as Professor Seo suggested, law enforcement can be manipulated by the government.[62] Both the guarantee of the prosecutorial independence and the separation of prosecutorial powers have been a significant issue.[63]

As Professor Han illustrated, this results from 'the political tendency of the prosecution service. The operations of the prosecution service are politically and economically slanted toward the group in power, and as a result, such tendency prevents

---

[59] Korean prosecutors have a statutory duty to follow instructions from the internal superiors. *See* Yong Se Kim. 'The Problems of the Current Investigation System' (2000) 19(1) Daejon Social Sciences Journal 77, 79.

[60] In this study, the concept of order and obedience relationship is used in two aspects: between the police and prosecutors and between prosecutors and their superiors. The Ministry of Justice (tr), *Public Prosecutor's Office Act [Keomchalcheongbeop] partially amended on 21 December 2007 No. 8717* (1949) art. 7(1) 'Prosecutors shall obey the prosecutors in higher office in prosecutorial affairs.' Translated by Kuk Cho. 'The Unfinished "Criminal Procedure Revolution" of Post-Democratization South Korea' (2002) 30(3) Denver J Int Law Policy 377, 381.

[61] ibid 381-382; In Seop Han, 'Legal Control on High Profile Corruption: the Public Prosecutor's Role and Limitation' in *A Vision for the New Millennium: The Establishment of Transparent Society* (The Korean Association for Public Administration, Seoul 1999) 99, 99-116.

[62] Bo Hak Seo, 'The Reasonable Allocation of Investigative Powers between the Police and Prosecutors' in Supreme Prosecutors' Office and National Police Agency (eds), *Public Hearing for Allocating Investigative Powers in Korea* (SPO; NPA, Seoul 2005) 197, 197.

[63] The National Assembly Committee on Legislation and Judiciary, *A Theoretical Study of the Reform of the Prosecution Service* (KNA, Seoul 2010); Il Soo Kim, *New Perspectives On the Prosecutorial Culture* (Se-Chang Pub., Seoul 2010); Dong-Woon Shin. 'The Reform of the Korean Legal System and the Revision of the Law of Evidence' (2006) 47(1) Seoul Law Journal 107-132; Kuk Cho. 'The Unfinished "Criminal Procedure Revolution" of Post-Democratization South Korea' (2002) 30(3) Denver J Int Law Policy 377;Dong-Woon Shin. 'The Reform of the Korean Public Prosecution' (1988) 29(2) Seoul Law Journal 39.

justice, impartiality, and consistency of the prosecution service.'[64] A number of legal professionals whom I interviewed implied such distrust in the prosecution service:

> [*PO3-IS1*] The prosecution service isn't independent from the politicians. Furthermore, the prosecution service itself is another big political power group in the Korean society.

> [*DL2-IS1*] I've never seen the prosecutors investigating the politicians in power. They only pretend to try when the media press them to carry out an investigation. In fact, they can't conduct such an investigation because they're subjected to the political power.

> [*DL3-IS*] The prosecutors don't investigate and charge the politicians, entrepreneurs, and high profile public servants being friendly to them. That's why the people try to give bribes to the prosecutors and several prosecutors have been criticised by accepting bribes.

The monopoly of power is one of the main causes of political interference. Professor Seo argued that 'the prosecution service has become a subject that politicians and plutocrats must control for the purpose of protecting their interests because the prosecution service monopolises most powers and the decisions made by the prosecutors have a significant impact on politics and social changes.'[65] Similarly, one judge described the prosecutor as the most necessary person to the politicians:

> [*J3-IS*] The enormous powers of the prosecutor must be used for the citizens. However, the Korean prosecutors use them as means to preserve their powers. ... For the Korean politicians, the prosecutor is one of the most necessary persons. They obviously need the prosecutorial assistance in order to survive in their world.

The prosecutor's operations should be conducted objectively on the basis of law and conscience. However, Korean prosecution service degrades into the 'extended arms' of

---

[64] In Seop Han op. cit.; Ho Joong Lee. 'Reformation and Democratic Control of the Public Prosecution Service' (2008) 9(2) Seo-Kang Law Journal 43, 47 (Professor Lee stated that 'the prosecution service has developed into a power group and forms a secret relationship with politicians as well as plutocrats.'); W.H. Lee presented empirical evidence showing that the quality of the prosecution service can be different depending on fortune and academic backgrounds of the suspects and victims. According to this research, the person having much fortune in general receives better service from the prosecutors than the others. *See* Woong Hyuk Lee. 'The Analysis of Multiple Organizational Outcome of the Public Prosecution Service' (2006) 15(1) Korean Journal of Public Administration 3, 23-24.

[65] Bo Hak Seo. 'The Reasonable Allocation of Investigative Power' (2002) 8(4) Korean Journal of Constitutional Law 177-210, 195-196.

politicians and plutocrats.[66] In particular, this has been exacerbated by both the organisational characteristics of the prosecutors' office - national, centralised, and hierarchical and the Ministry of Justice administered by the prosecutors.[67]

3. The Social Authority of the Korean Prosecution Service: A Content Analysis

This section aims to assess both the level of influence of prosecution service and how the public view its function. In particular, for the purpose of providing empirical evidence, the discussion is based on 'content analysis' by analysing articles in newspapers with reference to the actions of the prosecutors. Content analysis can help to indicate public perception about the prosecution service.

Content analysis is a technique to make objective inferences from analysing data such as documents, texts, and images. There are some well-known definitions. Berelson originally defined content analysis as follows: 'Content analysis is a research technique for the objective, systematic and quantitative description of the manifest content of communication.'[68] Holsti similarly defined content analysis as 'any technique for making inference by objectively and systematically identifying specified characteristics of messages.'[69] Krippendorf replaced Berelson's requirements that the content analysis should be 'objective' and 'systematic' with 'replicability' and 'validity': 'Content analysis is a research technique for making replicable and valid inference from texts (or other meaningful matter) to the contexts of their use.'[70]

In short, content analysis is a scientific tool that should be reliable and be expected to yield valid results. When researchers use the same data and technique, they should

---

[66] ibid; Ho Joong Lee op. cit. 47-48.

[67] The Ministry of Justice (tr), *Public Prosecutor's Office Act [Keomchalcheongbeop] partially amended on 21 December 2007 No. 8717* (1949); Ho Joong Lee op. cit. 45-47; Yong-duck Jung. 'Administrative Reform in Korea: A Historical-Institutionalist Perspective' (1999) Korea Journal, 9 (Professor Jung stated that 'the state administrative system has been centralized in order to monitor and control the daily lives of its citizens.'); No-Wook Park and Rohini Somanathan. 'Patronage in Public Administration: Presidential Connections, Position Assignments and the Performance of Korean Public Prosecutors, 1992-2000' (NEUDC 2001 Conference at Boston University 2004), 6-7.

[68] Bernard Berelson. 'Content Analysis in Communication Research' (1952) New York - Healthcare Related Statutes and Regulations, 18 cited from Alan Bryman, *Social Research Methods* (2nd edn Oxford University Press, Oxford; New York 2004) 592, 274.

[69] Ole R. Holsti, *Content Analysis for the Social Sciences and Humanities* (Addison-Wesley Reading, MA, 1969), 14.

[70] Klaus Krippendorff, *Content Analysis: An Introduction to its Methodology* (Sage, 2004), 18.

have the same results although there are differences in points of time and circumstances.[71] Mass communication is a typical area for content analysis. Many researchers tend to be interested in 'communicator conceptions, media biases and effects, institutional constraints, implications of new technologies, audience perceptions, public opinion, and how certain values, prejudices, cultural distinctions, and reality constructions are distributed in society – relying on mass-media messages as their causes or expressions.'[72]

Few studies have explored the functions of the prosecution service through the content analysis.[73] However, there is one important study where Professor Oh analysed the public interest in the Prosecutors' Office by carrying out such an analysis.[74] He collected newspaper articles that commented on the prosecution service on the front page of newspapers for two years from 2003 to 2004. The results were compared with 44 other government organisations, e.g. the Ministry of Defence, the Ministry of Justice, Home Office, Police Agency etc.

Among 45 government organisations, the prosecution service drew more attention from newspapers than other agencies. He concluded 'the prosecution service is one of the most influential organisations in Korea. In particular, such a high interest in the prosecution service arises from the prosecutorial investigation. Prosecutors often investigate politicians, high profile public servants, and entrepreneurs, and those investigations generally lead to such a high interest'.[75] But he did not present any empirical evidence supporting his argument about investigative function.

Unlike Oh's study, this content analysis not only explores the influence of the prosecution service, but it also examines its main function and the reasons behind the high level of public interest in prosecutorial operations.

3.1. Data Collection

For the content analysis, 275 articles dealing with the operations of the prosecution service were collected from two newspapers: *Hankyoreh* and *Dongailbo*.[76] They were selected by considering circulation, but also the fact that *Hankyoreh* represents

---

[71] Krippendorf stated that 'research techniques should result in findings that are replicable.' *See* ibid.
[72] ibid 28.
[73] Except for Oh's study, there seems to be no study to assess the influence of prosecutors and police by means of content analysis.
[74] Jae Rock Oh, *Bureaucratic Power in Korea* (Korean Studies Information, Paju 2007) 424.
[75] ibid 187-189.
[76] The articles were acquired from *Dongailbo* and *Hankyoreh* through the Korean Integrated Newspaper Database System (KINDS) by using the search term, 'Prosecution Service [*Keomchal*].' *See* < http://www.kinds.or.kr/ > managed by the Korean Press Foundation.

progressives, whereas *Dongailbo* has a conservative bias.[77] Additionally, 496 articles illustrating activities of the police, courts, defence counsel, and victims were collected in the same way in order to compare the prosecutors with other legal actors.[78]

The collection of data was conducted by the computer-based search by using the Korean Integrated Newspaper Database System (KINDS).[79] However, some articles had contents that are irrelevant to the purpose of this analysis. For instance, the article of *Dongailbo* on 23 January 2008 introduced a story about the 'LA Federal Prosecution Service' in the USA. Even if the article included the term 'Prosecution Service', the content was inappropriate to the study about the Korean Prosecution Service.[80] Therefore, after examining 771 articles collected from KINDS by using the search terms 'Prosecution Service', 'Police', 'Court', 'Defence Lawyer', and 'Victim,' 307 articles of them were excluded from the data because their contents were not pertinent to the research. As a consequence, 464 articles were ultimately selected.[81]

The articles were gathered only from the front page of newspapers because of two reasons. First, such a limitation reduces the number of articles for validity of the analysis.[82] Second, it reflects the importance of the articles. Analysing the articles on front pages perhaps reflects the importance of the contents as opposed to articles elsewhere in the papers.[83] The placement also suggests that it is more likely to be seen by the public, to influence them and to reflect editorial assumption about public interest

---

[77] *Dongailbo* and *Hankyoreh* respectively account for 23.3 per cent and 4.7 per cent of circulation for Korean newspapers. *See* Mun Seok Yang and Dong Jun Kim, *The Research on the Actual Condition of the Newspaper Industry* (Korea Press Commission, Seoul 2008) 94, 73; *Hankyoreh* and *Kyonghang* are grouped as the progressive newspapers, whereas *Dongailbo*, *Chosunilbo*, and *Jungailbo* are categorized as the conservative newspapers. *See* Kyong Seong Kwon. 'The Conflict Regarding the Title of the Press Law' *Media Today* (24 December 2008). In a broad sense, they represent respectively the Guardian and the Times in the UK context.

[78] 326 articles were chosen from *Dongailbo* and 445 stories were selected from *Hankyoreh*.

[79] Korea Press Foundation. 'Korean Integrated Newspaper Database System' <http://www.kinds.or.kr/>.

[80] Won Su Jung. 'Kim's Prison Records' *Dongailbo* (23 January 2008).

[81] The 464 articles consis of Prosecution Service (181), Police (107), Court (85), Defence lawyer (55), and victim (36). This may indicate a high level of interest in the criminal justice in Korea.

[82] Provided that the articles are collected from all pages in the two newspapers, the number of articles will be 3,715 articles, which are over ten times as many articles as those (N=275) collected from front pages.

[83] Christina A. Studebaker and others. 'Assessing Pretrial Publicity Effects: Integrating Content Analytic Results' (2000) 24(3) Law Hum Behav 317 (Studebaker et al. used four methods to measure the importance of the articles of newspapers: 'The length of the headline (to the nearest 1/16 in.), the height of the largest font used in the headline (to the nearest 1/16 in.), the location of the article on the page (e.g. above the fold, left side of the page), and the location of the article in the paper (front page vs. other).' And they argued that 'These measures were considered to be indicators of the importance of an article and the likelihood that it would be read.'; According to the statistics of Korean Association of Newspapers from 2004 to 2007, approximately 51.4 per cent of people are more interested in the front page than other sections in the newspaper. *See* Korean Association of Newspapers. 'Data & Statistics' <http://www.presskorea.or.kr/english/data2.asp>, accessed on 25 February 2011.

in the content.[84] In addition, the articles all were published in 2008. The year was chosen because there were the most recent data when the analysis was conducted in 2009. To ensure that the data were manageable, the searching period was limited to one year.

An increase in both the number of newspapers and the period would have helped to conduct a more accurate analysis. However, it was time-consuming and difficult for one researcher to carry out such an extensive content analysis. As the results of the content analysis were supplemented by the in-depth interviews with legal professionals, the one-year data should be sufficient. Based on such data, this analysis aims to assess the influence of the prosecution service and the public perception about its main functions.

3.2. Methods of Analysis

The visibility and function of the prosecution service was measured alongside those of other legal actors. Two methods were used: the comparison of the number of articles in the newspaper and the analysis of word-frequency.

First, for the purpose of assessing the relative influence of the prosecution service, the number of articles that discuss the operations of the public prosecutor was compared with those dealing with the actions of the other four actors in the criminal proceedings: the courts, the police, defence lawyers, and victims.[85] As Krippendorff argued, 'the relative frequency and space devoted to a topic' can be 'an index of an author's knowledge or interest or the importance that the mass media attached to that topic.'[86] For such an analysis, two hypotheses were established:

> ***Hypothesis 1***: The five legal actors in the criminal proceedings receive a different level of concern from the newspapers.
>
> ***Hypothesis 2***: The two newspapers show a different level of interest in the operations of each actor depending on their biases.

---

[84] Steve Uglow, Comments at the Meeting for Supervision (18 November 2011)

[85] There are previous studies which analysed the influence by measuring the amount of information such as 'the number of articles printed in the newspaper about the case, the total number of paragraphs that comprised each article, and the amount of space allotted to text.' *See* Christina A. Studebaker and others. 'Assessing Pretrial Publicity Effects: Integrating Content Analytic Results' (2000) 24(3) Law Hum Behav 317, 325; Jae Rock Oh, *Bureaucratic Power in Korea* (Korean Studies Information, Paju 2007) 424, 187-189; Marianne G. Pellechia. 'Trends in Science Coverage: A Content Analysis of Three US Newspapers' (1997) 6(1) Public Understanding of Science 49 (This study analysed the number of science articles being reported at three major daily newspapers in the USA.)

[86] Klaus Krippendorff, *Content Analysis: An Introduction to its Methodology* (Sage, 2004), 181.

In the previous work, Professor Oh compared the prosecution service with other 44 government organisations. However, he included only the police and prosecution service because he focused on bureaucratic powers.[87] However, this study measured and compared articles focusing on the actions of the five legal actors.

Second, in order to find out the main functions of the public prosecution service, the words with reference to the prosecutorial actions in the news articles were counted and word frequencies were analysed. As Krippendorff stated, indicative functions are often closely related to frequencies. For example, the proportion of 'discomfort' words can be an index of anxiety.[88] Weber also noted 'the most frequently appearing words reflect the greatest concerns.'[89] The main function of the public prosecution service can be inferred from the frequencies of words reflecting operations. For instance, *Dongailbo* published an article about a crime which the public prosecutor investigated: 'The public prosecutor "investigating" a corruption case in relation to the KTF "detained" Young Ju Jo, CEO of the KTF, on 22th September 2008... The public prosecutor will "summon" Jo's wife to "investigate" whether she helped to manage the money.'[90] In this article, there are some words reflecting the actions of the public prosecutor in Korea such as 'investigating', 'detained', and 'summon.' The frequency of these words helps to identify the functions of the public prosecution service. For this analysis, two further hypotheses were set up:

> ***Hypothesis 3***: The number of words representing the different actions of the prosecution service varies significantly.
>
> ***Hypothesis 4***: The two newspapers show a different level of interest in the different operations of the public prosecution service.

The words for analysing frequency were selected by examining the KCPA [*Hyungsasosongbeop*]. Such words are all related to the operations in the criminal proceedings: (a) Investigation [*Susa, Josa*][91]; (b) Direction of the investigation of the police [*Susajihui*][92]; (c) Summon [*Sohwan*][93]; (d) Arrest [*Chepo*][94]; (e) Detention

---

[87] Jae Rock Oh op. cit. 187-189.
[88] Krippendorff op. cit. 181.
[89] Robert P. Weber, *Basic Content Analysis* (Sage, 1990), 51,
[90] Won Su Jung and Yong Seok Kim. 'The Detention of Young Ju Jo, CEO of KTF' *Dongailbo* (23 September 2008).
[91] The Korean Ministry of Justice (tr), *Criminal Procedure Act [Hyungsasosongbeop] partially amended on 21 December 2007 No. 8730* (1954), art 195.
[92] ibid art 196.
[93] ibid art 200.
[94] ibid arts 200-2, 200-3..

[*Kusok*][95]; (f) Seizure and search [*Apsu Susaek*][96]; (g) Interview [*Shinmun*][97]; (h) Indictment [*Kiso*][98]; (i) Summary indictment [*Yaksikkiso*][99]; (j) Suspension of the prosecution [*Kisoyuye*][100]; (k) Withdrawal of the prosecution [*Kongsochuiso*][101]; (l) Submission of dossiers [*Seomyunjechul*][102]; (m) Applications to take evidence [*Jungkeojosashincheong*][103]; (n) Submission of evidence [*Jungkeojechul*][104]; (o) Examination of defendants [*Pikoinshinmun*][105]; (p) Examination of witnesses [*Junginshinmun*][106]; (q) Changes in the indictment by the prosecutors [*Kongsojangbyunkyung*][107]; (r) Recommendation of sentences [*Keomsakuhyung*][108]; (s) Appeal [*Hangko, Hangso, Sango*][109]; (t) Direction of the execution of judgments [*Jiphangjihui*].[110] According to the chapters of the KCPA, those words were grouped into four categories: investigation (a-g), prosecution (h-k), trial (l-s), and execution of judgments (t).[111]

Each word selected from the KCPA was measured by counting the total number of frequencies. The numbers of each word were summed up into four categories: investigation, prosecution, trial, and execution. The measurement was based on 181 articles, which were collected from two newspapers by searching KINDS using a term of 'Prosecution Service.'[112]

Finally, for the statistical analysis of data, chi-square tests were carried out by use of PASW 18.[113] The statistical methods were used to measure the differences between

---

[95] ibid art 201.
[96] ibid art 215.
[97] ibid art 241.
[98] ibid art 246.
[99] ibid art 448.
[100] ibid art 247.
[101] ibid art 255.
[102] ibid art 266-6.
[103] ibid art 291-2.
[104] ibid art 292.
[105] ibid art 296-2.
[106] ibid art 161-2.
[107] ibid art 298.
[108] ibid art 302.
[109] ibid arts 338, 339, 357, 371.
[110] ibid art 460.
[111] ibid; Similarly, Delmas-Marty categorised the criminal proceedings into four groups: Investigation (gathering proof of the crime and identifying the perpetrator), Prosecution (publicly presenting the evidence), and Judgment (legally finding guilt or innocence and, in case of the former, imposition of penalty), and Execution of judgments. *See* Mark A. Summers (tr), Mireille Delmas-Marty, *The Criminal Process and Human Rights: Toward a European Consciousness* (Martinus Nijhoff Publishers, 1995), 10.
[112] Originally, 275 articles weres collected through the KINDS. However, 94 of them were excluded because they were irrelevant to this study. *See* nn 80, 81 above.
[113] For this analysis, two types of chi-square tests were used: two-way and one-way chi-square tests. Bryman stated that two-way chi-square test 'allows us to establish how confident we can be that there is a relationship between the two variables in the population.' *See* Alan Bryman, *Social Research Methods*

variables and groups.

3.3. Results

As stated earlier, for the purpose of analysing people's perception on the prosecution service and its role, two measures were taken: comparison of the number of articles dealing with the activities of the different legal actors and the analysis of frequency of words reflecting the functions of the public prosecutor.[114]

3.3.1. The Influence of the Prosecution Service

The amount of information published in the newspapers about the legal professionals can be an index to measure interest in their actions.[115] As shown in Table 4.2, 464 articles were presented in the front pages of two newspapers in relation to the actions of five legal professionals.

Table 4.2 The comparison of the number of articles

Newspapers		Actors in the Criminal Procedure						
		Total	Prosecution Service	Police	Court	Defence Counsel	Victim	X^2
Total	*N*	464	181	107	85	55	36	1.368**
	%	100%	39.0%	23.1%	18.3%	11.9%	7.8%	
Dongailbo	*N*	219	99	50	35	17	18	
	%	100%	45.2%	22.8%	16.0%	7.8%	8.2%	
Hankyoreh	*N*	245	82	57	50	38	18	11.298*
	%	100%	33.5%	23.3%	20.4%	15.5%	7.3%	

Note. Dongailbo represents a conservative newspaper, whereas *Hankyoreh* has a progressive bias.

* $p < 0.05$, ** $p < 0.01$

(3rd edn Oxford University Press, Oxford; New York 2008) 748, 334-335. But, one-way chi-square test, for example, 'can be used to test the null hypothesis that the children have no preference for any particular toy.' *See* Paul R. Kinnear and Colin D. Gray, *SPSS 16 Made Simple* (1st edn Psychology Press, Hove, East Sussex; New York 2008), 17-21, 207-210, 413-418; Donald L. Diefenbach. 'The Portrayal of Mental Illness on Prime-Time Television' (1997) 25(3) J Community Psychol, 294; Christina A. Studebaker and others. 'Assessing Pretrial Publicity Effects: Integrating Content Analytic Results' (2000) 24(3) Law Hum Behav 317, 327-328.

[114] As seen above, these are prosecution service, police, court, defence counsel, and victim.

[115] *See* n 86 above and accompanying text.

For the purpose of verifying the statistical significance, two hypotheses need to be tested. First, as hypothesis one suggested, different legal actors had different levels of coverage.[116] A substantial difference was in fact found ($X^2 = 1.368, p < 0.01$). This is to say, the legal actors received a significantly different level of interest from the newspapers. In particular, the greatest number (N=181, 39.0%) was the articles discussing the operations of prosecution service. The other four actors account for sixty-one per cent of 464 articles: the police (N=107, 23.1%), courts (N = 85, 18.3%), defence counsel (N = 55, 11.9%), and victims (N = 36, 7.8%).[117]

Second, as hypothesised, the two newspapers showed a significant different level of interest in the operations of each actor depending on their biases ($X^2 = 11.298$, df = 4, $p < 0.05$).[118] It may be argued that this reflects their editorial approach. For instance, the progressive newspaper was more interested in the operations of defence counsel (15.5%) and court (20.4%), whereas the conservative newspaper showed a higher level of interest in the actions of the prosecution service (45.2%). However, of primary interest to both of them were the activities of the public prosecution service.

To sum up, while the different legal actors attract different levels of interest from the newspapers, the media pays much more attention to the actions of the prosecution service than it does to those of other legal actors. It is fair to suggest that this represents within the Korean culture generally.

3.3.2. The Functions of the Prosecution Service

The frequency of words or concepts is a significant element in content analysis because the frequency of words can be an index to indicate a function.[119] This has been applied

---

[116] *Hypothesis 1*: The five legal actors in the criminal proceedings receive a different level of concern from the newspapers.

[117] According to Professor Oh, the number of news articles dealing with the operations of the prosecution service was the greatest of 45 government organizations in 2003 and 2004. The number was more than five times as many as those presenting the activities of the police. *See* Jae Rock Oh, *Bureaucratic Power in Korea* (Korean Studies Information, Paju 2007) 424, 188-189. However, in my research, the number of news articles about the police greatly increased in 2008 because there were massive street demonstrations. This resulted in the increase of actions of the police. Based on the KINDS database, 65 (60%) of 107 articles were related to the demonstrations. *See* Korea Times Editorial Office. 'Ten Main News in 2008' *Korea Times [Hankukilbo]* (22 December 2008) (2,398 demonstrations took place in Korea from 2 May to 15 August in 2008).

[118] The null hypothesis was rejected that two newspapers have the same level of interest in the operations of the legal actors. *See* Alan Bryman, *Social Research Methods* (3rd edn Oxford University Press, Oxford; New York 2008) 748, 334-335.

[119] Kathleen M. Carley. 'Coding Choices for Textual Analysis: A Comparison of Content Analysis and Map Analysis' (1993) Sociological methodology 75, 81; Klaus Krippendorff, *Content Analysis: An*

to diverse fields, e.g. conceptual shifts in presidential addresses and cultural changes.[120] In this study, the content analysis was used to clarify the functions of the Korean prosecution service.

Table 4.3 refers to the results of such an analysis, which was statistically proved by two chi-square tests.[121]

Table 4.3 The frequency of words with reference to the functions of the prosecution service

	Functions	Total	Newspapers	
			Dongailbo	*Hankyoreh*
		N = 1,600 (100%)	*N* = 905 (100%)	*N* = 695 (100%)
Investigation	Total	**1,488 (93.0%)**	**846 (56.9%)**	**642 (43.1%)**
	Investigation	532	245 (27.1%)	287 (31.7%)
	Direction of police investigation	3	1 (0.1%)	2(0.2%)
	Summon	86	63 (7.0%)	23 (2.5%)
	Arrest	47	32 (3.5%)	15 (1.7%)
	Detention	216	124 (13.7%)	92 (10.2%)
	Seizure and Search	216	175 (19.3%)	41 (4.5%)
	Interview	388	206 (22.8%)	182 (20.1%)
Prosecution	Total	**98 (6.1%)**	**53 (5.9%)**	**45 (6.5%)**
	Indictment	93	48 (5.3%)	45 (5.0%)
	Summary Indictment	1	1 (0.1%)	0
	Suspension of the prosecution	4	4 (0.4%)	0
	Withdrawal of the prosecution	0	0	0
Trial	Total	**14 (0.9%)**	**6 (0.7%)**	**8 (1.2%)**
	Submission of Dossiers	0	0	0
	Application to take evidence	0	0	0
	submission of evidence	4	3 (0.3%)	1 (0.1%)
	Examination of defendants	0	0	0

Introduction to its Methodology (Sage, 2004), 181; Robert P. Weber, *Basic Content Analysis* (Sage, 1990), 51.

[120] M. P. Sullivan and Inter-university Consortium for Political and Social Research, *Perceptions of Symbols in Foreign Policy: Data from the Vietnam Case* (Inter-University Consortium for Political Research Ann Arbor, MI, 1973); J. Zvi Namenwirth and Robert P. Weber, *Dynamics of Culture* (Allen & Unwin Boston, 1987) cited from Kathleen M. Carley. 'Coding Choices for Textual Analysis: A Comparison of Content Analysis and Map Analysis' (1993) Sociological methodology 75, 181.

[121] For the details on these tests, *see* n 113 above.

	Examination of witnesses		0	0	0
	Change of the prosecution		0	0	0
	Recommendation of sentence		2	2 (0.2%)	0
	Appeal		8	1 (0.1%)	7 (0.7%)
Execution	Direction of the execution		0	0	0
		X^2	2.790**		92.731**

Note. For the accuracy of statistical analysis, functions are recoded into 9 variables, i.e. investigation (7), prosecution (1), and trial (1).

* $p < 0.05$, ** $p < 0.01$

First of all, given the result of a chi-square 'goodness-for-fit' test, the significant difference, as expected, was found between variables of functions (X^2=2.790, df=10, $p <$ 0.01). In other words, the denotation of each variable was meaningful and could be compared with the other variables. The prosecution service conducted various functions which draw a different level of attention from the newspapers. In relation to the actions of the prosecution service, 1,600 words from two newspapers were counted as indicators of functions. Among them 1,488 words, which account for ninety-three per cent, were found to be associated with the investigative function. By contrast, the number of words being related to the prosecution or trial was very small: prosecution (N=98, 6.1%) and trial (N=14, 0.8%). The word in relation to execution was not found at all.

Second, the conservative and progressive newspapers showed a significantly different level of interest in the functions of the prosecution service (X^2=92.731, df=8, p < 0.01). The value of chi-square contingency test rejected the null hypothesis that two newspapers indicated a similarity in terms of introducing the actions of the prosecution service. In other words, the discrepancy in the bias of newspapers led to a different level of attention as to the prosecutorial operations. *Dongailbo* showing conservative bias placed more emphasis on 'summon (7.0%)', 'arrest (3.5%)', 'detention (13.7%)', and 'seizure & search (19.3%)' than its counterpart did. In contrast, *Hankyoreh* having progressive bias drew more attention to 'appeal (0.7%)' and 'direction of police investigation (0.2%) than *Dongailbo* did. Nevertheless, the articles from both newspapers mostly concentrated on the investigation actions of the prosecution service – *Dongailbo* (56.9%) and *Hankyoreh* (43.1%).

3.4. Discussion

The results of the content analyses confirm two important points. First, the prosecution service is perceived as the most influential organisation in the Korean criminal justice system by the media. This is consistent with a previous study and public opinion surveys. According to the previous work of Jae-Rock Oh, the prosecution service was analysed to be one of the most powerful organisations in Korea.[122] The results of public opinion polls also support such analyses. In 2007 and 2008, *Jungangilbo* administered opinion surveys to examine the influence and trust of the governmental organisations. The surveys suggested that the level of influence of the prosecution service was seen as much higher than those of the Supreme Court or the police.[123]

The results of the interviews with legal professionals confirmed the outcomes of the content analysis. Eighty-five per cent (N=17) of interviewees stated that the prosecution service is the most influential organisation in the Korean criminal process:

> [*PO4-IS1*] The prosecution service has considerable powers. In particular, such powers play a key role in the criminal process. For example, once the prosecutor decide not to charge someone, it's not possible to charge such a person.

> [*J4-IC*] Let me describe like this. The courts generally decide which food they will eat after the prosecutors make a dinner table. But, in Korea, the prosecutors virtually determine the particular food that the judges must have. ... Given the enormous powers of the prosecution service, South Korea seems to be governed by the prosecutors.

> [*PP3-RC*] Indeed, the potential of the prosecution service is the most enormous. The influential power of the prosecution service can't be compared to that of the court. Do you know this expression? 'The Judges eat the food with a spoon, which has been prepared by the prosecutor.' This expression is a little bit adverse to the judge's role. But, this is the reality.

Second, of primary interest to the newspapers, consequently to the citizens, are the investigative actions conducted by the prosecution service even though prosecutors are involved in many other roles. Such interest from the public through the media, as

---

[122] Jae Rock Oh, *Bureaucratic Power in Korea* (Korean Studies Information, Paju 2007) 424, 187-189.
[123] Chang Woon Shin. 'Public Opinion Survey about the Power Organizations' *Jungangilbo* (14 June 2008); Chang Woon Shin. 'The Public Opinion Survey about the Influence and Credibility of 25 Powerful Organizations' *Jungangilbo* (3 July 2007).

Professor Kim suggested, encourages prosecutors to concentrate on direct investigation.[124]

Since investigations of high profile public servants or politicians attract much public attention, newspapers have a tendency to publicise the articles dealing with such investigations. For the public prosecutors, the publication of their investigations would be a chance to show their abilities. Jong Gu Kim, the former Minister of Justice and Chief of prosecutors, stated that 'the prosecutors receive high evaluation from the superiors and colleagues when they investigate a case being widely publicised by mass media.'[125] The prosecutors often try to prove their competence through the newspapers:

> *[DL2-IS2]* In the Suwon homeless girl murder case, the prosecutor provided the reporters from the newspapers and TV with the results of the investigation. He appeared even on TV programmes. The suspects were all innocent juveniles... ... Nevertheless, he publicized that he got the real criminals whom the police had missed. He became a hero by the media: 'An almost forgotten murder case was solved by the capable prosecutor.'[126]

This content analysis has two main limitations as to the methodology and interpretation of results. First, this analysis was mainly carried out in a relatively simple way by comparing the number of articles and words with reference to the actions of the public prosecutor instead of analysing the tones of articles, which could make the analysis more sophisticated. Most articles collected for this content analysis concentrated on the delivery of facts rather than a critical review. Thus, there was a limitation to analysing the tone of articles.

Second, there are few precedent studies that analyse the prosecution service in this fashion. Because of the lack of empirical research, comparisons could not be conducted. However, this analysis was supplemented by the results of public opinion surveys being conducted in 2007 and 2008.[127] In addition, as noted in detail in Chapter 8, the survey of police officers as well as interviews with legal professionals has provided indicative material which tends to confirm the hypotheses.

---

[124] Jong Gu Kim, *The Reform of the Korean Criminal Justice System* (2nd edn BuB-Mun-Sa, Seoul 2004), 531.
[125] ibid.
[126] For more information on this case, *see* ch 6.
[127] *See* n 123 above.

4. Conclusion

The Korean prosecution service is a centralised hierarchical organisation. The prosecutor general ranks at the top of this. An order and obedience relationship exists between the superior and subordinate prosecutors. Because of the influence of Confucianism, such a relationship should be stricter than the line management in other systems in the world. On the basis of such a structure, prosecutors in a sense run the Ministry of Justice by occupying key positions. This has contributed to develop the pre-eminent position of prosecutors along with their considerable discretion in the criminal process. However, at the same time, this leads the prosecution service to be easily manipulated by political interests. The operations of the service have been often distorted by the external and internal pressure.

The pre-eminent status of prosecutors is confirmed not only by the interviews with legal professionals, but also by content analysis. In the Korean criminal justice, the prosecution service is perceived as the most influential organisation. In particular, the public pay much attention to the prosecution service even though prosecutors are involved in many other roles. Such interest encourages prosecutors to concentrate on direct investigation. In the subsequent chapter, those roles, duties, discretion and accountability of the Korean prosecution service are compared with those in other jurisdictions.

systems, the civil law tradition had its effect on Korean criminal justice.[3]

However, after the defeat of Japan in the World War II in 1945, Korea became an independent country but, as happened in Japan, with a US military administration. This began to influence South Korea and introduced the US legal system.[4] However, this influence could not change the basic structure of the colonial criminal procedure because of two reasons. Firstly, as Korean society was in disorder due to the Korean War (1950-1953), legislators were worried that a major change could burden the judicial process.[5] Secondly, there was little research on the impact that such reforms might have on the Korean legal system. As a consequence, reform was limited and when Korean Criminal Procedure Act 1954 was established, it had a combined structure of the adversary and inquisitorial system. The fundamental contours of the colonial criminal proceedings remained intact.[6]

Korean criminal justice system has developed under the influence of other legal systems: England and Wales, USA, France, German, and Japan. Such influences have created the unique characteristics of the Korean public prosecution service.[7] As a result, the comparison with those five jurisdictions can help to delineate clearly the extraordinary status, powers and roles of the prosecution service in Korea.[8]

Second, those five jurisdictions represent ideal types of criminal justice systems and the differing role and functions of the prosecution service. It may be argued that the criminal justice systems in the world can be categorised into five groups – the common law or accusatorial, the civil law or inquisitorial, the hybrid, the socialist and the Islamic.[9] However, Cole and others suggested that just three systems were sufficient:

---

[3] Jae-Sang Lee, *Korean Criminal Procedure* (2nd edn Park Young Sa, Seoul 2008), 15; For the details on the development of the Japanese legal system, *see* below pt 2.

[4] United States Army Military Government in Korea Ordinance 1948 No. 176. For more detail, *see* Hee Gi Shim. 'USAMGIK Ordinance No. 176 and Criminal Procedure Reform of 1948' (1995) 16 Legal History Journal 117.

[5] Dong-Woon Shin. 'An Analysis of the Korean Criminal Procedure: Focusing on the Establishment of the Act' (1987) 69 Seoul Law Journal 144, 153.

[6] Jae-Sang Lee op. cit., 15.

[7] With respect to the importance of historical and social contexts, Fairchild and Dammer stated that 'The fact is that a nation's way of administering justice often reflects deep-seated cultural, religious, economic, political, and historical realities. Learning about the reasons for these different practices can give us insight into the values, traditions, and cultures of other systems.' *See* Erika Fairchild and Harry R. Dammer, *Comparative Criminal Justice Systems* (2nd edn Wadsworth/Thomson Learning, Belmont, CA 2000) 412, 9 cited from Francis J. Pakes, *Comparative Criminal Justice* (Willan Publishing, Cullompton; Portland 2004), 3.

[8] Pakes suggested one of the benefits of the comparative study thus: 'A further incentive for comparison relates to the question of 'Where do we stand?' In order to gain insight into states of affairs at home it might be helpful to examine matters abroad.' *See* ibid 4.

[9] For more details, *see* George F. Cole, Stanislaw J. Frankowski and Marc G. Gertz (eds), *Major Criminal Justice Systems: A Comparative Survey* (2nd edn Sage Publications, Inc, 1987); Pakes op. cit. ; Mireille Delmas-Marty and John R. Spencer (eds), *European Criminal Procedures* (Cambridge University Press,

> First, there are so called common-law or adversarial systems. The three examples...are England and Wales, the US and Nigeria. Originating from the British Isles, they are found in all English-speaking countries, with the possible exceptions of Scotland and South Africa. Second, there are civil law or inquisitorial systems. These originate in continental Europe... The third group consists of socialist law systems... of the former USSR and Poland.[10]

This seems somewhat limited and Dammer and colleagues considered seven countries as representing world criminal justice systems – England, the USA, France, Germany, Japan, China and Saudi Arabia.[11] However, they selected four jurisdictions for the discussion of common law (England and the US) and civil law (France and Germany) tradition because systems even in the same tradition have distinctive characteristics.[12] For instance, the French and the German legal systems stem from the civil law tradition. However, the French criminal justice system has more inquisitorial elements than the German.[13] In addition, the Japanese criminal justice system, as Dammer described, which developed under the influence of common law and civil law tradition but shows considerable differences from such traditional systems, represents the hybrid situation:

> Japanese law and criminal justice is hybrid, having borrowed from the Chinese, the French, the Germans, and the Americans. The final product, however, is peculiarly Japanese and certainly not analogous to any of the systems of origins.[14]

The Chinese and Saudi Arabian systems are also important comparators which represent the socialist and Islamic traditions. Yet, it is difficult to include those countries in this study. As Dammer and others suggested, they cannot be easily compared to other countries as they tend to place the emphasis on a unique element such as 'sacred law legal tradition' or 'the ideals of the communist party.'[15] As a result, this study is based

---

2002), and Harry R. Dammer, Erika Fairchild and Jay S. Albanese, *Comparative Criminal Justice Systems* (3rd edn Wadsworth/Thomson Learning, Belmont, CA 2006).

[10] Pakes op. cit. 13-14.

[11] Dammer et al. op. cit. 13.

[12] For the details on the distinctive features of each country and tradition, *see* ibid 71-99, 135-170; John Hatchard, Barbara Huber and Richard Vogler, *Comparative Criminal Procedure* (British Institute of International and Comparative Law, 1996), 7.

[13] Delmas-Marty and Spencer op. cit. 3-4. (Spencer argues that the French system is the 'most faithful to the original inquisitorial idea,' whereas the German system places relatively more emphasis on 'the principle that the court of trial must hear the witnesses orally, and reinforcing the divide between the functions of investigation and of judging by abolishing the German equivalent of the *juge d'instruction.*')

[14] Dammer et al. op. cit. 93.

[15] ibid 88-98.

on the five representative jurisdictions – England and Wales, the USA, France, Germany, and Japan.[16]

Limitations of the Research

In undertaking a comparative study, there are two main methodological difficulties. The first relates to the language barriers. Comparative researchers, as Winterdyk and others put it, can confront practical problems such as language barriers as well as understanding cultural differences.[17] Pakes suggested that 'anything less than complete fluency leaves one vulnerable to misinterpretation.'[18] However, this difficulty has not prevented scholars from researching foreign systems without having acquired the native language.[19]

Because of the language barrier, this study is carried out based on literature written in English and Korean. Fortunately, there are several comparative studies of the public prosecution service in those languages. They do not necessarily directly address the issues of this study nor do they compare all five jurisdictions. Professor Fionda's study of public prosecutors and discretion,[20] Jackson's study of the effect of legal culture and proof in decisions to prosecute,[21] Johnson's study of Japanese way of justice,[22] and

---

[16] Along with those jurisdictions, the Dutch and Kazakhstan prosecution services may be helpful to realise extensive powers of the prosecution service. The public prosecutor in the Netherlands is often cited as a powerful officer in Europe. *See* Francis J. Pakes. 'The Positioning of the Prosecution Service in the Netherlands and England and Wales: Lessons from One Extreme to Another' (1999) 21(2) Liverpool Law Rev 261, 263 (Pakes stated that 'The Dutch Public Prosecution Office is ... an example of a strong and independent service.') and Fionda op. cit. 96 (Professor Fionda suggests that the influence of the public prosecutors in the Netherlands is 'wide and their powers extensive in the determination of the penalty imposed upon an offender in any particular case.')

Similarly, in Kazakhstan, the public prosecutors dominate the whole legal system while 'overshadowing the judiciary.' As they belonged to the former USSR, as Staberock put it, they have the legal legacy: 'the function of law in the former Soviet Union was to allow the Government to rule. Law constituted a tool for the Communist Party to implement its policies, but could also be set aside if needed. ... This legal legacy left a positivist legal culture and a legal system dominated by the Prosecutor's Office (Prokuratura), exercising not only traditional criminal law functions, but also 'overall legal oversight' over the whole legal system, overshadowing the judiciary as well. The judiciary was largely dependent, with little prestige, and advocates were weak and state-controlled through a Collegium of Advocates.' *See* Gerald Staberock. 'A Rule of Law Agenda for Central Asia' (2005) 2(1) Essex Human Rights Review, 3. Such dominance of the prosecutors has continued until recently. *See* ibid 11 (Staberock argues that 'judicial human rights enforcement is dependent on key reforms of the Soviet-style prosecutor's office, which continues to dominate the legal system in Central Asia.')

[17] John Winterdyk, Philip Reichel and Harry Dammer (eds), *A Guided Reader to Research in Comparative Criminology/Criminal Justice* (Universitatsverlag Dr. N. Brockmeyer, 2009), 23.

[18] Francis J. Pakes, *Comparative Criminal Justice* (Willan Publishing, Cullompton; Portland 2004), 23.

[19] ibid 23.

[20] Fionda op. cit.

[21] John D. Jackson. 'The Effect of Legal Culture and Proof in Decisions to Prosecute' (2004) 3(2) Law, Probability and Risk 109.

[22] David T. Johnson, *The Japanese Way of Justice: Prosecuting Crime in Japan* (Studies on law and

Hodgson's study of French criminal justice system[23] are all English examples of comparative work in this area.

Professor Fionda discussed the sentencing role of the public prosecutors through the comparison of four prosecution systems: England and Wales, Scotland, the Netherlands, and Germany. Jackson drew attention to the role of the public prosecutors in the investigation procedure. In particular, he accounted for various functions of the public prosecutors in different countries with respect to the pre-trial fact-finding process. However, Johnson focused on the role of the Japanese public prosecutors while comparing them with their counterpart in the US. Hodgson explored the French criminal justice system. In particular, she focused on the investigation and prosecution of crime. She compared the prosecution service in England and Wales with the French prosecution system. In addition, Pakes's study of comparative criminal justice took up various aspects in the criminal proceedings such as policing, prosecution and pre-trial justice, systems of trial, judicial decision-makers, and punishment.[24]

Along with these works, there are recent comparative studies about the public prosecution systems of 11 European countries. Jehle and others considered the role of the public prosecutor as a key player in the criminal justice system.[25] They noted that the prosecution services conduct various functions depending on their legal status and discretion in the different criminal justice systems. Elsner and others concentrated on the role of the police in the investigation stage, their ability to end such investigations and their relationship with the prosecutors.[26]

There are also comparative studies written in Korean. In the study of 'Reforms of the Korean Criminal Justice System,' Jong Gu Kim carried out a much wider analysis of the organisation of the prosecution systems in five countries.[27] Byung Dae Jung's study also relates to the public prosecution system. He focused on the roles of the prosecution service at the investigation stage.[28] In addition to the prosecution services, he studied the police systems in various jurisdictions. Finally, Dong Hee Lee and others made a comparative study analysing the relationship between the police and prosecutors in

---

social control, Oxford University Press, Oxford; New York 2002).

[23] Jacqueline Hodgson, *French Criminal Justice: A Comparative Account of the Investigation and Prosecution of Crime in France* (Blackwell Synergy, 2005).

[24] Pakes op. cit.

[25] Jörg-Martin Jehle, Paul Smit and Josef Zila. 'The Public Prosecutor as Key-Player: Prosecutorial Case-Ending Decisions' (2008) 14(2) European Journal on Criminal Policy and Research 161.

[26] Beatrix Elsner, Chris Lewis and Josef Zila. 'Police Prosecution Service Relationship within Criminal Investigation' ibid (2-3) 203–224.

[27] Jong Gu Kim, *The Reform of the Korean Criminal Justice System* (2nd edn BuB-Mun-Sa, Seoul 2004).

[28] Byung Dae Jung, *Investigation Structure: A Comparative Study* (Legal Research and Training Institute, 2007) 450.

different systems.[29] Those works are all based on the same jurisdictions as this study.[30]

The second methodological difficulty is neutrality. Researchers should choose what to read, what to observe, and whom to interview. However, many issues of criminal justice can be controversial. As Pakes pointed out, it is significant 'to try to assess both sides of any argument and not limit oneself to talking to a restricted range of people with a shared set of opinions and knowledge.'[31] To offset such a methodological hazard, this comparative study is based on a 'descriptive approach.'[32] Such an approach draws attention to the structure of the system rather than the political and socio-philosophical development. Terrill regarded this approach as the 'institutional-structural approach.'[33] For instance, it can include research questions such as: Do the public prosecutors directly involve themselves in the investigation with their own resources? How does the public prosecutor become involved in the police investigation? Does the investigation dossier have an evidentiary impact? The descriptive approach, as Vagg suggested, is based on explaining dissimilarities and highlighting similarities.[34] In particular, those dissimilarities are explained on the basis of the historical development of the systems.

---

[29] Dong Hee Lee and others, *Investigation Systems: A Comparative Study [Bigyosusajedoron]* (Pakyoungsa, Seoul 2004).

[30] Jong Gu Kim op. cit. 34; For a similar reason, the criminal justice systems of those jurisdictions have been often introduced in the various comparative studies in Korea. *See* Byung Dae Jung op. cit. 2.

[31] Pakes op. cit. 23.

[32] Winterdyk et al. categorised the approaching types in the comparative studies into five groups: First, 'Historical approach – what do earlier experiences tell us about the present and how can knowledge of the past serve to inform/guide us for the future?', Second, 'Political approach – how does politics affect interaction among nations and how is a country's legal tradition affected by politics?', Third, 'Descriptive approach – what are the main components of a justice system and who are the main actors in a justice system and/or model?', Fourth, 'Socio-Philosophical approach – For example, how do different countries view the causes of youth crime and what are the ideological approaches to addressing such issues?', Finally, 'Analytical-Problem approach – Perhaps one of the more challenging approaches to employ in comparative research this approach 'emphasizes the development of theory'... and the testing of such theories with problems associated with the justice system.' John Winterdyk, Philip Reichel and Harry Dammer (eds), *A Guided Reader to Research in Comparative Criminology/Criminal Justice* (Universitatsverlag Dr. N. Brockmeyer, 2009), 29-30.

[33] ibid 29 citing Richard J. Terrill, *World Criminal Justice Systems: A Survey* (5th edn Anderson Pub. Co., Cincinnati, OH 2002).

[34] Vagg suggested an approaching method to accomplish a comparative study. He drew attention to 'linkage' and 'relevance' on the basis of examination of dissimilarity and similarity. Jon Vagg. 'Context and Linkage: Reflections on Comparative Research and 'Internationalism' in Criminology' (1993) 33(4) Br J Criminol 541. Winterdyk, Reichal, and Dammer categorised Vagg's typology into four groups: 'Linking variables – the researcher(s) attempt to link crime/criminal justice trends to common social, economic, or political denominators.'; 'Explaining dissimilarity – based on a particular question, two or more countries are examined with a comparative focus.'; 'Highlighting similarity – with a practical orientation in mind, broad generalization are drawn based on summarizing material on a specific question.'; 'Indicating consequences – international comparison results from particular regional/international developments as a way to show what consequences may flow from a particular development.'

Plan of this Chapter

This chapter attempts to find where the Korean prosecution service stands among world criminal justice systems. Before moving on to the main issues, the development of the modern public prosecution systems and their general roles are described in Part 2 and 3. Then, the main features are addressed based on the Damaska's framework of coordinate and hierarchical structures of authority.[35] Three issues which are chosen from discussion of the main chapters are explored.

Firstly, Part 4 addresses the investigative function of the prosecution service. As noted in Chapter 3 and 4, the public prosecutors can be involved in the investigation through direct and indirect methods. Indirectly they supervise the police investigation, but they can also directly question witness and investigate themselves. Thus, this part examines these two aspects in the relationship between the police and prosecutors.

Secondly, Part 5 explores the discretion of the public prosecutors at the pre-trial stage.[36] Such discretion attracts a great deal of attention not least as it has a role to play in reducing the workload of the court.[37] In particular, the comparison between the comparative discretion exercised by the police and prosecutors at this stage is a good indicator of their relationship.

Thirdly, Part 6 explores the influence of the prosecution services upon trial outcomes. Three elements are considered: recommending a sentence; appealing against verdicts and sentences; and the evidentiary impact of investigative dossiers. In particular, in Korea, the dossier is used as significant evidence in court rather than information about the offences.[38] The confessions in the dossier are admitted as key evidence and the dossier has a considerable impact on the result.[39] The investigative dossier and its impact can be an important indicator to decide the role and power of the prosecutors.

Finally, Part 7 explores the accountability of the prosecution services. In general,

---

[35] Mirjan Damaska. 'Structures of Authority and Comparative Criminal Procedure' (1974) 84 Yale LJ 480.

[36] Marcia E. Goodman. 'Exercise and Control of Prosecutorial Discretion in Japan' (1986) 5 UCLA Pac.Basin LJ 16; Fionda op. cit.; Abraham S. Goldstein. 'The State and the Accused: Balance of Advantage in Criminal Procedure' (1959) 69 Yale LJ 1149.

[37] Jörg-Martin Jehle, Paul Smit and Josef Zila. 'The Public Prosecutor as Key-Player: Prosecutorial Case-Ending Decisions' (2008) 14(2) European Journal on Criminal Policy and Research 161; Beatrix Elsner, Paul Smit and Josef Zila. 'Police Case-Ending Possibilities within Criminal Investigations' (2008) 14 (2-3) European Journal on Criminal Policy and Research 11; Jörg-Martin Jehle and others, *Coping with overloaded criminal justice systems: the rise of prosecutorial power across Europe* (Springer, Berlin ; New York 2006) 333.

[38] Pakes drew attention to the status of the dossier in inquisitorial trials. He stated that 'It is worth a moment of reflection about what it means for a panel of judges to have access to the case-file before the defendant appears before them in court. Via its contents the court will usually know what the defendant said to the arresting police officers and what was found at a house search.' *See* Pakes op. cit. 85.

[39] The Korean Ministry of Justice (tr), *Criminal Procedure Act [Hyungsasosongbeop] partially amended on 21 December 2007 No. 8730* (1954) art 312; For further discussion, *see* ch 6.

prosecutors exercise extensive discretion. Such discretion has the potential for abuse. Most jurisdictions have established mechanisms to check the discretion of the prosecution service.[40]

2. The Development of the Modern Public Prosecution Systems

This part explores the origins of the modern public prosecution systems. As the countries have different historical backgrounds, their developments of public prosecution have distinctive features. However, there are also similarities as their fundamental purposes will be the same, namely to control crime in an effective way and protect defendants.

2.1. Japan

The Korean modern public prosecution system was introduced during the Japanese colonial period (1910-1945). Thus, there exist relatively many similarities between the Korean and the Japanese systems. However, the Japanese system itself is a hybrid which has elements of the Chinese, the French, the German, and the US systems.[41] It has developed distinctive features, which cannot be easily seen in other jurisdictions.[42]

The modern Japanese system was established on the basis of the French model.[43] At the start of the process of modernizing the Japanese legal system, G. Boissonade,[44] a professor of the University of Paris, was employed by the government and became involved in the establishment of Japanese Code of Criminal Procedure 1880 (JCCP). He

---

[40] Hans-Jorg Albrecht. 'Criminal Prosecution: Developments, Trends and Open Questions in the Federal Republic of Germany' (2000) 8 European Journal of Crime, Criminal Law and Criminal Justice 245, 254 (Albrecht noted that 'control and supervision of public prosecutors certainly are necessary insofar as the legal substance is concerned and as regards the implementation of prosecution policies which must be based upon discretion.')

[41] Cole et al. op. cit. 85 (Cole et al. stated that 'Japan may be viewed as a mixture of civil law with regard to substantive criminal law yet with elements of the common law in the field of criminal procedure.'); Dammer et al. op. cit. 93.

[42] ibid.

[43] A. Didrick Castberg. 'Prosecutorial Independence in Japan' (1997) 16 UCLA Pac.Basin LJ 38, 38; Mark D. West. 'Prosecution Review Commissions: Japan's Answer to the Problem of Prosecutorial Discretion' (1992) Columbia Law Rev 684, 686.

[44] Gustave Emile Boissonade de Fontarabe (1825-1910).

introduced the *Code d'instruction criminelle* (1808) of France to Japan.[45] In 1922, there was a revision of the JCCP 1880, which was mainly based upon the German Code of Criminal Procedure 1877.[46] As the Japanese modern criminal procedure was created on the basis of the French legal system and influenced by German criminal code, it was mainly inquisitorial in nature.[47]

In the late nineteenth century, both prosecutors and judges belonged to the Ministry of Justice. They had equal status.[48] Yet, the prosecutors had relatively limited power in terms of investigation. For instance, the modern Japanese prosecutors can become directly involved in the investigation, but they could not do so in 1880s. As Kiyoura put it, 'a prosecutor has the power to request the investigation of a crime, but not to investigate the crime on his own initiative.'[49] However, they expanded their powers so that they could conduct their own investigations, a process that had been completed by 1916.[50] This was with the support of the people who were concerned about the conviction rates.[51] Nagashima described the causes which led the public prosecutors to be involved in the investigation as follows:

> "[T]he people in general wanted [the public prosecutor] to investigate crimes so that he would not institute proceedings with insufficient evidence to support conviction of the defendants; the percentage of acquittals entered by the courts was amounting to nearly 30 percent of the total cases. The effort was successful, for in 1916 the rate of acquittals was only 7 percent by examining magistrates and 2.5 percent in the trial courts. This practice has continued to the present.[52]

Such prosecutorial power was further increased while 'the Japanese government became

---

[45] B. J. George (tr), Shigemitsu Dando and Wayne State University Law School. Comparative Criminal Law Project., *The criminal law of Japan: the general part* (Publications of the Comparative Criminal Law Project ; v.19, Rothman, Littleton, Colo. 1997) 35.

[46] Kenzo Takayanagi, 'A Century of Innovation: The Development of Japanese Law, 1868-1961' in Arthur Taylor Von Mehren (ed), *Law in Japan. The Legal Order in a Changing Society* (Harvard University Press, Cambridge, Mass 1963) 22.

[47] Marcia E. Goodman. 'Exercise and Control of Prosecutorial Discretion in Japan' (1986) 5 UCLA Pac.Basin LJ 16, 20; Castberg op. cit. 38.

[48] Goodman op. cit. 20 (Goodman suggested that the judge and the prosecutor were given equal status and they 'sat side by side on a raised platform, the accused more an object than a party.')

[49] Keigo Kiyoura (1880) Zuicho Zuihitsu (Random Things Heard and Noted) quoted in West op. cit. 686.

[50] ibid 687.

[51] Castberg op. cit. 38.

[52] Atsushi Nagashima, 'The Accused and Society: The Administration of Criminal Justice in Japan' in Arthur Taylor Von Mehren (ed), *Law in Japan: The Legal Order in a Changing Society* (Harvard University Press, Cambridge, Mass. 1963) 297, 298-299.

increasingly militaristic, fascist, and repressive in the 1930s.'[53] As West described, the enormous powers of the prosecution service in this period are often referred to 'prosecutorial fascism [*Kensatsu Fassho*].'[54] In the Tanaka's work, those powers are illustrated as follows:

> [Prosecutors] occupied most of the key positions in the Ministry of Justice (Shiho Sho), which had the power to decide on the promotion of judges. Some of the [prosecutors] exerted a strong influence on politics, especially in the 1920's and 1930's, primarily through the exercise of their authority to prosecute or not to prosecute persons for suspected crimes, such as bribery and violation of electoral laws.[55]

However, the roles and powers of the Japanese prosecution service were radically changed after Japan's defeat in the World War II. The reform managed by the US military government focused on giving the 'criminally accused rights with which to defend themselves from powerful prosecutors.'[56] As a consequence, the Japanese criminal justice system adopted new elements from the USA through the reform of the Constitution and the Code of Criminal Procedure (CCP) of 1948.[57]

Those changes can be summarised into three features. First, the investigative function of the prosecution service became restricted. Before this reform, the investigation and prosecution were dominated by the prosecutor.[58] However, the new code limited the investigative role of the prosecutors, and instead made them concentrate on the trial work.[59] As a result the investigation was carried out mainly under the responsibility of the police.[60] Yet, this reform did not abolish completely the involvement of the public prosecutors in the investigation. They still have been able to conduct supplementary investigations on their own initiatives, and to supervise the

---

[53] West op. cit. 687.
[54] ibid 687 n 17.
[55] Hideo Tanaka and Malcolm D. H. Smith, *The Japanese Legal System: Introductory Cases and Materials* (University of Tokyo Press; distributor, ISBS, Tokyo; Forest Grove, Or. 1976) 556 cited from West op. cit. 687.
[56] ibid.
[57] Atsushi Nagashima, 'The Accused and Society: The Administration of Criminal Justice in Japan' in Arthur Taylor Von Mehren (ed), *Law in Japan: The Legal Order in a Changing Society* (Harvard University Press, Cambridge, Mass. 1963) 297, 297.
[58] Dong Hee Lee and others, *Investigation Systems: A Comparative Study [Bigyosusajedoron]* (Pakyoungsa, Seoul 2004), 664, 719-739
[59] Nagashima op. cit. 302.
[60] The Ministry of Justice (tr), Japan, *Code of Criminal Procedure (Act no. 131)* (1948) art 189 '(1) A police official shall perform his/her duties as a judicial police official pursuant to the provisions of other acts, or pursuant to the regulations of the National Public Safety Commission or Prefectural Public Safety Commission. (2) A judicial police official shall, when he/she deems that an offense has been committed, investigate the offender and evidence thereof.'

police investigation after receiving the cases from the police.[61]

Second, the new code put the emphasis on the principle of open trial. Unlike the old procedure in which the prosecutors presented documents as well as other evidence before the trial and just waited for the judgement, they now had to examine witnesses in court.[62] In addition, there were new rules of evidence which dealt with confessions, hearsay and so on. Finally, the status of the prosecutor was defined as a lawyer for the government rather than an impartial party to the trial.[63] Taken together, in contrast with their role in the old procedure focusing on investigation, the prosecutors now had to concentrate on the trial.

Nevertheless, the elements rooted in continental tradition have still existed in the Japanese criminal justice system. The public prosecutor's office is structured as a centripetal hierarchical organisation.[64] Accordingly, the prosecutors conduct their work by relying on the instructions from the superiors based on 'the principle of uniformity of the prosecutors.'[65]

2.2. France

The modern French criminal justice system has influenced many different jurisdictions across the world based on France's colonial expansion.[66] Because of this extensive impact, it is often used to represent the civil law tradition or inquisitorial system.[67] As

---

[61] ibid art 191 (1) 'A public prosecutor may, if he/she deems it necessary, investigate an offense him/herself.'; art 193 '(1) A public prosecutor may, within his/her jurisdiction, give necessary general instructions to judicial police officials regarding their investigation. Such instructions shall be given by setting forth general standards for a fair investigation and other matters necessary for the fulfilment of prosecution. (2) A public prosecutor may, within his/her jurisdiction, also issue to judicial police officials such general orders as are necessary for them to cooperate in investigations. (3) A public prosecutor may, when it is necessary for the prosecutor him/herself to investigate an offense, issue orders to judicial police officials and have them assist in the investigation. (4) In the case of the preceding three paragraphs, judicial police officials shall follow the instructions and orders of the public prosecutor.'

[62] Nagashima op. cit. 302.

[63] ibid.

[64] David T. Johnson, *The Japanese Way of Justice: Prosecuting Crime in Japan* (Studies on law and social control, Oxford University Press, Oxford; New York 2002) 119-143; Mirjan Damaska. 'Structures of Authority and Comparative Criminal Procedure' (1974) 84 Yale LJ 483-507 (Damaska stated that 'a general continental [inquisitorial] pattern can be discerned from these features: the strong tendency to arrive at uniform policies through the centralization of authority; the rigorously hierarchical ordering of agencies participating in the administration of justice; the preference for precise and rigid normative directives over more flexible standards; and, finally, the great importance accorded official documentation.')

[65] Byung Dae Jung op. cit.

[66] Yue Ma. 'Exploring the Origins of Public Prosecution' (2008) 18(2) International Criminal Justice Review 190, 198; Pieter Verrest. 'French Public Prosecution Service' (2000) 8 European Journal of Crime, Criminal Law and Criminal Justice 210, 211.

[67] Pakes op. cit. 13.

we have seen, the Japan and the Korean systems have been influenced by the French as it was a model for the modernisation of the Japanese legal system.[68]

The French system of public prosecution was created by the Napoleonic Code of Criminal Procedure [*Code of d'instruction Criminelle*] of 1808.[69] However, this system was not totally new, but instead had been developing for centuries in France. Prior to the 1200s, the accusation of crime was a private right. The right to bring the criminals before the court was limited strictly to the hands of injured individuals.[70] Only kings and sovereign lords could protect their interest by employing a representative who is called '*procureur du roi*' (king's prosecutor).[71] In this period the king's prosecutors did not involve themselves in all criminal matters. They prosecuted crimes which impinged on the king's interest. As the accusation of crime was the right of private individuals, even the king's prosecutor could not interfere in cases which were irrelevant to such interests.[72] However, in the 1200s, as the concept of territorial state developed, the king began to be more involved in the control of crime.[73] Since then, his prosecutors had been involved in more criminal prosecutions of private individuals,[74] and their title was

---

[68] *See* above pt 1 Introduction.

[69] Richard Vogler. 'Reform Trends in Criminal Justice: Spain, France and England & Wales' (2005) 4 Wash.U.Global Stud.L.Rev. 631, 631; Verrest op. cit. 211.

[70] John Simpson (tr), Adhémar Esmein, *A History of Continental Criminal Procedure, with Special Reference to France* (The continental legal history series...[vol.v], Little, Brown, and company, Boston 1913) 640, 114.

[71] ibid; John H. Langbein, *Prosecuting Crime in the Renaissance: England, Germany, France* (Studies in legal history, Harvard University Press, Cambridge, Mass. 1974) 321, 217; Ma op. cit. 117; However, as Esmein put it, although the king's prosecutors had already existed for a long time, it firstly appeared in the law book in 1302. *See* John Simpson (tr), Adhémar Esmein, *A History of Continental Criminal Procedure, with Special Reference to France* (The continental legal history series...[vol.v], Little, Brown, and company, Boston 1913) 640, 115-116 (In 1302, 'Philip the Fair regulates their duties in terms which carry the conviction.')

[72] ibid (Esmein stated that 'One of the most important duties of the king's procurator or fiscal was the superintendence of the prosecution of certain offenses: fines and forfeitures, the fruit of penal sentences, were one of the chief sources of revenue of the king and the nobles.')

[73] ibid 98, 115; Ma op. cit. 197.

[74] Simpson op. cit. 98-99 (Esmein described the accusations by the king's prosecutors as follows: 'since the king is directly interested in the repression of crime, why not employ the inquest in this case as in all cases where the king's interests are concerned? This is a strong argument; and it happens that in the same chapter of the "Livre de Jostice et de Plet" in which we read that old maxim "none shall be put to the inquest to lose life or limb " we see the inquest admitted in criminal matters: "If injury is caused to a poor person who cannot prosecute his rights, either by himself, his goods, or his friends, such matter should proceed by inquest; for such matters are not allowed to come to naught because of such poverty. And if he claim [sic] for an offense involving capital punishment it is not a matter for inquest, except it happens that the king should grant conditional absolution." 1 And a little further on: "If the man or the woman who is killed shall have no relative" or friend who can avenge him or her, the king can prosecute and punish according to what is ascertained in the 'aprise,' without capital condemnation." 2 - "The king can make an inquisition by reason of evil notoriety on keepers of brothels, thieves, doers of malicious mischief, rioters."')

changed into the 'public prosecutor [*ministere publique*].'[75] Such involvement increased gradually, but by the 16th century the public prosecutors had exclusive control over the prosecution of crime.[76] Based on this office, the modern public prosecution system was set up by the Code of Criminal Procedure 1808.

In contemporary France, the main characteristics of the traditional system remain intact.[77] One of the distinctive features is a centralised hierarchy. As Hodgson stated, 'this centralised state tradition, or *etatisme*, remains an important feature. The state enjoys the moral and political authority firstly, to become widely involved in areas which touch upon the public interest and secondly, to exercise significant powers in the protection of that public interest.'[78] Such a feature stems from the early 19th century Napoleonic state in which the military played a role as a model in establishing the civil service and justice.[79] Hazareesingh described this tradition as follows:[80]

> There were many distinctive features of the Napoleonic State: an emphasis on power, authority, and technical competence, a strict system of hierarchy, a clearly delineated system of rules, which were applied in a uniform manner, and a scope of intervention in matters both public and private which was pervasive (in comparison with its predecessors). The most important and durable feature of the Napoleonic system was the principle of centralisation, which Napoleon consciously adopted from the Jacobin heritage of the 1790s.

This centralised hierarchical structure remains.[81] The public prosecutors must follow the direction from the Minister of Justice as well as from their superiors.[82] As Hodgson suggested, such hierarchy of authority was produced to guarantee 'the legitimacy and

---

[75] Ma op. cit. 197; Simpson op. cit. 114.

[76] John H. Langbein, *Prosecuting Crime in the Renaissance: England, Germany, France* (Studies in legal history, Harvard University Press, Cambridge, Mass. 1974) 321, 224-228 (Langbein stated that 'The criminal sanction pertained to a wrong conceived to be against the king and the public; only the procureur might demand it. The aggrieved victim or kin was limited to civil damages in his own right.'); Robert Vouin. 'The Role of the Prosecutor in French Criminal Trials' (1970) The American Journal of Comparative Law 483, 485.

[77] Pieter Verrest. 'French Public Prosecution Service' (2000) 8 European Journal of Crime, Criminal Law and Criminal Justice 210, 211.

[78] Jacqueline Hodgson, *French Criminal Justice: A Comparative Account of the Investigation and Prosecution of Crime in France* (Blackwell Synergy, 2005), 16.

[79] ibid.

[80] Sudhir Hazareesingh, *Political Traditions in Modern France* (Oxford University Press, 1994), 159.

[81] Hodgson op. cit. 75.

[82] Richard S. Frase. 'Comparative Criminal Justice as a Guide to American Law Reform: How do the French do it, how can we find out, and why should we care' (1990) 78 Calif Law Rev 539, 559-561 (Frase described this feature as follows: 'Although individual prosecutors are theoretically free to speak their own minds in court, in their written submissions they must follow the written orders of their superiors. If they do not, they are subject to disciplinary action, including dismissal.')

democratic accountability of the procurers, as well as a degree of centralisation and uniformity within the parquet, this hierarchical control defines and constrains the exercise of the procurer's discretion.'[83]

In Damaska's study of 'structure of authority and comparative criminal procedure', he argued that 'Certainty in decision making requires that uniform policies be developed.'[84] Hence, this process can be achieved by the centralisation of authority which is the key factor to constitute the hierarchical organisation.[85] Goldstein and Marcus also argue that hierarchical structure is an important element in the inquisitorial system.[86] Such characteristics have influenced other countries in Europe through the Napoleon's military expansion such as Belgium, Netherlands, Luxembourg, Italy, Germany, and Poland.[87] These countries adopted the French public prosecution service as a model for their own systems.[88]

French criminal procedure has developed while remaining rooted in its inquisitorial roots. It has adopted adversarial features to protect the rights of the defendants.[89] These changes are not limited to the role of the public prosecutors and relate to the criminal proceedings as a whole. However, as they can have an effect on the prosecution process, it is important to note those modifications happened after the establishment of the modern public prosecution system in 1808.

Such changes can be summarised into three aspects. First, the Code of Criminal Procedure of 1808 was reformed in 1897. This reform aimed to increase the power of the defence during the judicial investigation.[90] Due to this reform, the defendants began to have the assistance of lawyers for judicial questioning, allowing them to attend the judicial investigation process and to consult the case documents in advance.[91]

---

[83] Hodgson op. cit. 75.

[84] Mirjan Damaska. 'Structures of Authority and Comparative Criminal Procedure' (1974) 84 Yale LJ 480, 484.

[85] ibid.

[86] Abraham S. Goldstein and Martin Marcus. 'The Myth of Judicial Supervision in Three Inquisitorial Systems: France, Italy, and Germany' (1977) 87ibid240, 247 (Goldstein and Marcus suggested that 'The Code's provisions are to be applied rigorously by prosecutors and police, both of whom are organized nationally and hierarchically and are subject, in theory, to greater control by superiors than under American practice.'); Jacqueline Hodgson. 'Hierarchy, Bureaucracy, and Ideology in French Criminal Justice: Some Empirical Observations' (2002) 29(2) Journal of Law and Society 227, 232.

[87] Ma op. cit. 198; Verrest op. cit. 211.

[88] Richard Vogler. 'Reform Trends in Criminal Justice: Spain, France and England & Wales' (2005) 4 Wash.U.Global Stud.L.Rev. 631, 632-633; Verrest op. cit. 211.

[89] Jacqueline Hodgson, *French Criminal Justice: A Comparative Account of the Investigation and Prosecution of Crime in France* (Blackwell Synergy, 2005), 27.

[90] ibid.

[91] Hodgson stated that this reform was designed to check the enormous power of the examining magistrate [*juge d'instruction*]. However, as she put it, after this reform, 'Ironically, in order to avoid the presence of the defence lawyer, the *procureur* and the police began their own process of investigation

Second, the French legal reform of 1958 secured the independence of the investigating magistrate [*juge d'instruction*] from the prosecution service to protect the interests of defendants.[92] As Hans Gross put it, around 1903 the investigating magistrate was considered to be a better safeguard for the interests of the defendant than defence counsel.[93] However, as the investigating magistrates belonged to the *police judiciaire* and were under the surveillance of the public prosecutor,[94] it was difficult for them to remain impartial.[95] Thus the investigating magistrate was separated from the *police judiciaire* and became independent of the public prosecutor.

Finally, although criminal proceedings rest heavily on written documents rather than oral evidence, the importance of the debate on the evidence by the parties has been increased in the trial and even in some of the pre-trial hearings.[96] This trend, as Hodgson noted, has taken place through the influence of the European Convention on Human Rights (ECHR) and the jurisprudence of the European Court of Human Rights (ECtHR). The participation rights of the defence lie in the heart of such a change.[97]

2.3. Germany

The German criminal justice system is another important representative of the civil law tradition but it also has features of common law system as a result of the influence of

---

which included the detention of suspects. This remained outside any legal framework until the 1958 code of criminal; procedure laid down procedures for the regulation of this long standing practice of *garde a vue* (the period of police detention.' *See* ibid 27 n 137.

[92] John D. Jackson. 'Theories of Truth Finding in Criminal Procedure: An Evolutionary Approach' (1988) 10 Cardozo Law Review 475, 510-511; Hodgson op. cit. 27.

[93] Quoted in Jackson op. cit. 510.

[94] ibid; Robert Vouin. 'The Protection of the Accused in French Criminal Procedure' (1956) 5(01) International and Comparative Law Quarterly 1, 13-15; Jong Gu Kim, *The Reform of the Korean Criminal Justice System* (2nd edn BuB-Mun-Sa, Seoul 2004), 131.

[95] Jackson op. cit. 510 (Jackson suggested that 'during the course of this century [until the French Code of 1958], concern has been expressed in France that the *juge d'instruction* was too close to the prosecution.')

[96] For instance, in 1993 the suspect began to have the right to access to custodial legal advice. In 2000, the police should provide the suspect with greater information concerning the nature of charges related to the detention. In addition, suspects have a greater opportunity to take part in the judicial investigation. *See* Hodgson op. cit. 27-28.

[97] ibid; With respect to this trend, Jackson argued that 'This may be seen as the beginnings of the development of a new rights-based model of proof. Neither traditionally adversarial nor inquisitorial in character, the new model is better classified as 'participatory' on the ground that it seeks to enable all those capable of giving relevant evidence in the proceedings to do so in as least a coercive manner as possible.' For more details, *see* John D. Jackson and R. Castle. 'The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?' (2005) 68(5) Modern Law Review 737, 737; Swart and Young stated that this trend has made non-adversarial systems become more adversarial. *See* Bert Swart and James Young, 'The European Convention on Human Rights and Criminal Justice in the Netherlands and the United Kingdom' in Phil Fennell, Christopher Harding and Jorg Nico (eds), *Criminal Justice in Europe: A Comparative Study* (Oxford University Press, 1995), 86.

the US after the World War II.[98] As Dammer suggested, German criminal procedure is mostly grounded in the civil law process and has been considered as a significant model for any comparative study.[99] The German system of public prosecution had a considerable impact, as did the French, on the development of the Japanese and Korean systems.

In Germany, the modern institution of public prosecution was created in the middle of 19th century under the influence of French criminal process.[100] This new system was adopted to overcome the weaknesses caused by the inquisitorial judge and private prosecution of crime. As Professor Fionda put it, the investigation, prosecution, and adjudication were concentrated in the hands of the inquisitorial judge before the establishment of the public prosecution system. As a consequence, it was difficult to expect a fair trial based on neutrality of the judge.[101] Concerning this neutrality, Jackson argued that 'In the 1840s, Zachariae, among others, believed that it was impossible to require unbiased impartiality from someone whose task was to investigate and discover those who are guilty.'[102] The German criminal justice system sought to improve the 'procedural lot' of the defendant by securing the independence of the judge from the investigation and prosecution.[103] This reform had been completed by the establishment of the Code of Criminal Procedure of 1877.[104] A modern public prosecution system bedded down into German criminal proceedings.[105]

Even though the German public prosecution system was created based on the French criminal proceedings, it has four distinctive features. Firstly, the German prosecutors, unlike their counterparts in France, monopolise the prosecution of crime.[106] The private individual could not institute a criminal case. As Langbein put it, 'If the German prosecutor has determined not to prosecute, the victim can bring his civil action only in tort.'[107] This monopoly over prosecution has been expressed as 'the principle of the

---

[98] Cole et al. op. cit. 85; Dammer et al. op. cit. 84.
[99] ibid 13, 84.
[100] Dong Hee Lee and others, *Investigation Systems: A Comparative Study [Bigyosusajedoron]* (Pakyoungsa, Seoul 2004), 258.
[101] Fionda op. cit. 133.
[102] Jackson op. cit. 511.
[103] John H. Langbein. 'Controlling Prosecutorial Discretion in Germany' (1974) 41(3) The University of Chicago Law Review 439, 446; John H. Langbein, *Prosecuting Crime in the Renaissance: England, Germany, France* (Studies in legal history, Harvard University Press, Cambridge, Mass. 1974) 321, 321.
[104] Howard D. Fisher, *The German Legal System and Legal Language: A General Survey together with Notes and German Vocabulary* (4th edn Routledge-Cavendish, London; New York 2009) 344, 262; Dong Hee Lee et al. op. cit. 259.
[105] Fisher op. cit. 264.
[106] Langbein op. cit. 442.
[107] ibid.

formal criminal charge.'[108]

Secondly, the German prosecutors must prosecute in any criminal case where there is sufficient incriminating evidence.[109] The Code prohibited the prosecutors from dismissing criminal cases based on their discretion. This is called literally 'the legality principle [*Legalitatsgrundsatz*]'[110] which was created 'to restore the Rule of Law, and to achieve an equal application of the law.'[111]

However, this rule of compulsory prosecution has been weakened and public prosecutors have begun to exercise discretion in the prosecution of crime.[112] In the 1960s, the criminal justice process was faced with 'the phenomenon of mass crimes'.[113] This new environment led the policy makers to find a way to reduce the workload of the court and non-prosecution policies were considered as an alternative. As a consequence, prosecutorial discretion was introduced into the code.[114] This discretion was gradually expanded in order to satisfy social needs such as the decriminalisation of juvenile offenders or the economic difficulties caused by the re-unification of Germany.[115]

Thirdly, the German public prosecution system, unlike the nationalised French approach, is organised on a federal basis. Each state has its own criminal justice system which is managed by a Ministry of Justice who is responsible for the prosecutorial decisions.[116] However, Damaska argued that although the German criminal procedure is

---

[108] According to Langbein, '[i]t was designed to constrain to inquisitorial judge of earlier centuries, who had been empowered to conduct the entire criminal process, from the gathering of first suspicions to final adjudication and sentencing.' *See* ibid.

[109] Howard D. Fisher, *The German Legal System and Legal Language: A General Survey together with Notes and German Vocabulary* (4th edn Routledge-Cavendish, London; New York 2009) 344, 264; With respect to the evidence, the code of criminal procedure articulates that 'the prosecutor the public prosecution office shall be obliged to take action in the case of all criminal offenses which may be prosecuted, *provided there are sufficient factual indications*.' *See* Federal Ministry of Justice (tr), Germany, *Criminal Procedure Code [Strafprozeßordnung]* (1987) s 152 (2) (Emphasis added)

[110] Fisher op. cit. 264; Langbein defined this principle as 'the rule of compulsory prosecution.' *See* Langbein op. cit. 442.

[111] Fionda op. cit. 167.

[112] Hans-Jorg Albrecht. 'Criminal Prosecution: Developments, Trends and Open Questions in the Federal Republic of Germany' (2000) 8 European Journal of Crime, Criminal Law and Criminal Justice 245, 246.

[113] ibid.

[114] Federal Ministry of Justice (tr), Germany, *Criminal Procedure Code [Strafprozeßordnung]* (1987) s 153 '(1) If a less serious criminal offense is the subject of the proceedings, the public prosecution office may dispense with prosecution with the approval of the court competent for the opening of the main proceedings if the perpetrator's culpability is considered to be of a minor nature and there is no public interest in the prosecution. The approval of the court shall be not required in the case of a less serious criminal offense which is not subject to an increased minimum penalty and where the consequences ensuing from the offense are minimal.' Translated by German Federal Ministry of Justice. <http://www.iuscomp.org/gla/statutes/StPO.htm#153>; Hans-Jorg Albrecht. 'Criminal Prosecution: Developments, Trends and Open Questions in the Federal Republic of Germany' (2000) 8 European Journal of Crime, Criminal Law and Criminal Justice 245, 246.

[115] ibid 247.

[116] Fionda op. cit. 134.

based on the federal system, 'strong forces are at work to coordinate law enforcement among federal units and establish uniform national policies.'[117] In other words, in Germany the prosecutor's offices are organised at a state level rather than national, but nevertheless they seek national uniformity by relying on the hierarchical structure.[118] In short, the German criminal justice system, as in France, shows the characteristics of a hierarchical structure irrespective of its federalised organisation.[119]

Finally, the German criminal procedure abolished the investigating magistrate who actively conducted serious investigations. In Germany, the investigating magistrate was considered as an unnecessary element in the criminal proceedings that 'duplicates ... the work already done by the public prosecutor.'[120] Hence, the reform of the code of criminal procedure of 1974 eliminated the investigating magistrate, and instead gave the responsibility for pre-trial investigation to the public prosecutor. Since then, the magistrate has merely played a passive role by issuing warrants to arrest and search. As Goldstein and Marcus noted, 'the elimination of the examining magistrates has meant that judges can supervise pre-trial investigation only if police and prosecutor adhere strictly to the Code.'[121] This is in contrast to France where the investigating magistrate [*juge d'instruction*] is still involved in the investigation of serious crimes.

The German public prosecution system has developed distinctive features even though it is rooted in the French code of criminal procedure of 1808 [*code d'instruction criminelle*]. The German prosecutors monopolise the prosecution process, but they have a duty to prosecute all crimes in order to prevent the misuse of the monopolised power.[122] The investigating magistrate who involved in the serious investigations was abolished. Instead the public prosecutors have the responsibility for a pre-trial investigation. With respect to the organisation, the public prosecutor's offices are

---

[117] Mirjan Damaska. 'Structures of Authority and Comparative Criminal Procedure' (1974) 84 Yale LJ 480, 488.

[118] Damaska stated that 'the police and prosecutorial offices are organized on the state, not federal, level. But s striving for uniformity is nevertheless obvious. In this connection it must also be noted that, for the sake of uniformity, both substantive and procedural criminal law tends to be heavily 'federalized' in all continental federations.' *See* ibid 488 n 9. In addition, in Germany, as external constraints are rooted in hierarchical structure, 'official agencies, including the police, are legally bound to report all criminal activity to the prosecutor's office.' For more details, *see* ibid 502-503.

[119] *See* ibid.

[120] Abraham S. Goldstein and Martin Marcus. 'The Myth of Judicial Supervision in Three Inquisitorial Systems: France, Italy, and Germany' (1977) 87 Yale LJ 240, 259.

[121] ibid 261-262.

[122] John H. Langbein. 'Controlling Prosecutorial Discretion in Germany' (1974) 41(3) The University of Chicago Law Review 439, 461 (Langbein stated that 'It is the prosecutorial monopoly that makes this such an extremely important question, because other officers or private citizens cannot come forward to take up the neglected prosecution. There are two ways to prevent the abuse of a monopoly-break it or regulate it. The prosecutor's monopoly would be broken if citizen prosecution were allowed as in England or France.')

structured on a federal basis. However, the German and French systems still have similarities which result from their hierarchical structure.

2.4. The United States

The United States system, as is the English, is representative of the common law tradition.[123] However, it is different from the English and, after World War II, its criminal procedure had an impact on a number of countries such as Japan and Korea.[124]

In the USA, the origin of public prosecution can be traced back to the system of private prosecution in the early colonial period when important elements of criminal process such as the court structure, the jury and the tradition of the private prosecution itself were introduced to the American colonies by the English.[125] However, the system of private prosecution, unlike its ancestor in England, existed for a relatively short period and was replaced by the public prosecution.

Private prosecution was considered to be incompatible with the colonial situation. For the colonists, crime control was one of the most important values, as they have to survive in a foreign environment.[126] Thus, the colonial government needed an effective system to control crime, which is difficult to achieve by depending on private prosecution.[127] As a consequence, some forms of public prosecution such as English 'attorney general,' Dutch '*schout*,' and French '*ministere public*' appeared soon after the settlement of colonies.[128]

Among those schemes, the system of attorney general contributed considerably to

---

[123] Francis J. Pakes, *Comparative Criminal Justice* (Willan Publishing, Cullompton; Portland 2004), 13.

[124] Dong-Woon Shin. 'An Analysis of the Korean Criminal Procedure: Focusing on the Establishment of the Act' (1987) 69 Seoul Law Journal 144; Dong-Woon Shin, 'An Analysis of the Korean Criminal Procedure during the Japanese Occupation' in *Korean Legal History Review* (Parkyoungsa, Seoul 1991) 401-417.

[125] David H. Flaherty, 'An Introduction to Early American Legal History' in David H. Flaherty (ed), *Essays in the history of early American law* (Published for the Institute of Early American History and Culture of Williamsburg, Va., by the University of North Carolina Press, Chapel Hill 1969) 3, 3-38; Juan Cardenas. 'The Crime Victim in the Prosecutorial Process' (1986) 9 Harvard Journal of Law & Public Policy 357, 366; Angela J. Davis, *Arbitrary justice: The power of the American prosecutor* (Oxford University Press, 2007), 9; Yue Ma. 'Exploring the Origins of Public Prosecution' (2008) 18(2) International Criminal Justice Review 190, 199.

[126] ibid.

[127] Angela J. Davis, *Arbitrary justice: The power of the American prosecutor* (Oxford University Press, 2007), 10; Juan Cardenas. 'The Crime Victim in the Prosecutorial Process' (1986) 9 Harvard Journal of Law & Public Policy 357, 366-372.

[128] In the early Dutch colonies such as New York, New Jersey, Delaware, and Pennsylvania, the Dutch officer '*schout*' dealt with the prosecution of crime. *See* Van Alstyne, W. Scott Jr. 'The District Attorney-A Historical Puzzle' (1952) Wis.L.Rev. 125, 130-131. In the region of Louisiana, as it was a French colony, it followed the French criminal procedure including the prosecution system. For more details, *see* Alain A. Levasseur. 'The Major Periods of Louisiana Legal History' (1995) 41 Loyola Law Review 585, 585-628.

the establishment of the modern public prosecution in the USA. As the attorney general stemmed from England, their role was initially limited to the protection of the interests of the Crown, as in England.[129] Yet, with increasing interest in crime control,[130] the role of attorney general was expanded into the prosecution of all crimes.[131]

This system developed further after the American Revolution. The US public prosecution service has brought about three important features which make it distinctive from other systems. Firstly, the US attorneys have enjoyed considerable independence even though they are federal public prosecutors who belong to the Department of Justice. The federal public prosecution service was established by the Judiciary Act of 1789.[132] This federal system was headed by the US attorney general and structured on a hierarchical organisation. However, the limits of the federal system were soon apparent as the US attorney general was 'a weakened office with vague supervisory powers, acting in an advisory capacity.'[133] There was almost no centralised control for the state district attorneys. This feature was rooted in the US tradition that 'local affairs should be handled locally', which prevented the attorney general from 'interfering with U.S. attorneys' daily operation.'[134] As a consequence, the district attorneys became so independent that they could make a decision autonomously in their districts.[135]

Secondly, the local public prosecutors achieved the elective status which led

---

[129] Cardenas op. cit. 369.

[130] ibid; Davis op. cit. 450 (Davis suggested that 'This development [of public prosecution] occurred not only as a remedy for the problems and abuses of private prosecution, but also as a result of the shift in philosophical view of crime and society. ... crime should be viewed as a social problem, not simply as a wrong against an individual victim.')

[131] For example, the Virginia state government appointed the first attorney general in 1643, whose main duty was to protect the interests of the English King. However, they began to deal with the public prosecution in the last quarter of the 17th century, and by 1711, assumed the responsibility of all prosecutions as well as trials in relation to serious crimes. *See* Oliver Perry Chitwood, *Justice in colonial Virginia* (Ams Pr Inc, 1905), 120. There are similar patterns noted in other colonies such as Maryland, New Hampshire, and Carolinas. *See* Ma op. cit. 200.

[132] The act provided the role of the US attorneys: 'a meet person learned in the law to act as attorney for the United States in such district, who shall be sworn or affirmed to the faithful execution of his office, whose duty it shall be to prosecute in such district all delinquents for crimes and offences, cognizable under the authority of the United States, and all civil actions in which the United States shall be concerned.' *See* 'Establishment of the judicial courts of the United States (September 24, 1789) s 35' in R. Peters (ed), *The public statutes at large of the United States of America* (Charle C. Little and James Brown, Boston 1846) quoted from Ma op. cit. 201.

[133] Joan E. Jacoby. 'The American Prosecutor: From Appointive to Elective Status' (1997) 31(5) The Prosecutor, 2.

[134] Ma op. cit. 202; This situation applied to the state level. The state attorney general also rarely exercised the power to overrule the county attorneys' decisions. For example, in Massachusetts, the office of the district and county attorney was created and placed under the 'nominal supervision' of the state attorney general in 1817. However, by 1843, with the increase in the independence of those attorneys, the state attorney general's office was eliminated because it was considered as unnecessary. *See* Joan E. Jacoby. 'The American Prosecutor: From Appointive to Elective Status' (1997) 31(5) The Prosecutor, 2.

[135] Ma op. cit.

increased their independence. The vote was extended to almost all citizens and many governmental offices were decided by election. [136] This trend, which is called 'Jacksonian democracy,' influenced the whole country, and in the end also changed the way of judicial selection.[137] As the public prosecutors were seen as part of the judiciary, the method to select them also changed. Before this, public prosecutors were mostly appointed.[138] This limited prosecutor's independence, as the authority who appointed them could interfere in making prosecutorial decisions.[139] However, nowadays, most states select the public prosecutors by election[140] and this is one of the most important elements in the development of the modern public prosecution service because, as Professor Ma noted, it has caused significant changes of 'the role and image' of the public prosecutors.[141] They are not organised in a centralised hierarchical structure, and moreover selected by election on a local basis. Thus, they are accountable to their constituents rather than superiors or ministry of justice.

Finally, soon after achieving elective status, the public prosecutors began to monopolise the prosecution of crime.[142] In general, the public prosecutors have the power to charge a suspect.[143] Unlike the German prosecutors, they do not have a duty to prosecute every crime as a principle, but instead enjoy 'broad discretion to prosecute or not to prosecute.'[144] Ramsey stated that this monopoly of prosecution resulted from

---

[136] Jacoby op. cit. 1.

[137] ibid; Berkson stated that 'By the time of the Civil War, 24 of 34 states had established an elected judiciary. ... As new states were admitted to the Union, all of them adopted popular election of some or all judges until the admission of Alaska in 1959.' For example, in 1812, Georgia's constitution was amended to select inferior court judges by election. In Mississippi, all judges had been elected since 1832. New York began to select judges by election from 1846. *See* Larry C. Berkson. 'Judicial Selection in the United States: A Special Report' (1980) 64(4) Judicature 176, 176.

[138] For example, the public prosecutors were appointed by the governor in Pennsylvania, by the attorney general in North Carolina, and by the local courts in Connecticut and Virginia. *See* Jacoby op. cit. 2.

[139] Ma op. cit. 202 (Professor Ma suggested that due to the appointive status, the prosecutors 'had to consider the wishes of the actors who had appointed them.')

[140] New Jersey and Connecticut still have the appointive system of selecting judges and prosecutors. *See* ibid.

[141] ibid 203.

[142] Until the mid-19th century, public prosecution had shared a room with private prosecution. *See* Mike McConville and Chester Mirsky. 'The Rise of Guilty Pleas: New York, 1800-1865' (1995) 22(4) Journal of Law and Society 443, 453-454, 464-466. However, in the second half of the 19th century, private prosecution began to disappear and instead public prosecution took over the monopoly of prosecution of crimes. For instance, in New York, criminal cases were often presented by the private lawyers in courts in the early 19th century. However, after the mid-19th century, representing victims by private lawyers was stopped. In addition, private settlements also were abolished. *See* Carolyn B. Ramsey. 'The Discretionary Power of" Public" Prosecutors in Historical Perspective' (2002) 39(4) Am Crim Law Rev 1309, 1327.

[143] 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 283, 289. However, as Walther put it, there are a small number of exceptions: 'Only in a minority of jurisdictions can the decision to file certain (minor) criminal charges be made by the police.'

[144] ibid.

both the elective status of the prosecutors and the increasing public demand for crime control.[145] The increase of crimes, which resulted from both industrialisation and growing population in urban areas, led people to demand greater state involvement.[146] Such a demand played a part in giving rise to the monopoly of the prosecution by the public prosecutors.[147]

The modern public prosecution in the USA stems from private prosecution but this was replaced because of the public demand for effective crime control. In this regard, the origin of the public prosecution system in the USA has a similarity to the French. The public prosecution of crimes in both countries began from the idea that crimes should be controlled by the state rather than private individual. However, unlike other countries in this study, the US public prosecutors are elected and as a result their roles and image have been developed in a different way to other systems. In particular, the greater independence of the US prosecutor has become one of the important features which can help them to reach 'the decision most appropriate to the circumstances of each case.'[148]

2.5. England and Wales

The English legal system is also representative of the common law tradition.[149] It has influenced the establishment of common law systems across the world, including the US. Consequently, as Dammer put it, many similarities are readily apparent.[150] However, there are still distinctive characteristics between two systems, in particular, as to the functions and status of the public prosecutors. The English system has indirectly influenced the Korean system through the US as it has provided the Korean criminal proceedings with the fundamental accusatorial elements.

In England and Wales, the modern public prosecution system was only created in the last quarter of the 20th century which was very recent when compared to other countries. The previous prosecution system was developed from the private prosecution of crime.

---

[145] Carolyn B. Ramsey. 'The Discretionary Power of Public Prosecutors in Historical Perspective' (2002) 39(4) Am Crim Law Rev 1309, 1327-1328.
[146] ibid; McConville and Mirsky op. cit. 460.
[147] Professor Ma stated that 'The establishment of urban police departments and the shift to the model of full public prosecution were driven by the same idea that state sponsored criminal justice would be more effective in accomplishing the goal of crime control.' *See* Ma op. cit. 203.
[148] Damaska op. cit. 509.
[149] Mireille Delmas-Marty and John R. Spencer (eds), *European Criminal Procedures* (Cambridge University Press, 2002), 3; Dammer et al. op. cit. 13, 77; Cole et al. op. cit. 27; John Bell, *Judiciaries within Europe: a comparative review* (Cambridge Univ Pr, 2006), 2.
[150] Dammer et al. op. cit.

Until early in the 19th century, as Professor Uglow stated, 'enforcement of the law was a communal responsibility'.[151] Ordinary citizens had as much power as the police in terms of arrest, search, and interrogation.[152] The private citizens initiated the prosecution, presented the evidence and examined witnesses in court.[153] The criminal process was only controlled by the court through the judicial monitoring methods, for instance, by issuing a warrant for arrest or search and deciding the prosecution.[154] However, this private prosecution was a burden to individuals. Not only did it cause inconvenience, but also resulted in the loss of money as well as time.[155] Thus, the power to prosecute was generally exercised by the 'member of the propertied class.'[156] To the working class, the criminal justice based upon the private prosecution was often considered as the unjust tool for 'social discipline.'[157] Such distrust in criminal justice played a part in developing the 'public' prosecution service but initially one in the hands of the police.[158]

In the 19th century, the mechanism of law enforcement was developed by the social changes which resulted from industrial revolution.[159] This development led to citizens increasingly expecting the police officer to conduct the prosecution on behalf of them.[160] As a result, since the establishment of the London Metropolitan Police in 1829, the police began to take charge of the prosecution on behalf of victims in a regular way until 1985.[161] However, this was not in principle the public prosecution. The police

---

[151] Steve Uglow. 'Independent Prosecutions' (1984) 11 Journal of Law and Society 233, 233.

[152] Andrew Sanders and Richard Young, *Criminal Justice* (3rd edn Oxford University Press, Oxford 2007), 321.

[153] Uglow op. cit.; Robin M. White. 'Investigators and Prosecutors or, Desperately Seeking Scotland: Re-formulation of the 'Philips Principle'' (2006) 69(2) Modern Law Review 143, 147.

[154] Sanders and Young op. cit. 321.

[155] Uglow op. cit. 234.

[156] Steve Uglow, *Criminal Justice* (2nd edn Sweet & Maxwell, London 2002), 188.

[157] ibid.

[158] Professor Uglow stated that 'To be effective, substance had to be given to the values of neutrality, universality and equality. In that context, the nineteenth century should have witnessed the right of private prosecution withering away and a public prosecution service taking its place.' *See* ibid.

[159] Those changes include the emergence of congested urban population and the increase in crimes. More effective system of law enforcement was critical to deal with crimes. In the 18th century, in London, organised groups of private agents known as thief takers, appeared. *See* Yue Ma. 'Exploring the Origins of Public Prosecution' (2008) 18(2) International Criminal Justice Review 190, 194.

[160] White states that 'during the nineteenth century, the burden was largely passed to the 'new police', who commenced prosecution as well as investigation'. *See* White op. cit. 147; Sanders and Young op. cit. 321.

[161] Fionda op. cit. 14 (Professor Fionda stated that 'The police were designated the first public prosecutors in 1829, rather more circumstantially than deliberately, due to the absence of a suitable alternative public agency.'); Uglow op. cit. 189 (Professor Uglow suggested that 'It was the success of the 'new' police that must have contributed to the decline of the private prosecutor and the still birth of any public successor. All too easily the police were seen not only as investigators but also as prosecutors.'); Ma op. cit. 194.

officers initiated prosecution as a private individual who was interested in retaining law and order rather than a public servant.[162]

Fifty years after the emergence of the police prosecutors, the first formal public prosecution agency, the Director of Public Prosecutions (DPP), was created by the Prosecution of Offences Act 1879.[163] The role of the DPP was to 'institute, undertake or carry on such proceedings and to give such advice or assistance to chief officers of police, clerks to the justices and other persons, as may be directed in a special case by the Attorney-General.'[164] Yet, the DPP only took up a small number of prosecutions of criminal cases. The vast majority of prosecutions were still conducted by the police prosecutors.[165]

There was no unified system for the police prosecution. The police who 'were responsible for initiating criminal prosecutions and bringing cases to court' developed the prosecution system in their own way.[166] For example, in the 1970s 31 of the 43 police forces had created their own prosecution departments while the rest employed private firms of solicitors to conduct prosecutions.[167] There was an ostensible separation of investigation and prosecution, but the prosecuting solicitors generally conducted the prosecution depending on the decisions taken by the police.

The prosecution by the police created an unclear border between the investigation and prosecution.[168] Such a functional mixture, as Philips put it, caused problems such as the prosecutions of evidentiary weak cases or 'overcharging' because police involvement restricted the prosecutor's role as a filter to screen the results of the investigation.[169] Sanders and Young illustrated this situation as follows:[170]

---

[162] Patrick Devlin, *The Criminal Prosecution in England* (Oxford University Press, London 1960) 118, 13-14.

[163] Fionda op. cit. 14.

[164] Prosecution of Offences Act 1979 s 2; Mansfield and Peay argued that 'The essential functions of the office have not altered substantially in the ensuing 100 years.' *See* Graham Mansfield, Jill Peay and University of Oxford. Centre for Criminological Research, *The Director of Public Prosecutions: principles and practices for the Crown Prosecutor: an inquiry carried out at the Centre for Criminological Research, University of Oxford* (Tavistock, London; New York 1987) 246, 8.

[165] Devlin op. cit. 20-21 (Devlin stated that 'The Director's cases amount only to about 8 per cent. of the total number of prosecutions for indictable offences. Another 4 per cent is accounted for by prosecutions brought by some public bodies, such as the Post Office, who handle their own cases and by those brought by private individuals. The remaining 88 per cent are police prosecutions.')

[166] Nicola Padfield, *Text and Materials on the Criminal Justice Process* (4th edn Oxford University Press, Oxford; New York 2008) 536, 162.

[167] ibid; For the process of development, *see* Devlin op. cit. 21; Steve Uglow, *Criminal Justice* (2nd edn Sweet & Maxwell, London 2002), 189.

[168] John R. Spencer, 'The English system' in Mireille Delmas-Marty and John R. Spencer (eds), *European Criminal Procedures* (Cambridge University Press, 2002) 142, 152.

[169] Sir Cyril Phillips, 'The Royal Commission on Criminal Procedure: Report' HMSO (Cmnd 8092, London), para 6.27.

[170] Andrew Sanders and Richard Young, *Criminal Justice* (3rd edn Oxford University Press, Oxford

> If the police insisted on prosecuting a weak case to further their crime control goals, or bring more serious charges than were warranted by the evidence ('overcharging'), there was little or nothing the prosecutor could do about it.

The modern public prosecution system, the Crown Prosecution Service (CPS), was created by the Prosecution of Offences Act 1985.[171] This set up an independent public prosecution system in order to improve efficiency and protect the interests of the defendants by separating the prosecution from investigation and preserving the filtering role of the prosecutors.

There are two salient features of the organisation and development of the CPS. First, unlike the structure of the police, the CPS was organised on a centralised national basis.[172] All 42 areas are directly answerable to the DPP whose role is to provide national guidelines and procedures in order to intervene in difficult or complex cases, to appoint and supervise personnel and to manage resources.[173] Despite this centralised hierarchical organisation, the CPS has operational independence from the government.[174] However, the CPS is accountable to the national government through the Attorney General rather than to local government. Consequently, the issue of autonomy of the crown prosecutor has been often a matter of debate.[175]

2007), 322.

[171] For more details on those discussions, *see* Justice. 'The Prosecution Process in England and Wales' (1970) Crim L R 668; Henry Fisher, *Report of an Inquiry into the circumstances leading to the trial of three persons on charges arising out of the death of Maxwell Confait and the fire at 27 Doggett Road, London SE6 (HCP 90)* (HMSO, London 1977); Phillips op. cit.

[172] The police are structured on a local basis. There are 43 local police forces, in each of which the chief constable and the local Police Authority share the responsibility for them. With regard to the political responsibility, the home secretary issue them regular guidance. However, s/he does not have the power to give them orders. *See* Spencer op. cit. 150.

[173] Uglow op. cit. 190; Those areas were originally designed as 31 in 1985. But, they were reduced to 13 in 1992 and reorganised as 42 areas in 1999. For more details on this development, *see* Iain Glidewell, 'The Review of the Crown Prosecution Service' The Stationery Office (Cm 3960, London).

[174] Terence Daintith and Alan C. Page, *The Executive in the Constitution: Structure, Autonomy, and Internal Control* (Oxford University Press, 1999), 222 (Daintith and Page argue that the Attorney General has the right to appoint the DPP, but his/her role is 'one of statutory superintendence rather than hierarchical authority on the usual Departmental pattern.'); Sanders and Young op. cit. 373.

[175] For the discussions before the establishment of the CPS, *see* Phillips op. cit. paras 7.23, 7.25-7.37; Steve Uglow. 'Independent Prosecutions' (1984) 11 Journal of Law and Society 233, 242; Home Office/Law Officers' Department, 'An Independent Prosecution Service For England and Wales' HMSO (Cmnd 9074, London) paras 9,10. After foundation of the CPS, there were discussions about its structure. *See* Iain Glidewell, 'The Review of the Crown Prosecution Service' The Stationery Office (Cm 3960, London) summary of the report part 1 para 5; Andrew Ashworth. 'Review of the Crown Prosecution Service' (1998) Crim L R 517; Francis J. Pakes. 'The Positioning of the Prosecution Service in the Netherlands and England and Wales: Lessons from One Extreme to Another' (1999) 21(2) Liverpool Law Rev 261.

Secondly, it was the police that initiated a prosecution even though the CPS could make an independent assessment. The Phillips committee suggested that the police had the power to open the criminal procedure because they were 'the first decision maker' on the street and their discretion should not be limited.[176] However, such discretion to initiate prosecutions was significantly changed by the statutory charging scheme based on the Criminal Justice Act 2003.[177] This reform was rooted in the Auld committee report which suggested the initiation of the prosecution by the CPS. The Auld committee considered the cause of the 'prolonged and disjointed nature' of criminal proceedings as 'the 'over-charging' by the police and failure by the Crown Prosecution Service to remedy it at early stage.'[178] In particular, the committee draw attention to 'the police charge':

> Much of the problem is due to the fact that the police, not the Crown Prosecution Service, initiate prosecutions. The police charge. The Crown Prosecution Service reviews the charge after the event; and, in doing so, it applies a more stringent test than that of the police.[179]

As a consequence of the statutory charging scheme, the prosecuting procedure became independent from the investigation of the police. At present, the CPS is responsible for not only maintaining prosecutions, but also making decisions whether to initiate criminal proceedings.[180]

To sum up, the prosecution of crime had been conducted de facto by the police before the emergency of the modern public prosecution system. However, this system was ineffective to protect the rights of the defendants because it did not have an objective regime to screen the investigation. Thus, the CPS was established to achieve an independent filter to review the police investigation.

2.6. Discussion

While each country has developed its own prosecution system depending on different

---

[176] Phillips op. cit. para 6.31.

[177] Ian D. Brownlee. 'The Statutory Charging Scheme in England and Wales: Towards a Unified Prosecution System?' (2004) Crim L R 896, 896.

[178] Robin Auld and Great Britain. Lord Chancellor's Dept, *The Review of the Criminal Courts of England and Wales : a Report* (Stationery Office, London 2001) 686, ch 10 para 35.

[179] ibid ch 10 para 37.

[180] The power to initiate prosecutions began to shift to the CPS in Kent and West Yorkshire on 17th April 2004. This process was completed in April 2006. *See* The Crown Prosecution Service. 'First phase of Statutory Charging goes live a year ahead of schedule' <http://www.cps.gov.uk/news/press_releases/118_06/index.html> accessed 26 April 2011.

historical, political and cultural contexts, two distinctive features can be noted in relation to all of them.

First, as seen in France and the USA, the public prosecution system was created for the effective crime control. As crimes began to be considered as an object that the state must control, the traditional private prosecution system was regarded to be incompatible with such a goal. As a result, the public prosecution took the place of the system of private prosecution. This trend is also seen in Japan where public support for crime control, led to an increase in prosecutorial powers until 1945. The role of the public prosecution service is closely associated with Packer's ideas of crime control.

Second, the separation of the functions is another important factor in establishing independent public prosecution systems. This feature is more closely associated with Packer's notions of due process. The establishment of the CPS in England & Wales and the German public prosecution system are examples. In England and Wales, both investigation and prosecution were de facto conducted by the police. However, this meant the lack of a significant filter to screen the investigation. In the end, the English criminal proceedings established an independent public prosecution service to separate the prosecution from investigation.

The German public prosecution system was also established to secure the objectivity of the criminal procedure. Before the introduction of the public prosecution system, the inquisitorial judge had the combined functions of the prosecution and judgement. However, the system could not preserve judicial neutrality and to overcome this drawback, investigating judges were abolished and the independent public prosecution system was adopted. The objectivity of the public prosecutors was then encapsulated in the code. As the prosecutors also may lose the neutrality by being involved in the preliminary investigation, the German code of criminal procedure has required the prosecutor to have 'a judge-like impartiality' from the outset.[181]

In short, the public prosecution systems have been in general created to carry out two, perhaps conflicting, roles. Prosecutors play a role in controlling crimes by charging criminal offenders on behalf of victims but they also have a duty to protect the defendant's rights as an objective filter between the investigation and judgement. Due to this role, they are often called as a quasi-judicial officer.

[181] John H. Langbein. 'Controlling Prosecutorial Discretion in Germany' (1974) 41(3) The University of Chicago Law Review 439, 449.

3. The General Role of the Public Prosecutors

Before moving on to the specific functions of the prosecution service, this part briefly examines the general role of the public prosecutors in different criminal proceedings. In the fact finding process, the prosecutors, as discussed in Chapter 3, are normally required to have 'prosecutorial neutrality', which is often called the 'quasi-judicial role' and have a duty to act impartially while conducting their duties.[182]

As the protection of the defendant's rights may be seen as no less important than the effective crime control, many jurisdictions have emphasised such a role of the prosecutors. However, there seems to be differences in the precise manner in which such a quasi-judicial role appears as each criminal justice system has distinctive legal cultures.[183] In many jurisdictions, the prosecutor is regarded as an important officer who has a duty to 'uphold not merely the letter of the criminal law but also those legal values which belong to fundamental human rights.'[184]

In Korea, the quasi-judicial role of the prosecutors is not provided for in the statutes or rules. The prosecutor's status of 'a representative of the public interests' is interpreted as the reason why they have a duty to be objective while carrying out their missions.[185] However, this is not good enough to maintain the neutrality of the prosecutor as a quasi-judicial officer. Thus, the damage caused to defendants by the loss of the prosecutor's objectivity occasionally needs to be remedied by tort law.[186] This may be useful because it helps to guarantee the prosecutorial neutrality.

The Japanese, as in Korea, regard the public prosecutors as a quasi-judicial officer.[187] In particular, as Koyama described, the trust of the people in the prosecution service is based on such a role:

> It has always been believed that there is little criminal defence work, especially at the stage of investigation, owing to "proper and precise" investigation and high confession and conviction rates. This belief is based on confidence in the integrity of public prosecutors

---

[182] Stanley Z. Fisher. 'In Search of the Virtuous Prosecutor: A Conceptual Framework' (1988) 15 Am J Crim Law 197, 216; Andrew Ashworth. 'Developments in the Public Prosecutor's Office in England and Wales' (2000) 8 European Journal of Crime, Criminal Law and Criminal Justice 257, 281-282.; Bruce A. Green and Fred C. Zacharias. 'Prosecutorial Neutrality' (2004) Wis L Rev 837.

[183] John D. Jackson. 'The Effect of Legal Culture and Proof in Decisions to Prosecute' (2004) 3(2) Law, Probability and Risk 109, 112.

[184] Ashworth op. cit. 281-282.

[185] Jae-Sang Lee, *Korean Criminal Procedure* (2nd edn Park Young Sa, Seoul 2008), 103.

[186] *2001 DA 23447* (2002) 152 Panre Gongbo 753 (Korean Supreme Court).

[187] A. Didrick Castberg. 'Prosecutorial Independence in Japan' (1997) 16 UCLA Pac.Basin LJ 38, 43.

> who conduct reinvestigations and exercise wide discretion in deciding whether to prosecute as "quasi-judicial" officers.[188]

The Japanese prosecutors have both 'quasi-judicial and executive' roles.[189] However, there is again no provision in the statutes to guarantee the prosecutorial objectivity. In theory, tort actions against the prosecutors may be a method to force them to act impartially.[190]

The German code of criminal procedure, unlike the Korean and Japanese, specifically provides the quasi-judicial role of the public prosecutors. Accordingly, they have a duty to seek out not only incriminating, but also exonerating evidence.[191] In addition, they can appeal against court decisions in order to protect the benefits of the accused.[192] Due to such a role, the prosecutors are regarded not as a party to the proceedings, but as 'a neutral representative of the state.'[193] Goldstein and Marcus described the development of the prosecutor's status as follows:

> The relative lack of judicial control and the independence of police and prosecutors are reconciled with inquisitorial theory by resort to fictions. The public prosecutors in France and Italy are treated as part of the judiciary, and their investigations are considered to be conducted in their "judicial" capacity. Similarly, the abolition of the examining magistrate

---

[188] Masaki Koyama, 'The Public Prosecutor, Criminal Law and the Rights of Accused in Japan: Yet to Strike a Balance?' in Stuart S. Nagel (ed), *Handbook of Global Legal Policy* (CRC, 2000) 39, 43; As Haley argued, the public trust in judges, the police, and prosecutors is very high in Japan: '*Public opinion polls routinely reveal judges along with the police and prosecutors to enjoy the highest levels of public trust.* The degree of public confidence in the courts in Japan is especially notable in comparison with other civic and government institutions, and other countries, including the United States. Newspaper polls, for example, routinely show that trust of the courts in Japan is second only to the procuracy and police. In one relatively recent Yomiuri Newspaper poll trust in the judiciary was three times as great as trust in religious institutions or the self-defense forces, and five times greater than for the Diet, more than seven times greater than for offices of the national government. The Prime Minister ranked last. Trust in the courts in the United States, however, was less than half the Japanese level and ranked below all religious institutions and all political branches except national government offices.' *See* John O. Haley, 'The Japanese Judiciary: Maintaining Integrity, Autonomy and the Public Trust' in Daniel H. Foote (ed), *Law in Japan: A Turning Point* (Univ of Washington Pr, 2008) 99, 127 (Emphasis added).

[189] Castberg op. cit. 43.

[190] Yasutoshi Tamura. 'Prosecutorial Immunity in Criminal Proceedings in Japan: A Comparative Study' (1993) 1 Willamette Bull.Int'l L.& Pol'y 45, 50-51. (In particular, as Tamura put it, such misconducts bringing about tort actions mainly stem from the investigative function of the public prosecutors.)

[191] Federal Ministry of Justice (tr), Germany, *Criminal Procedure Code [Strafprozeßordnung]* (1987) s 160 (2)

[192] ibid s 296 (2) 'The public prosecution office may also make use of [the remedies admissible against court decisions] for the accused's benefit.' <http://www.iuscomp.org/gla/statutes/StPO.htm#11>.

[193] Kuk Cho. "'Procedural weakness" of German Criminal Justice and its Unique Exclusionary Rules based on the Right of Personality' (2001) 15(1) Temple International and Comparative Law Journal 1, 5.; Rodolphe Juy-Birmann, 'The German system' in Mireille Delmas-Marty and John R. Spencer (eds), *European Criminal Procedures* (Cambridge University Press, 2002) 292, 300.

> in Germany has been explained not as an attempt to replace a judicious magistrate with a partial prosecutor, but rather as based on the assumption that the prosecutor can conduct *as impartial-as "judicial"*- an investigation as a member of the judiciary.[194]

The quasi-judicial role of the prosecutors in Germany was developed to make up for the elimination of the inquisitorial judges who took up the prosecution and trial. The prosecutors had been required to act impartially on behalf of the inquisitorial judges.

In France, the task of the public prosecutors is to prove the guilt of the defendant. However, they can demand not only the conviction of the accused and penalty, but also the acquittal or dispensation of the penalty.[195] The code of criminal procedure provides implicitly the objectivity of the prosecutors by requiring them act 'to the ends of justice'.[196] Yet, it does not specify particular duties of the prosecutor as a quasi-judicial officer.

In the USA, such a quasi-judicial role has been explicitly provided in the Standards of Criminal Justice (SCJ) of American Bar Association. According to the standard 3-1.2 of the SCJ, the public prosecutors have a duty 'to seek justice, not merely to convict' as a minister of justice.[197] In particular, with respect to the disclosure of evidence, the public prosecutors ought not to avoid deliberately pursuit of exonerating evidence even if such evidence damages the prosecution of cases and aids the accused.[198] This duty was confirmed by the judgement of the US Supreme Court in *Berger*:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so.

---

[194] Abraham S. Goldstein and Martin Marcus. 'The Myth of Judicial Supervision in Three Inquisitorial Systems: France, Italy, and Germany' (1977) 87 Yale LJ 240, 249 (Emphasis added).

[195] Valerie Dervieux, 'The French system' in Mireille Delmas-Marty and John R. Spencer (eds), *European Criminal Procedures* (Cambridge University Press, 2002) 218, 246.

[196] Ministry of Justice and John R. Spencer (trs), France, *Code of Criminal Procedure* (2000) art 458 'The district prosecutor makes, in the name of the law, such written and oral submissions as he considers appropriate *to the ends of justice.*'(Emphasis added).

[197] American Bar Association, *Standards for Criminal Justice: Prosecution and Defense Function* (3rd edn ABA, New York 1993) Standard 3-1.2 (The Function of the Prosecutor) '(a) The office of prosecutor is charged with responsibility for prosecutions in its jurisdiction. (b) The prosecutor is an administrator of justice, an advocate, and an officer of the court; the prosecutor must exercise sound discretion in the performance of his or her functions. (c) The duty of the prosecutor is to seek justice, not merely to convict.'

[198] ibid Standard 3-3.11 (Disclosure of evidence by the prosecutor)

> But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[199]

The US Supreme Court placed emphasis on the impartiality of the public prosecutors, whose fundamental role is not only to win a case, but also to seek justice as a servant of the law.

In England and Wales, the neutrality of the prosecution service has been regarded as an important value because the prosecutorial objectivity is one of the main concerns to create the CPS.[200] Such a quasi-judicial role is encapsulated in the Code for Crown Prosecutors:

> Prosecutors must be fair, independent and objective. They must not let any personal views about the ethnic or national origin, gender, disability, age, religion or belief, political views, sexual orientation, or gender identity of the suspect, victim or any witness influence their decisions. Neither must prosecutors be affected by improper or undue pressure from any source. Prosecutors must always act in the interests of justice and not solely for the purpose of obtaining a conviction.[201]

Accordingly, the public prosecutors must be fair and objective both when they review the investigations and when they make a decision to charge the offenders. Furthermore, their prosecutions ought to be based on the 'interests of justice' rather than 'improper pressure' to make them pursue the conviction.

In short, each criminal justice system has different descriptions and methods to maintain the quasi-judicial role of the prosecutors. Nevertheless, this role is regarded as a general duty of the prosecutors.[202] Prosecutorial neutrality is one of the most

---

[199] *Berger v United States* (1935) 295 U.S. 78 (The U.S. Supreme Court), 88.

[200] Ashworth and Redmayne op. cit. 203-204.; Sanders and Young op. cit. 334 (Sanders and Young argued that 'the CPS is ... supposed to be act as a neutral truth seeking "Minister of Justice".')

[201] The Code for Crown Prosecutors 2010 para 2.4.

[202] The impartiality was agreed as one of the standards for the duties of the prosecutors by the International Association of Prosecutors in 1999. *See* International Association of Prosecutors, *Standards of professional responsibility and statement of the essential duties and rights of prosecutors* (IAP, 1999) para 3 'Prosecutors shall perform their duties without fear, favour or prejudice. In particular they shall: carry out their functions impartially; remain unaffected by individual or sectional interests and public or media pressures and shall have regard only to the public interest; act with objectivity; have regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect; in accordance with local law or the requirements of a fair trial, seek to ensure that all necessary and reasonable enquiries are made and the result disclosed, whether that points towards the guilt or the innocence of the suspect; always search for the truth and assist the court to arrive at the truth and to do justice between the community, the victim and the accused according to law and the dictates of fairness.'

important elements to sustain a public prosecution system, and thus the various functions of the public prosecutors should be compatible with such a general duty.

4. Investigative Function of Prosecution Service

In theory, investigation is a separate function from prosecution. The prosecutors begin their work by reviewing the investigation after receiving the case from the police and make a decision whether to proceed with the prosecution. Under these circumstances, the prosecution service does not seem to be involved in the investigation. However, as Professor Uglow suggested, in practice, it is almost impossible to divide both functions completely.[203] The investigative function of the prosecutors can be divided into two categories depending on the extent of their involvement in the investigation: 'supervision or advice on the police investigation' and 'direct investigation on their own initiative.' In this part, based on those two concepts, the investigative function of prosecution service in different jurisdictions is explored.

As suggested above, in some criminal justice systems, the public prosecutors directly investigate cases or supervise police investigation whereas in other jurisdictions, the police merely seek advice from the prosecutors who consult the police. But in both circumstances, the public prosecutors can be regarded as playing an investigative role. However, there are two main differences between jurisdictions, firstly in the relationship between the police and prosecutors and secondly the involvement of the prosecutors into the investigation.

The first is based on Damaska's structures of authority, which identifies two models: the coordinate and the hierarchical.[204] We can identify distinctive decision making processes between the police and prosecutors. In the coordinate model, independent decision making is regarded as an important value.[205] Thus, the relationship between the police and prosecutors is organised on a coordinate structure.[206] As a consequence,

---

[203] Steve Uglow, *Criminal Justice* (2nd edn Sweet & Maxwell, London 2002), 190. As a consequence, the police prosecution or prosecutorial investigation can take place in the criminal proceedings. For the details on the police prosecution, *see* above pt 2; Stephanie Beck. 'Under Investigation: A Review of Police Prosecutions in New Zealand's Summary Jurisdiction' (2006) 12 Auckland University Law Review 150; Van Alstyne, W. Scott Jr. 'The District Attorney-A Historical Puzzle' (1952) Wis.L.Rev. 125, 126-127.

[204] Mirjan Damaska. 'Structures of Authority and Comparative Criminal Procedure' (1974) 84 Yale LJ 480.

[205] ibid 509; John D. Jackson. 'The Effect of Legal Culture and Proof in Decisions to Prosecute' (2004) 3(2) Law, Probability and Risk 109, 116.

[206] Damaska stated that the aim of this structure is to reach 'the decision most appropriate to the circumstances of each case.' *See* Mirjan Damaska. 'Structures of Authority and Comparative Criminal Procedure' (1974) 84 Yale LJ 480,509.

there seems no room for direct prosecutorial supervision of the police investigation. Instead, the public prosecutors work on the basis of 'advice and counsel.'[207] By contrast, in the hierarchical model, the police and prosecutors are organised into a hierarchy, as in most continental jurisdictions. Thus, police investigations are mostly supervised by prosecutors.[208]

The second difference reflects the degree of involvement of the public prosecutors in the investigation: the investigative and the adjudicative.[209] The investigative approach of the prosecutors, as Jackson suggested, is to 'form a judgement about the guilt of the accused' before making a decision to prosecute.[210] Thus, in this model, the evidence is generally investigated thoroughly before charging by the prosecutors.[211]

On the contrary, in the adjudicative approach, the decision to prosecute is based upon an objective assessment of the evidence presented by the police.[212] If the prosecutors conclude that there is sufficient evidence, they charge the suspects even though they do not necessarily have a belief in guilt. Worboys who emphasised the adjudicative approach argued that 'such a personal belief in the guilt or innocence of an accused is generally held to be an impediment to fairness and objectivity in reaching the decision to prosecute or to continue with a prosecution.'[213]

Taken together, the role of public prosecutors and their relationship with the police can be effectively explored through a mixture of such contrasting models: 'coordinate & adjudicative', 'coordinate & investigative', 'hierarchical & adjudicative', and 'hierarchical & investigative'.[214]

4.1. The Coordinate and Adjudicative Model

In this model, the prosecutors place emphasis on adjudication rather than investigation,

---

[207] Ken Macdonald. 'Building a Modern Prosecuting Authority' (2008) 22(1) International Review of Law, Computers & Technology 7, 14. (Ken Macdonald QC, a former Director of Public Prosecutions, described the role of the prosecutors with respect to the police investigation as follows: 'public prosecutors have moved into police stations, to work side by side with investigators, *giving advice and counsel* when it is necessary. Sometimes they help the police to design operations.') (Emphasis added)

[208] Jackson op. cit. 116.

[209] ibid 117, Glanville Williams. 'Letting off the Guilty and Prosecuting the Innocent' (1985) Crim L R 115, and P. Worboys. 'Convicting the Right Person on the Right Evidence' (1985) Crim L R 764.

[210] Jackson op. cit.

[211] ibid.

[212] Worboys op. cit.

[213] ibid 764.

[214] Those four models were suggested by Jackson to 'identify a range of contrasting ideal types of prosecutorial assessment of evidence.' *See* Jackson op. cit. 116-124. In this study, the investigative function of the public prosecutors and their relation with the police will be discussed with reference to the basic structure of those models.

and their relationship with the police is coordinate. The CPS in England and Wales represent this model.

The English criminal justice system considers the objectivity of the public prosecutors as one of the important values. Thus, the role of the public prosecutor in the investigation has been limited to 'an evaluative one assessing the sufficiency of evidence' rather than an investigative forming belief in the guilt before the trial.[215] Such a role has been established from the outset of the CPS based on the recognition of the Royal Commission:

> A police officer who carries out an investigation, inevitably and properly, forms a view as to the guilt of the suspect. Having done so, without any kind of improper motive, he may be inclined to shut his mind to other evidence telling against the guilt of the suspect or to overestimate the strength of the evidence he has assembled.[216]

The independent public prosecution service was established in order to screen any biases that the police may have.[217] Jackson argues that such emphasis on the prosecutorial objectivity leads the crown prosecutors to concentrate on the adjudication rather than on the investigation.[218] Needless to say, the prosecutors do not have the power and resources to directly investigate criminal cases.

For a similar reason, the public prosecutors do not have the authority to supervise the police. As a consequence, their relationship with the police is one of equality, on a coordinate basis.[219] With respect to this, the Royal Commission stated as follows:

> [W]e do not consider it appropriate for the CPS to supervise police officers in the investigation ... serious confusion of roles would be likely to result to no good purpose if the CPS, whose task is to assess the results of investigations in terms of the prospects of prosecution to conviction for the offence involved, were to direct investigations themselves.

---

[215] ibid 118.

[216] Sir Cyril Phillips, 'The Royal Commission on Criminal Procedure: Report' HMSO (Cmnd 8092, London) para 6.24.

[217] *See* above pt 2 'The Development of the Modern Public Prosecution Service'.

[218] Jackson op. cit. 118. This prosecutor's position can be noted in Northern Ireland. The DPP for Northern Ireland states the challenges of the new prosecution service: 'It is the duty of the Chief Constable to investigate offences and to furnish evidence and information to the Director. It is the duty of the Director to consider the evidence and information and where he thinks proper to undertake criminal proceedings. Involvement of members of my staff in investigations would lessen or appear to lessen the capacity of the prosecuting service *to form the properly impartial judgement* which is required in the decision whether or not to prosecute.' *See* ibid 119 (Emphasis added).

[219] Criminal Justice Act 2003 s 3 (2) 'It shall be duty of the Director (e) to give, to such extent as he considers appropriate, advice to police forces on all matters relating to criminal offences.'

> Such a step would also remove accountability in this area from the police, with whom it most naturally belongs. Although, therefore, the CPS must be in a position to advise on the evidence that is required if the case is to go forward to trial, it should not be in the position of supervising the gathering of the evidence.[220]

The crown prosecutors do not supervise the investigation but instead advise on evidential aspects of individual cases. This ensures the objectivity of the public prosecutors and acts as an important filter. The system places great weight on the adjudicative role rather than investigative. Such a role may limit the effectiveness of their supervisory role.

4.2. The Coordinate and Investigative Model

Even though the relationship between the police and prosecutors is based on the coordination, the public prosecutors can become actively involved in the investigation through two different ways: 'the dynamic of the particular relationship', as in the US, or the direct investigation by prosecutors, as in Japan.[221]

First, in the USA, the relationship between the police and prosecutors is based on a coordinate model rather than a hierarchical one.[222] The criminal procedure does not authorise the hierarchical supervision by the prosecutors,[223] and instead the Standards for Criminal Justice defines their function as an 'advisor' to the investigation of the police.[224] However, in such a relationship, the public prosecutors do not emphasise their adjudicative role, as with the CPS in England and Wales, but rather become involved in the investigation.[225] Jackson described this circumstance as follows:

---

[220] Walter G. Runciman, 'The Royal Commission on Criminal Justice: Report' HMSO (Cm 2263, London) ch 2 para 67. Along with those two reasons, the Royal Commission noted the competency of the prosecutor as a supervisor of the investigation: 'It is the responsibility of the police to investigate crime. There is no reason to believe that another service, whose members are recruited and promoted for their legal skills and experience, would be more proficient at investigating crime or at supervising and monitoring investigations conducted by those specifically trained for the purpose.'

[221] Jackson op. cit. 120.

[222] Mirjan Damaska. 'Structures of Authority and Comparative Criminal Procedure' (1974) 84 Yale LJ 480, 511-521.

[223] Jackson op. cit. 120 (Jackson argued that 'although the prosecutors are involved in the investigations of the police, "prosecutorial control" is by no means guaranteed' in the USA.)

[224] American Bar Association, *Standards for Criminal Justice: Prosecution and Defense Function* (3rd edn ABA, New York 1993) Standard 3-2.7 '(Relations with Police) (a) The prosecutor should provide legal advice to the police concerning police functions and duties in criminal matters. (b) The prosecutor should cooperate with police in providing the services of the prosecutor's staff to aid in training police in the performance of their function in accordance with law.'

[225] Little stated that 'Public prosecutors in this country [the USA] have increasingly become involved in the investigative stages of criminal matters during the 20th century.' *See* Rory K. Little. 'Proportionality

> Prosecutors in the United States expressed bewilderment at how prosecutors in England and Wales and Northern Ireland could maintain such a rigid separation between investigation and prosecution. To them part of the function of prosecution was to ensure that a case was properly investigated and prepared and this required a degree of control over investigation. It was acknowledged, however, that within a coordinate structure of decision-making, the prosecutor does not enjoy complete control over the direction of investigations.[226]

Notwithstanding this, public prosecutors do not have an investigative role in all criminal cases.[227] Their investigative role is mainly limited to the particular cases which require 'investigative strategy and action' before any prosecution such as organised crime, public corruption or serious fraud.[228]

In particular, the federal prosecutors, who are called 'the US attorneys,' occasionally investigate crimes themselves. Rudolph Giuliani, the former Mayor of the New York City, is an example to show the investigation of the federal prosecutors in the USA. He worked as the US attorney for the Southern District of New York and mainly dealt with the investigations of the white-collar and organised crimes.[229] As Nelken and Levi put it, some of federal prosecutors 'are looking for political advancement, and the pursuit of high-publicity cases, including white collar crime and corruption, is an expected part of their self-glorifying role.'[230] This end has a part to play in leading the federal prosecutors to investigate criminal cases on their own initiatives.[231] However, as Johnson stated, such direct involvements in the investigation is an exception to the US rule.[232]

---

as an Ethical Precept for Prosecutors in Their Investigative Role' (1999) 68 Fordham Law Review 723, 724. Such involvements can be noted in the judgements of the court. *See Imbler v. Pachtman* (1976) 424 U S 409 (The U.S. Supreme Court), 430-431 and *Burns v. Reed* (1991) 500 U S 478 (The U.S. Supreme Court), 487-496. Langbein suggested that 'The public prosecutor in Anglo-American criminal procedure performs two primary functions. One is investigatorial – evidence gathering – and this has no firm border with the higher levels of the policing function.' *See* John H. Langbein. 'The Origins of Public Prosecution at Common Law' (1973) 17(4) The American Journal of Legal History 313, 313.

[226] Jackson op. cit. 119-120.

[227] Little op. cit. 728.

[228] ibid.

[229] David Nelken and Michael Levi. 'The Corruption of Politics and the Politics of Corruption: An Overview' (1996) Journal of Law and Society 1, 11.

[230] ibid.

[231] The duty of the US attorney is the prosecution of offences rather than investigation. *See* The U.S., *The Constitution* (1787) Title 28 s 547 (Duties).

[232] David T. Johnson, *The Japanese Way of Justice: Prosecuting Crime in Japan* (Studies on law and social control, Oxford University Press, Oxford; New York 2002), 52. (Johnson argues that the direct investigations by prosecutors 'are exceptions to the U.S. rule. Unlike Japan, in the American offices ... prosecutors conduct few interviews (especially prior to the charge decision) and even fewer

In preparation for trial, prosecutors often take additional investigative measures even in 'reactive investigative settings, where the crime is identified and the perpetrator is in custody.'[233] Even if the number of cases where the prosecutors play an investigative role is not large, such a role of the prosecutors, as Little put it, has been considered significant due to its impact.[234] However, such involvement of the prosecutors in investigation has limitations. The US Supreme Court clarified that the investigative role of the prosecutors had to be closely associated with the judicial process in order to secure the 'absolute immunity' of the prosecutorial decisions.[235]

Second, Japanese criminal proceedings show hybrid features.[236] In principle, the relationship between the police and prosecutors is based on a coordinate structure.[237] In general, the public prosecutors cannot direct the police investigation, but rather give advice on the criminal cases. However, article 193 of the Japanese Code of Criminal Procedure (JCCP) partially allows public prosecutors to supervise the police when they conduct their own investigation.[238] As a result, the police have primary responsibility for the investigation without prosecutorial supervision, whereas the public prosecutors can conduct a complementary investigation of the cases which are sent to them by the police after the primary investigation.[239] To conduct this complementary investigation,

---

interrogations.') Along with the federal prosecutors, the district attorney occasionally investigate cases themselves.

[233] Little op. cit. 728.

[234] Little argued that 'The involvement of prosecuting attorneys in the investigative function is valuable, because intrusive investigative decisions are not left solely to law enforcement personnel. Prosecutors, due to their training, experience, and temperament, can provide a healthy brake on non-lawyer enforcement personnel. Moreover, as lawyers, prosecutors are subject to ethical regulation and bar discipline, checks on discretion that are unavailable for regulating non-lawyers law enforcement agents.' *See* ibid 729.

[235] *Burns v. Reed* (1991) 500 U S 478 (The U.S. Supreme Court), 495 (The US Supreme Court held that 'The United States argues that giving legal advice is related to a prosecutor's roles in screening cases for prosecution and in safeguarding the fairness of the criminal judicial process ... That argument, however, proves too much. Almost any action by a prosecutor, including his or her direct participation in purely investigative activity, could be said to be in some way related to the ultimate decision whether to prosecute, but we have never indicated that absolute immunity is that expansive. Rather, as in Imbler, we inquire whether the prosecutor's actions are closely associated with the judicial process. Indeed, we implicitly rejected the United States' argument in Mitchell, supra, where we held that the Attorney General was not absolutely immune from liability for authorizing a warrantless wiretap. Even though the wiretap was arguably related to a potential prosecution, we found that the Attorney General "was not acting in a prosecutorial capacity," and thus was not entitled to the immunity recognized in Imbler.')

[236] Dammer et al. op. cit. 93.

[237] The Ministry of Justice (tr), Japan, *Code of Criminal Procedure (Act no. 131)* (1948) art 192 'There shall be mutual cooperation and coordination on the part of public prosecutors and the Prefectural Public Safety Commission and judicial police officials regarding the investigation.' <http://www.japaneselawtranslation.go.jp/law/detail/?printID=&ky=lineal+descendant&re=02&page=1&vm=02>

[238] ibid art 193 (3) 'A public prosecutor may, when it is necessary for the prosecutor him/herself to investigate an offense, issue orders to judicial police officials and have them assist in the investigation.'

[239] Johnson op. cit. 52; Dong Hee Lee op. cit. 737, Jong Gu Kim op. cit. 364; Most criminal cases

the prosecutor can call on and supervise the police. But in practice such an investigation is conducted by the prosecutors themselves.[240]

Unlike other systems, the public prosecutor's offices in Japan have their own investigative units.[241] At present, in thirteen out of fifty prosecutor's offices, the public prosecutors conduct investigations of corruption, organised crime and white-collar crimes.[242] In particular, most criminal enquires into high profile corruption are initiated by the public prosecutors rather than by the police.[243] Japanese prosecutors are involved vigorously in such investigations because, as Castberg stated, they in general require sufficient evidence before charging:

> One of the great fears of Japanese prosecutors is that a suspect will destroy evidence, so many initial investigations, especially in corruption cases, are made secretly to gather sufficient evidence for a search warrant and an arrest warrant so that the suspect may be detained long enough for prosecutors to seize all relevant evidence and use that evidence to bring about an indictment.[244]

Accordingly, as Johnson described, 'front-line prosecutors spend most of their work time (perhaps 60 per cent) investigating cases.'[245] The prosecutors try to elicit 'confessions directly, by interrogating suspects,' and more often interview them 'to confirm the details of confessions by the police.'[246] That is to say, the Japanese criminal proceedings place much emphasis on the investigative role of the prosecution service.[247]

---

investigated by the police must be sent to the prosecutor's office because only the prosecutors have the authority to end the cases. For more details, *see* pt 5 'Discretion at the Pre-Trial Stage'.

[240] The Ministry of Justice (tr), Japan, *Code of Criminal Procedure (Act no. 131)* (1948) art 193 (3). However, with regard to the interpretation of this provision, the police and the prosecutors have different opinions, which lead to the friction between them. Johnson described this situation thus: 'Police tend to interpret [this provision] as referring only to investigations the prosecutors have independently initiated..., while prosecutors construe them more broadly to cover all investigations, whether initiated by prosecutors or by police... These disagreements were especially strong in the first two decades or so after the new CCP was enacted in 1947.' Yet, such dispute is still intense. *See* Johnson op. cit. 53.

[241] Castberg op. cit. 53 n 66; Marcia E. Goodman. 'Exercise and Control of Prosecutorial Discretion in Japan' (1986) 5 UCLA Pac.Basin LJ 16, 22.

[242] Prior to 1998, the investigation units existed only in three public prosecutor's offices - Tokyo, Osaka, and Nagoya. However, in August of 1998, the new investigation units were established in ten prosecutor's offices such as Kyoto and Kobe etc. *See* Dong Hee Lee et al. op. cit. 715; Goodman op. cit. 22.

[243] Castberg op. cit. 74 (According to Castberg, 'In 1993, for example, the Special Investigation Department of the Tokyo District Public Prosecutor's office initiated 15 cases, only one of which was sent to them by the police.'); In 2001, 7,691 suspects, which are 0.4 per cent of all suspects, were investigated in their special investigative units of the public prosecutor's offices. *See* Dong Hee Lee et al. op. cit. 772.

[244] Castberg op. cit. 45-46.

[245] Johnson op. cit. 52.

[246] ibid 126; For the impact of confession in Japan, *see* pt 6 'The Influence of the Prosecutors upon the Trial'.

[247] Castberg op. cit. 71.

However, this circumstance, as a former judge of the Osaka High Court argued, has a part to play in weakening the whole adjudicative process: 'Criminal trials – and in particular the fact-finding that lies at the heart of trials – are conducted in closed rooms by the investigators. Many court proceedings are merely "formal ceremony" and "empty ritual".'[248]

In short, in the USA and Japan, the relationship between the police and prosecutors is structured on a coordinate basis. But the rigid separation between the investigation and prosecution, apparent in England and Wales, is less obvious. Rather, in both jurisdictions, the prosecutors' investigative role is regarded as more important than their adjudicative. In particular, the Japanese prosecutors seem to be more strongly involved in the investigation than their counterparts in the USA, conducting extensive investigations with their own resources and legal authorities.

4.3. The Hierarchical and Adjudicative Model

Unlike the common law traditions, the continental criminal justice systems are based on a hierarchical structure.[249] The French criminal procedure is a representative of such a tradition.[250] The prosecutors have an authority to supervise the investigation by the police and the relationship between the police and prosecutors is structured on a hierarchical basis.[251]

However, the French criminal procedure leads public prosecutors to concentrate on the adjudicative role rather than the investigative.[252] This is because of the impact of the role of investigating judge [*juge d'instruction*].[253] In the French procedure, investigations are categorised into three groups. Firstly, the investigations of serious

---

[248] Takeo Ishimatsu, 'Are Criminal Defendants in Japan Truly Receiving Trials by Judges?' in Daniel H. Foote (tr), *Law in Japan* (1989) 143 cited from Johnson op. cit. 126.

[249] Damaska op. cit. 487. Damaska defined the features of the continental criminal procedure as follows: 'the strong tendency to arrive at uniform policies through the centralization of authority; the rigorously hierarchical ordering of agencies participating in the administration of justice; the preference for precise and rigid normative directives over more flexible standards; and, finally, the great importance accorded official documentation.'

[250] *See* pt 1 'Introduction' and pt 2 'The Development of the Modern Public Prosecution Systems'

[251] Ministry of Justice and John R. Spencer (trs), France, *Code of Criminal Procedure* (2000) art 38 'Judicial police officers and agents are placed under the supervision of the prosecutor general. He may instruct them to collect any information he considers useful for the proper administration of justice.' art 41 'The district prosecutor institutes or causes to be taken any step necessary for the discovery and prosecution of violations of the criminal law. To this end, he directs the activity of the judicial police officers and agents within the area of jurisdiction of his court. The district prosecutor supervises police custody measures. He visits the places where persons are held whenever he considers this to be necessary and at least once every year...'

[252] Jackson op. cit. 120-124.

[253] ibid.

crimes are mostly conducted by the investigating judges.[254] Secondly, there is an investigation of flagrant offences.[255] Those investigations are mainly conducted by the police.[256] Finally, the investigation of criminal cases, other than serious or flagrant matters, is carried out by the police under the supervision of the public prosecutors. These latter are often called the preliminary investigations.[257]

Even if there is a difference in the extent of their contribution, public prosecutors become involved in all kinds of investigations. However, their role is relatively passive.[258] For instance, in relation to serious offences, the main role of the prosecutors is to pass the cases to the investigating judges although the prosecutors can determine the limits of the investigation.[259] Such investigations are conducted by the police under the supervision of the investigating judges.[260] In the cases of preliminary and flagrant investigations, the prosecutorial role is mainly to approve the measures taken by the police.[261] Jackson states that the prosecutor's role in the investigation is to review the police investigation in a bureaucratic way 'with considerable reliance placed on written evidence and authenticity of form,' and consequently this makes the French prosecutors as 'an adjudicator of the dossier submitted by the police' rather than 'an active investigator of the facts.'[262]

---

[254] Ministry of Justice and John R. Spencer (trs), France, *Code of Criminal Procedure* (2000) art 79 'A preliminary judicial investigation is compulsory where a felony has been committed. In the absence of special provisions, it is optional for misdemeanours. It may also be initiated for petty offences if it is requested by the district prosecutor...' For more details on the investigating judge, *see* arts 79-190; Valerie Dervieux, 'The French system' in Mireille Delmas-Marty and John R. Spencer (eds), *European Criminal Procedures* (Cambridge University Press, 2002) 218, 237.

[255] Flagrant offences in France include: the offence is 'actually being committed or has just been committed, or 'shortly after the act, the suspect is denounced by public outcry, or is found in possession of objects, with traces or evidence, indicating that he took part in the crime or *delit*'.' *See* ibid 234; Bruno Aubusson de Cavarlay, 'The Prosecution Service Function within the French Criminal Justice System' in Jörg-Martin Jehle and Marianne Wade (eds), *Coping with Overloaded Criminal Justice Systems: The Rise of Prosecutorial Power Across Europe* (Springer, Berlin; Heidelberg 2006) 185–205, 201.

[256] Dervieux op. cit. 234; Cavarlay op. cit. 201.

[257] ibid; Dervieux op. cit. 234-235.

[258] Jackson op. cit. 121.

[259] Ministry of Justice and John R. Spencer (trs), France, *Code of Criminal Procedure* (2000) art 80 'The investigating judge may only investigate in accordance with a submission made by the district prosecutor. The prosecution submission may be made against a named or unnamed person. Where an offence not covered by the prosecution submissions is brought to the knowledge of the investigating judge, he must communicate forthwith to the district prosecutor the complaints or the official records which establish its existence...'; Dervieux defined the role of the prosecutor in relation to the investigation of the judges as follows: 'If the offence is a *crime*, the *procureur de la Republique* calls in the *juge d'instruction* by means of a formal request asking him to investigate the precise facts.' *See* Dervieux op. cit. 237; Jackson op. cit. 121

[260] Cavarlay op. cit. 201.

[261] The examples of approvals as to the preliminary investigations are extending the period of custody, securing scientific reports, requiring attendance for questioning, and etc. *See* French Code of Criminal Procedure op. cit. arts 75, 77, and 78. For the flagrant offences, *see* arts 54, 56, and 63.

[262] Jackson op. cit. 121.

It is the investigating judges, rather than the prosecutors, who play the significant role in the investigation.[263] They can take any investigative steps to discover the truth.[264] Unlike the prosecutor whose role is 'oversight and accountability', the investigating judges have the authority to conduct a personal inquiry.[265] However, as they have professional backgrounds as a judge and limited resources, they generally delegate the investigative powers to the police, and most investigation actions are taken by the police under the direction of the investigating judges.[266]

This hierarchical and adjudicative model can equally apply to the German public prosecution system although it does not have the investigating judges.[267] In theory, the German public prosecutors are regarded as the 'ruler of the investigative stage', whereas the police have been considered as 'an organ serving the public prosecution service.'[268] Thus, the relationship between the police and prosecutors is structured on a hierarchical basis.[269] However, in practice most offences are investigated by the police without the supervision of the prosecutors.[270] Only for a small number of serious cases do the prosecutors involve themselves at an early stage. This is because certain investigative measures must be carried under their supervision.[271]

However, the German prosecutors are also more adjudicative rather than investigative because of two main features. First, evidential sufficiency, as Professor Fionda has stated, is the governing criterion in the prosecution of crimes since the 'legality principle' leads the prosecutors to file an indictment in almost all cases without

---

[263] Jackson stated that 'The examining magistrate is apt to take a more investigative role than the continental prosecutor.' *See* ibid 122.

[264] Ministry of Justice and John R. Spencer (trs), France, *Code of Criminal Procedure* (2000) art 81 'The investigating judge undertakes in accordance with the law any investigative step he deems useful for the discovery of the truth. He seeks out evidence of innocence as well as guilt.'

[265] Jackson op. cit. 122.

[266] Jacqueline Hodgson. 'The Police, the Prosecutor and the Juge D'Instruction: Judicial Supervision in France, Theory and Practice' (2001) 41(2) Br J Criminol 342, 352; Jackson op. cit. 123.

[267] The German criminal procedure abolished the investigating magistrate who conducted serious investigations actively. *See* above pt 2.3 'The German System'.

[268] Beatrix Elsner and Julia Peters, 'The Prosecution Service Function within the German Criminal Justice System' in Jörg-Martin Jehle and Marianne Wade (eds), *Coping with Overloaded Criminal Justice Systems* (Springer, Berlin; Heidelberg 2006) 207, 227.

[269] Federal Ministry of Justice (tr), Germany, *Criminal Procedure Code [Strafprozeßordnung]* (1987) art 161 'For the purpose indicated in the foregoing section the public prosecution office may request information from all public authorities and may make investigations of any kind, either itself or through the authorities and officials in the police force. The authorities and officials in the police force *shall be obliged to comply with the request or order of the public prosecution office.*' (Emphasis added)

[270] Elsner and Peters suggested that 'Nowadays the PPS is not the 'ruler of the investigative stage' in most cases. In relation to less serious or mass crimes this role has long been assumed by the police. They carry out investigations independently and only when these are finished the file is passed on the PPS.' Elsner and Peters op. cit. 227-228.

[271] ibid.

exercising discretion.[272] All offences of the criminal code in principle must be prosecuted and proven in courts rather than, as in Japan and Korea, being decided in the office of the prosecutors.[273] Similarly, the discretionary powers of the German prosecutors at the investigation stage, as Goldstein and Marcus discussed, are mainly 'exercised by finding the evidence insufficient, by concluding too casually that witnesses are not credible.'[274] Consequently, the compulsory prosecution of crimes leads the prosecutors to be more interested in their adjudicative role than their investigative.

Second, 'the aggressive inquisitorial role' of the judges also guides the prosecutors to place emphasis on adjudication.[275] In the German criminal procedure, it is the judges that have a duty to seek the truth in a case.[276] Thus, they can 'form an inner conviction without being bound by the statements recorded at the hearing.'[277] All offences with sufficient evidence should be prosecuted, and they must be dealt with in court by the judges.[278] The inquisitorial judges have a main role to play in criminal process. As a consequence, the public prosecutors have no choice but to focus on their adjudicative role.

In particular, the public prosecutors in Germany and France do not have their own investigative units to directly carry out investigations.[279] Investigations are conducted by the police and the prosecutors supervise.[280] In other words, the prosecutors have a statutory power to investigate cases but their roles are limited to the supervision of the investigation and trial work.

---

[272] Fionda op. cit. 135.

[273] ibid.

[274] Abraham S. Goldstein and Martin Marcus. 'The Myth of Judicial Supervision in Three Inquisitorial Systems: France, Italy, and Germany' (1977) 87 Yale LJ 240, 275.

[275] ibid 248 (Goldstein and Marcus stated that 'The police and prosecutor prepare the dossier in Germany, and judicial supervision is preserved only through the aggressive inquisitorial role assigned to the trial judge, who is expected to bring out all the "objective facts".')

[276] This duty of the judges stems from the 'principle of investigation or factual truth' guiding the criminal process in relation to evidence, which gives the judges the obligation to find the truth of a case. *See* Rodolphe Juy-Birmann, 'The German system' in Mireille Delmas-Marty and John R. Spencer (eds), *European Criminal Procedures* (Cambridge University Press, 2002) 292, 309.

[277] ibid (Juy-Birmann described that 'the [German] judges at trial hears the parties and himself collects the elements of evidence likely to influence his decision.')

[278] Fionda op. cit. 135.

[279] Marianne Wade, 'The Power to Decide - Prosecutorial Control, Diversion and Punishment in European Criminal Justice Systems Today' in Jörg-Martin Jehle and Marianne Wade (eds), *Coping with Overloaded Criminal Justice Systems: The Rise of Prosecutorial Power Across Europe* (Springer, Berlin; Heidelberg 2006) 27, 41 (Wade stated that 'It is not difficult to imagine this legal PPS superiority being hampered by reality. After all police services have more specific investigative competence and the PPS is dependent upon the police to carry out investigative actions in all of the countries studied [England & Wales, France, Germany, the Netherlands, Poland, and Sweden]; no PPS has an own investigative unit and it is the police who are 'on the ground', doing the work')

[280] ibid.

Such circumstances may be explained in two aspects. Firstly, the public prosecutors do not have sufficient resources to investigate cases themselves on their own initiatives.[281] Most resources of the prosecutor's office go to carrying out their adjudicative role, and they have to depend on the police forces in order to accomplish their investigative role.[282] Secondly, the prosecutors themselves regard the investigation as the role of the police rather than that of the prosecution service.[283] The supervision and review of the police investigations are considered more important than the direct involvement in the investigations.[284] The prosecutors regard their roles as a legal expert as significant. As Jackson put it, 'If resources play a considerable part in constraining prosecutors' activities, professional ideology would, nevertheless, seem to play a part as well.'[285]

Taken together, both French and German public prosecutors have the authority to direct police investigations. Nevertheless, they do not become over-involved in the investigation due to some systematic limitations: in France the investigating judges have a role to play in investigating the serious crimes and the public prosecutors are mainly in charge of the trial work whereas in Germany, the prosecutors do not in principle have the discretionary power not to charge.[286] Thus, most serious crimes must be prosecuted, and the trial judges take charge of finding the truth in court. In particular, the prosecution services do not have their own investigative units due to the lack of resources and professional ideology as a legal expert.

4.4. The Hierarchical and Investigative Model

In this model, prosecutors direct the investigation of the police on a hierarchical basis and form a belief in guilt of the suspects before charging. The Korean system of public prosecution is a typical example of this model. The Korean prosecutors, as their

---

[281] ibid; Sven Reckewerth. 'The Role of the Prosecution in German Criminal Procedure' (1998) 7 Tilburg Foreign L.Rev. 65, 70.

[282] *See* above pt 4.3 'The Hierarchical and Adjudicative Model'.

[283] Hodgson suggested a difference in the professional ideology thus: 'As one *procureur* ... put it: "There is a part of (the police's) work that I cannot evaluate. I can only talk of their role in the legal procedure, how they report on the telephone. We inhabit different worlds. They do not know the world of judges and I do not know the world of nightclubs." This comment was echoed by a senior police officer ..., who said, when asked about relations with the *parquet*: "Our work is different. They are in their offices and we are outside on the ground".' *See* Jacqueline Hodgson. 'The Police, the Prosecutor and the Juge D'Instruction: Judicial Supervision in France, Theory and Practice' (2001) 41(2) Br J Criminol 342, 352.

[284] Wade op. cit. 40 (Wade stated that 'In civilian systems ... the PPS is traditionally considered to have a controlling role in the investigative stage.')

[285] Jackson op. cit. 115.

[286] The prosecutors can become involved in the enquiry by the investigating judges. However, most investigative measures are decided by the investigating judges.

counterparts in German, are often called 'a ruler of the investigation'.[287] Almost all criminal offences are investigated by the police under the supervision of the prosecutors.[288] The relationship between the police and prosecutors, as in France and Germany, is structured on a hierarchical basis.

However, the Korean prosecution service does not have the limits to the prosecutorial involvement which have been seen in the French and German proceedings. In other words, the Korean criminal justice system does not have the investigating judges who deal with the investigations of serious crimes in France. Serious crimes are investigated by the police under the supervision of the prosecutors.[289] Indeed, supervision occurs from an early stage because, as in Germany, most coercive measures can be taken only on the authority of the prosecutors.[290] In addition, prosecutorial discretion is not limited as it is in Germany.[291]

The prosecutors carry out thorough investigation until when they are certain about the guilt of the suspects.[292] The investigative role of the Korean prosecutors is similar to that of their counterparts in Japan. In both jurisdictions, the prosecutors investigate a crime themselves after receiving the files from the police to make a decision to charge.[293] However, there are three main differences between the Japanese and Korean system.

Firstly, the Korean prosecutors have the power to direct all investigations of the police. However, their counterparts in Japan cannot intervene in the police investigation until the police investigation ends and the case is sent to their office.[294]

Secondly, unlike in Korea, the investigative dossiers written by the police and those written by prosecutors have the same evidentiary impact at the trial. The police interview documents as well as the prosecutorial are accepted into evidence in courts. As Johnson argued, the investigation by the prosecutors is 'to confirm the details of

---

[287] Jae-Sang Lee, *Korean Criminal Procedure* (2nd edn Park Young Sa, Seoul 2008), 99-102.

[288] The Korean Ministry of Justice (tr), *Criminal Procedure Act [Hyungsasosongbeop] partially amended on 21 December 2007 No. 8730* (1954) art 196 (Judicial Police Officers) '(l) Investigators, police administrative officials, police superintendents, police captains or police lieutenants shall investigate crimes as judicial police officers *under instructions of a public prosecutor*.' (Emphasis added)

[289] The Korean prosecutors can investigate crimes with their own resources. In practice, most investigations of serious crimes are conducted by the prosecutors.

[290] Dong Hee Lee et al. op. cit. 778-779.

[291] KCPA art 247 (Principle of Discretionary Indictment) 'A public prosecutor may decide not to institute a public prosecution, considering the matters under Article 51 of the Criminal Act.'

[292] Young-Chul Kim. 'The Effective System of Criminal Investigation and Prosecution in Korea' (2003) 60 UNAFEI Annual Report For 2001 and Resource Material Series 77-93, 85-86

[293] In Japan and Korea, the prosecutors have their own resources to carry out investigations without the support from the police.

[294] Under this circumstance, the police can seek out advice from the prosecutors. *See* David T. Johnson, *The Japanese Way of Justice: Prosecuting Crime in Japan* (Studies on law and social control, Oxford University Press, Oxford; New York 2002), 53.

confessions gained by the police, filling in holes, and painting over problems, and, in the argot insiders employ, wiping police butts as necessary.'[295]

However, in Korea, as noted in detail in Chapter 6, there is a significant difference in the admissibility of the investigative dossiers. Those written by the prosecutors have much more impact on the trial than those written by the police. Thus, unlike their counterparts in Japan, the Korean prosecutors must interview the suspects to obtain confessions and record these in their own dossiers. As a result, this impact of the prosecutors' dossiers has led them to concentrate on their investigative role rather than the adjudicative.[296]

Finally, all the Korean public prosecutor's offices, unlike other jurisdictions, have their own investigative units. Japanese prosecutors have their own investigative units but only thirteen out of fifty prosecutor's offices have the special departments for investigation.[297] In Korea, even headquarters which are called the Supreme Prosecutor's Office have special investigative units operating on instructions from the attorney general.[298] Furthermore investigations, unlike in Japan, are not limited to particular crimes such as corruption and organised crime, but instead, are carried out for almost all kinds of offences.

Taken together, the prosecutors' relationship with the police and their main role in the criminal proceedings, as seen in Table 5.1, can be categorised into four groups.

Table 5.1 Four models on the prosecutors' relationship with the police and their main role

		Relationship	
		Coordinate	**Hierarchical**
Main Role	**Adjudicative**	England and Wales	France* Germany*
	Investigative	The USA* Japan	Korea

Note. * In the USA, France and Germany, the public prosecutors are in charge of the investigative role by becoming involved in the police investigation. However, they have a different relationship with the police, e.g. in the USA, the prosecutors can only give advice and consult the police, whereas in Germany and France, they have a power to supervise. There seems to be a discrepancy in the extent to intervene in the police investigations. Thus, although the US prosecutors place emphasis on the investigative role, they do

[295] ibid 126.
[296] Jong Gu Kim op. cit. 529.
[297] *See* ch 3.
[298] Dong Hee Lee et al. op. cit. 774-775.

not have necessarily more intensified investigative role than the German and French.

5. Discretion at the Pre-Trial Stage

In the pre-trial procedures, public prosecutors exercise considerable discretion which makes them 'one of the most powerful officials in the government.'[299] Generally, they make decisions whether or not to charge and what to charge.[300] In addition, in the English and US systems, decisions whether or on what terms to enter into plea bargains are taken by the prosecutors.[301] This goes even further in Korea where only the public prosecutors decide whether or not to initiate the investigation of crimes.[302]

These decisions by prosecutors, as Ashworth and Redmayne illustrated, 'are characterized by discretion rather than by binding rules.' [303] Hawkins described discretion in the criminal proceedings as follows:

> Discretion arising from a number of sources suffuses the processes of law enforcement and regulation. Discretion is plastic, shaped and given form to some extent by the institutions of law and legal arrangements and more substantially by decision-makers' framing behaviour. Systems of formal rules, for all their appearance of precision and specificity, work in only imprecise ways. ... The legal system is not neatly carved up by smoothly functioning institutional arrangements, but in reality, as a loosely coupled set of subsystems, is much more messy, with internal inefficiencies and conflicts. Those enforcing rules may seek to attain the broad aim of a legal mandate in general terms, but the specific question of whether and how a particular rule applies in a particular circumstance will inevitably be reserved for, or assumed within, the discretion of the legal actor concerned.[304]

---

[299] Bennett L. Gershman. 'The New Prosecutors' (1991) 53 U.Pitt.L.Rev. 393, 405; James Vorenberg. 'Decent Restraint of Prosecutorial Power' (1980) 94 Harv L Rev 1521, 1555 (Vorenberg stated that 'Giving prosecutors the power to invoke or deny punishment at their discretion raises the prospect that society's most fundamental sanctions will be imposed arbitrarily and capriciously.') and for the restrictions on discretion of the prosecution service in the USA, *see* ibid 1537-1545; Angela J. Davis, *Arbitrary justice: The power of the American prosecutor* (Oxford University Press, 2007), 8 (Davis argued that 'since prosecutors are widely recognized as the most powerful officials in the criminal justice system, arguably they should be held more accountable than other officials, not less. However, for reasons that are not entirely clear, the judiciary, the legislature, and the general public have given prosecutors a pass.')

[300] Vorenberg op. cit. 1525.

[301] ibid.

[302] *See* ch 3.

[303] Ashworth and Redmayne op. cit. 75.

[304] Keith Hawkins, *Law as Last Resort: Prosecution Decision-making in a Regulatory Agency* (Oxford University Press, USA, 2002), 424-425.

In criminal proceedings, discretion plays a significant role in supplementing as statutes cannot provide for every circumstance. However, the extent or type of discretion is different depending on the systems of criminal justice.

5.1. Discretion to Drop the Case at the Investigation Stage

At the investigation stage, the discretion to conclude a case is exercised by the police and prosecutors. After the police finish an investigation, the case is sent to the prosecutor's office for review and prosecution. This process, as Wade described, is a 'defining moment' for the prosecutors since it determines the workload of the prosecution service.[305] Where the police have autonomous discretion to drop cases, the prosecutors only have a duty to review those cases already filtered by the police. As a result, the more discretion the police have, the less workload the prosecutors have to deal with. As noted in Elsner's comparative study of 'police case-ending possibilities within criminal investigations', many systems of criminal justice give the police legal or de facto discretion to end cases which has the effect of reducing the workload of the prosecution service.[306]

Such discretion of the police can be observed extensively in the English and United States systems. Fundamentally, as the police are responsible for the investigation, they are given the authority by implication to initiate an investigation, to review it and to discontinue without referring to the prosecution service.[307] The police decide which cases have sufficient evidence for a successful prosecution, and only those cases are sent to the prosecutor's office.

Maximum Police Discretion (England & Wales and the USA)

In England and Wales, the police not only drop the cases by applying the evidentiary sufficiency test, but they also conclude investigations by considering the public interest.[308] Police discretion can be categorised into three groups. First, the police may make a decision to take no further action. As Ashworth and Redmayne stated, this

---

[305] Wade op. cit. 52

[306] Beatrix Elsner, Paul Smit and Josef Zila. 'Police Case-Ending Possibilities within Criminal Investigations' (2008) 14(2-3) European Journal on Criminal Policy and Research 11, 192-195 (The discretion of the police in this study includes: selective hand-over and simple drop of cases, public interest drop, disposal, sanction, and prosecution.)

[307] Wade op. cit. 53; Elsner et al. op. cit. 191-192; Dong Hee Lee et al. op. cit. 582.

[308] Ashworth and Redmayne op. cit. 148-150.

measure is taken mostly for cases in which there is insufficient evidence. However, although there is sufficient evidence, the police can take this action where 'the defendant has already been sentenced to custody, or indicates a willingness to have the offence 'taken into consideration' in sentencing for another crime, or the offender is very young, or the offence is non-serious' or etc. Second, the police may give an informal warning to the minor offenders, e.g. motorists violating traffic laws may be given such a warning.[309] Finally, the police give a 'simple caution' to an offender.[310] This simple caution can be applied to most criminal cases[311] under certain conditions:

> [T]he suspect made a clear and reliable admission of the offence either verbally or in writing ...; there is a realistic prospect of conviction if the offender were to be prosecuted in line with the Code for Crown Prosecutors ... [e.g.] ... A clear, reliable admission of the offence, corroborated by some other material and significant evidential fact will be sufficient evidence to provide a realistic prospect of conviction; it [is] in the public interest to use a simple caution as the means of disposal ... Officers should take into account the public interest factors set out in the Code for Crown Prosecutors, "The Full Code Test", in particular the seriousness of the offence; the suspect [is] 18 years of age or older at the time the caution is to be administered ... Where a suspect is under 18, a Reprimand or Warning would be the equivalent disposal, as per the Crime and Disorder Act 1998; a simple caution is appropriate to the offence and the offender.[312]

The simple caution of the police is different from the informal warnings because it is generally exercised by a senior officer in uniform at a police station.[313] In addition, the cautions are recorded and disclosed to the court in the statement of antecedents. Adult cautions had no legislative basis until Part 3 of the Criminal Justice Act 2003 which introduced a statutory scheme of conditional cautions (discussed below).[314] With respect to the police, Professor Uglow stated that two filters exist in the English criminal proceedings: 'the police as a preliminary filter, removing cases from the conveyer-belt of justice, by decisions either to take no further action or to caution. The CPS acts as a second filter using their power to discontinue prosecutions'.[315]

Similarly, in the USA, the police themselves can determine the cases to be sent to the prosecutor's office depending on the result of the evidentiary sufficiency test irrespective of the severity of offences. Yet, unlike their counterparts in England and

---

[309] ibid.

[310] This simple caution had been known as 'formal caution' before Home Office Circular 30/2005. However, it was renamed to distinguish it from the 'conditional caution'. *See* Home Office, *Simple cautioning of adult offenders* (circular 016 / 2008, Office for Criminal Justice Reform (OCJR), Policy and Process, London 2008) para 2.

[311] However, the simple caution is mainly used for minor offences. Only exceptionally, it can be used to deal with serious offences. *See* ibid para 3.

[312] ibid para 9.

[313] Ashworth and Redmayne op. cit. 149.

[314] ibid.

[315] Steve Uglow, *Criminal Justice* (2nd edn Sweet & Maxwell, London 2002), 196.

Wales, they have relatively little discretion concerning the offences with sufficient evidence since they generally have the obligation to invoke criminal proceedings.[316] This difference arises from the distinctive legal culture in the USA. Traditionally, the US criminal law assumes that 'police encounter criminals, no matter what the gravity of their offences must arrest them and produce them in court.'[317] Beale suggests that as the United States legal tradition has placed emphasis on the punitive justice, restorative justice allowing such diversion of a case has developed relatively slowly in there.[318]

Minimal Police Discretion (Germany and Korea)

In contrast, in Germany and Korea, all cases investigated by the police must be sent to the prosecutor's office without exception.[319] As the investigation is entirely controlled by the prosecution service, only they can make a decision not to invoke the criminal process.[320] There is no room for the discretion of the police.

This has an impact on diversion as in these jurisdictions any form of police diversion is not generally permitted. In Germany, police take part in prosecutorial diversion schemes regarding juveniles. Even this is comparatively restricted due to the principle of compulsory prosecution.[321] The German prosecutors have little discretion not to charge where there is sufficient evidence.[322] In this sense, Germany is different from

---

[316] George stated that 'screening, diversion, and informal resolution of criminal matters in the United States are not formalised by law, and experimental programs have been sporadic and at the local level.' *See* B. J. George. 'Screening, Diversion and Mediation in the United States' (1984) 29 NYL Sch.L.Rev. 1, 1.

[317] ibid 2.

[318] Sara S. Beale. 'Still Tough on Crime-Prospects for Restorative Justice in the United States' (2003) Utah L.Rev. 413, 413.

[319] Marianne Wade, 'The Power to Decide - Prosecutorial Control, Diversion and Punishment in European Criminal Justice Systems Today' in Jörg-Martin Jehle and Marianne Wade (eds), *Coping with Overloaded Criminal Justice Systems: The Rise of Prosecutorial Power Across Europe* (Springer, Berlin; Heidelberg 2006) 27, 53; Dong Hee Lee and others, *Investigation Systems: A Comparative Study [Bigyosusajedoron]* (Pakyoungsa, Seoul 2004), 742-746; Ordinance 665 of the Ministry of Justice for the duties of the Judicial Police Officer 2009 partially amended on 29 May 2009 art 54; In Korea, the police do not have the discretion to drop the cases, but instead, they can file an indictment of minor offences. This discretion is accounted for in pt 5.2 'The Decision to Charge'

[320] Beatrix Elsner, Paul Smit and Josef Zila. 'Police Case-Ending Possibilities within Criminal Investigations' (2008) 14(2-3) European Journal on Criminal Policy and Research 11, 193-196 (Elsner stated that 'In Germany, which has the most restricted Police of all study countries, there is no legal provision for a Police drop.')

[321] Wolfgang Heinz, 'Diversion in German Juvenile Justice: Its Practice, Impact, and Penal Policy Implications' in Günter Albrecht and Wolfgang Ludwig-Mayerhofer (eds), *Diversion and Informal Social Control* (Walter de Gruyter, 1995), 160.

[322] Heinz stated that 'In the German system of criminal justice the only diversionary strategies which are possible are those which use the procedural possibilities for the public prosecutor to halt the prosecution during the pretrial examination ... or during the trial by the judge. Of particular relevance are the provisions relating to the halting of prosecution in sections 45 and 47 of the Juvenile Justice Act' *See* ibid,

Korea where there is no such principle and the Korean prosecutors exercise more extensive discretion.[323]

Hybrid Police Discretion (France and Japan)

Unlike those four jurisdictions, the French and Japanese systems show hybrid features. In both jurisdictions, in principle, reviewing and ending the criminal cases is within the authority of the prosecution service. However, other legal parties such as the police or investigating judges are able to end the investigations of certain crimes. In France, the police can conclude the investigation concerning minor cases, where there is either no sufficient evidence or no known offender.[324] In addition, the police can decide not to invoke criminal proceedings on the basis of the public interest test.[325] However, the French police do not have the authority to discontinue in serious criminal matters. In such cases, it is the investigating judges who make the decision.[326] As they are in charge of the investigations, they have the authority to end an investigation or to refer the cases to the prosecutor's office.[327] In France, as in England and the United States, there are two filters to screen cases with the police and investigating judge as the first filter, and the prosecutor acts as the second.[328]

In Japan, the public prosecutors mainly control the power to conclude investigations. The police must send criminal cases to the prosecutor's office when they complete the investigation.[329] However, with respect to some minor crimes, the Japanese code of criminal procedure gives the police the authority to end investigations without referring

---

160.

[323] *See* pt 5.3 'Discretion at the Prosecution Stage'.

[324] The drops based on insufficient evidence are regulated by law, whereas there is no legal provision to end the investigations with unknown offenders. However, in practice, such decisions are made by the police without the supervision from prosecutors. *See* Wade op. cit. 53 table 10 nn d, h.

[325] ibid.

[326] Dong Hee Lee et al. op. cit. 151.

[327] Ministry of Justice and John R. Spencer (trs), France, *Code of Criminal Procedure* (2000) arts 175-184, e.g., art 175 paras 3, 4 'The investigating judge sends the case file to the district prosecutor ... The latter sends his submissions within one month if a person under judicial examination is detained, and within three months in other cases. The investigating judge who does not receive the prosecution's submissions within the prescribed time limit may make the closing order.'

[328] However, with regard to the investigations of serious crimes, the role of the prosecutors as a filter can be relatively limited when compared with their counterparts in England & Wales and the USA as the final decision on the prosecution is made by the investigating judges. *See* ibid art 175 and Dong Hee Lee et al. op. cit. 151.

[329] The Ministry of Justice (tr), Japan, *Code of Criminal Procedure (Act no. 131)* (1948) art 246 para 1 'Except as otherwise provided in this Code, the judicial police official shall, when he/she has conducted the investigation of an offense, send the case together with the documents and articles of evidence to a public prosecutor promptly.'

them to the prosecution service.[330] As a consequence, the investigation of minor crimes can be concluded by the police without the intervention of the prosecutors.[331] However, serious cases must be sent to the prosecutor's office, and in such cases only the prosecutors have the authority to decide not to invoke criminal proceedings.

As would be expected, the decision to conclude investigations, as shown in Table 5.2, is closely related to the relative investigative powers of the police and prosecutors. For instance, in England & Wales and the USA, where the police have the autonomy to conduct investigations, they can conclude the criminal cases. In contrast, in German and Korea, where the prosecutors are considered as the 'ruler of the investigation', all criminal cases must be referred to the prosecutors and only they can make a decision on the conclusion of the investigation. However, as seen in France and Japan, in order to reduce the workload of the prosecution service, the investigations of minor crimes are in general may be discontinued by the police themselves.[332]

Table 5.2 The discretion to drop the case at the investigation stage

		Discretion to Drop the Cases	
		Separated between Legal Actors	**Monopolised** By the Prosecutors
Offences	**Minor Offences**	Japan [a]	
	All Offences	France [b] The USA England and Wales [c]	Germany Korea

Note. [a] The investigation of serious crime is reviewed and ended only by the prosecutors

[b] In France, the investigation of minor offences is reviewed and concluded by the police as well as prosecutors, and with regard to the serious offences, the investigating judges as well as the prosecutors review and end the investigations.

[c] Apart from evidentiary sufficiency test, the police have the power to drop the cases by considering public interest.

[330] ibid art 246 para 2 'provided, however, that this *shall not apply to cases which have been specially designated by a public prosecutor.*' (Emphasis added)

[331] In Japan, the number of cases ended by the police occupies about 24 per cent of the total. *See* Dong Hee Lee et al. op. cit. 743-744.

[332] Elsner et al. suggested that 'in almost all countries, ways have been found to either legally or factually reduce PPS [Public Prosecution Service] workload by giving Police some sort of case-ending decisions.' *See* Elsner op. cit. 191-192.

5.2. The Decision to Charge

Charging is one of the fundamental functions of the prosecution service. When the prosecutors receive the cases from the police or, as in Korea and Japan, finish their own investigations, their first duty is to review the result of investigations and decide whether or not to charge the suspect.[333] As Professor Uglow put it, the charge can be defined as a 'beginning of the legal process against the accused.'[334] In addition to such 'quasi-legal status' of charging, it has a part to play in highlighting 'the obscurity of the boundaries between and the responsibilities of' the police, the public prosecutors and the judges.[335]

The power to charge is exercised in different ways in different systems even though it is generally regarded as one of the main functions of the prosecutors. For instance, in some jurisdictions, only public prosecutors initiate and conduct prosecutions. But in most jurisdictions, other legal actors such as victims or regulatory agencies can initiate prosecution. Even in these jurisdictions, such prosecutions are regarded as an exception to the rule of public prosecution and can be categorised into three types: prosecution by private individuals, by regulatory agencies and by the police.

5.2.1. Charges filed by Private Individuals or Other Agencies

In England and Wales, the USA, France, and Germany, private individuals and regulatory agencies have the legal authority to prosecute crimes.[336] First, the right of the private citizen to prosecute has a role to play in achieving the accountability of the criminal justice system.[337] Victims or their families who are dissatisfied with the decisions of the public prosecutors not to charge have the power to prosecute the offenders themselves [*An example was the Stephen Lawrence prosecution – although that collapsed*].[338] There is, however, a difference in the frequency of the private

---

[333] Ashworth and Redmayne op. cit. 159.
[334] Uglow op. cit. 185.
[335] ibid.
[336] Wade op. cit. 65; Abraham S. Goldstein. 'Defining the Role of the victim in Criminal Prosecution' (1982) 52 Miss.LJ 515, 558 (Goldstein stated that 'Though the public prosecutor now controls the charging power in the United States, remnants of private prosecution still exist.'); Rodolphe Juy-Birmann, 'The German system' in Mireille Delmas-Marty and John R. Spencer (eds), *European Criminal Procedures* (Cambridge University Press, 2002) 292, 301-303; Valerie Dervieux, 'The French system' in Mireille Delmas-Marty and John R. Spencer (eds), *European Criminal Procedures* (Cambridge University Press, 2002) 218, 226-227.
[337] Sanders and Young op. cit. 379.
[338] ibid.

prosecution between these jurisdictions.[339] In contrast, the Japanese and Korean systems do not allow a citizen to file an indictment.

Second, regulatory agencies can carry out prosecutions of relevant offences without referring the cases to the prosecution service. In England and Wales, substantial numbers of prosecutions are conducted by various agencies.[340] For instance, the Health and Safety Executive prosecutes offences in relation to death, injury, and ill-health to those at work. In addition, other agencies such as the Environment Agency, HM Revenue and Customs, the Television Licensing Authority, the Department for Work and Pensions, the Financial Services Agency, the Department for Business and the Serious Fraud Office deal with their own prosecutions.[341]

Such prosecutions can also be seen in the United States, France and Germany although there are obviously differences in the number of agencies, which have these powers.[342] For instance, in the USA, the federal Occupational Safety and Health Administration, the Environmental Protection Agency, as well as some state agencies such as California's air pollution control agency can decide whether to charge, which helps avoid the delay caused by proceeding through the prosecution service.[343] Germany also permits some administrative bodies to initiate prosecutions for certain crimes.[344] For instance, the departments dealing with 'quasi-administrative fines [*Ordnungswidrigkeiten*]' have the authority to charge and to impose fixed penalties.[345] In France, the authority to charge has been regarded as a separate power rather than the monopoly of the prosecution service.[346] Accordingly, private individuals and the administrative bodies have the power to initiate prosecutions.[347] For instance, the

---

[339] Marianne Wade, 'The Power to Decide - Prosecutorial Control, Diversion and Punishment in European Criminal Justice Systems Today' in Jörg-Martin Jehle and Marianne Wade (eds), *Coping with Overloaded Criminal Justice Systems: The Rise of Prosecutorial Power Across Europe* (Springer, Berlin; Heidelberg 2006) 27, 65.

[340] Sanders and Young op. cit. 360.

[341] ibid.

[342] In the USA, 'minor offences may be prosecuted directly by victims or by regulatory agencies serving as proxy victims' in a few jurisdictions. *See* Abraham S. Goldstein. 'Defining the Role of the victim in Criminal Prosecution' (1982) 52 Miss.LJ 515, 558.

[343] Eugene Bardach and Robert A. Kagan, *Going by the book: The problem of regulatory unreasonableness* (Transaction Pub, New Brunswick 2002), 52 (These regulatory agencies have also 'the power to impose sanctions directly, without having to go to court and convince a judge that the penalty is warranted.')

[344] John A. E. Vervaele and André Klip, *European Cooperation between Tax, Customs and Judicial Authorities: The Netherlands, England and Wales, France and Germany* (Kluwer Law Intl, 2002), 139-140; German Administrative Offences Act art 35.

[345] Rodolphe Juy-Birmann, 'The German system' in Mireille Delmas-Marty and John R. Spencer (eds), *European Criminal Procedures* (Cambridge University Press, 2002) 292, 301.

[346] Robert Vouin. 'The Protection of the Accused in French Criminal Procedure' (1956) 5(01) International and Comparative Law Quarterly 1, 7-13.

[347] ibid 12-13 (Vouin suggested that 'Companies, professional bodies [including administrative] and

Ministry of Water and Forestry can carry out the prosecution of offences regarding forestry, hunting or fishing. In such cases, the civil servant in the ministry serves as a prosecutor for the criminal proceedings.[348] In contrast to these jurisdictions, in Korea, prosecution by private individuals and regulatory agencies is not allowed.

5.2.2. The Police Prosecution

As well as private and agency prosecutions, prosecutions by the police can be found in the English, US, French, and German criminal procedure. In England and Wales, in principle, the decision to charge is made by the prosecution service.[349] Yet, with regard to certain minor cases, the police can decide to charge without referring to crown prosecutors. Those offences are arranged by the guidance of the Director of the Public Prosecutions and at present most minor offences are prosecuted by the police.[350] Prior to 1986, the police also presented the case in court but this will now be done by the CPS. In France, if the offences are crimes [*contraventions*] of Classes 1-4, the police may initiate prosecution and have a duty to notify the accused.[351] The German police also have the power to commence proceedings for some minor offences. For instance, if the offender violates the rules of the traffic laws, this case will be generally investigated and prosecuted by the police.[352] In the United Sates, in principle, most cases are charged by

---

associations, like private individuals may also commence the civil action before the criminal jurisdiction, and so automatically set in motion the public action, on brining the case before either the trial court or the examining magistrate.'); Dervieux op. cit. 226-227 (Dervieux stated that 'A number of special laws allow certain state officials to take official notice of certain specified offences that they create.'); Dong Hee Lee et al. op. cit. 115; Jong Gu Kim op. cit. 292.

[348] Dervieux op. cit.

[349] Director of the Public Prosecutions, *The Director's Guidance on Charging* (3rd edn The Prosecution Team, 2007) para 3.1 'Crown Prosecutors will be responsible for the decision to charge and the specifying or drafting of the charges in all indictable only, either way or summary offences where a Custody Officer determines that the Threshold Test is met in any case, except for those offences specified in this Guidance which may be charged or cautioned by the police without reference to a Crown Prosecutor.'

[350] ibid para 3.3 '(i) Any offence under the Road Traffic Acts or any other offence arising from the presence of a motor vehicle, trailer, or pedal cycle on a road or other public place ... (ii) Any offence of absconding under the Bail Act 1976 and any offence contrary to Section 5 of the Public Order Act 1986 and any offence under the Town Police Clauses Act 1847, the Metropolitan Police Act 1839, the Vagrancy Act 1824, the Street Offences Act 1959, under Section 91 of the Criminal Justice Act 1967, Section 12 of the Licensing Act 1872, any offence under any bylaw and any summary offence punishable on conviction with a term of imprisonment of 3 months or less ...'

[351] Dervieux op. cit. 236; Jörg-Martin Jehle, Paul Smit and Josef Zila. 'The Public Prosecutor as Key-Player: Prosecutorial Case-Ending Decisions' (2008) 14(2) European Journal on Criminal Policy and Research 161, 169 (Jehle et al. stated that 'ordonnances penales 1-4 classe are imposed by police and controlled by police court. In case of contraventions 5th classe (including more serious traffic offences and minor assaults) also the imposition of an ordennance penale is possible, but here the PPS is the central figure.'); Dong Hee Lee et al. op. cit. 50 (Professor Tak-Su Kim stated that 'crimes of classe 1 are mainly dealt with by the administrative fine without a trial.')

[352] Bruno Aubusson de Cavarlay and et al., 'Dealing with Various offence Types in Different Criminal

the public prosecutors. However, in some urban areas, the public prosecutors generally deal with the serious cases, whereas minor cases can be prosecuted by the police, although relying on the instructions from the public prosecutors.[353]

Korean law also allows the police to prosecute minor offences. In principle, the KCPA gives the prosecution service exclusive authority to charge which is called 'the monopoly of prosecution' [*Kisodokjeom*].[354] However, there is one exception to this principle, which is called 'police prosecution [*Jukgulsimpanchunggu*].'[355] Rather than the public prosecutors, the chief of the police station charges the offenders and maintains the prosecution with respect to some minor offences which are punishable by fines of not more than KRW 200,000 (approximately equal to GBP 100) or detention for less than thirty days.[356] In 2009, 76,753 suspects were charged by the police under this procedure and those prosecutions occupied six per cent of all charged persons.[357]

Unlike those jurisdictions, in Japan, the power to charge is monopolised by the prosecution service without exception.[358] The Japanese law does not allow the prosecutions of private individuals, regulatory agencies or the police.[359] Under these circumstances, the judges can only examine a case on the basis of an indictment filed by the public prosecutors.[360] As a result, the Japanese public prosecutors, as Johnson suggested, have more power than their counterparts in almost any other democratic

---

Justice Systems - Case Examples' in Jörg-Martin Jehle and Marianne Wade (eds), *Coping with Overloaded Criminal Justice Systems: The Rise of Prosecutorial Power Across Europe* (Springer, Berlin; Heidelberg 2006) 127-148, 128.

[353] Wayne R. LaFave, Jerold H. Israel and Nancy J. King, *Criminal Procedure* (Hornbook series, 3rd edn West Group, St. Paul, Minn. 2000) 1409, 14 quoted in Dong Hee Lee et al. op. cit. 543-544.

[354] The Korean Ministry of Justice (tr), *Criminal Procedure Act [Hyungsasosongbeop] partially amended on 21 December 2007 No. 8730* (1954) art 246.

[355] Jae-Sang Lee op. cit. 802-809.

[356] Speedy Trial Procedure Act [*Jeukkyeolsimpan Jeolchabeop*] 1957 partially amended on 21 December 2007 No. 8730 art 2 (According to article 14, the defendant is entitled to request a formal trial if the defendant is not satisfied with the judgment in the speedy trial) Translated by Professor Cho, *see* Kuk Cho. 'The Unfinished "Criminal Procedure Revolution" of Post-Democratization South Korea' (2002) 30(3) Denver J Int Law Policy 381.

[357] Korean Supreme Court, *Judicial Yearbook [Sabeopyungam]* (KSC, Seoul) published 2010 pt 13; Korean Supreme Prosecutors' Office, *The Annual Report of the Public Prosecutors' Office in 2009 [Keomchalyeongam]* (KSPO, Seoul 2010), 490; Professor Ho-Jung Lee stated that 'the exception seems to be insignificant as most prosecutions of criminal cases are conducted by the public prosecutors.' *See* Ho Joong Lee. 'Reformation and Democratic Control of the Public Prosecution Service' (2008) 9(2) Seo-Kang Law Journal 43 n 1.

[358] There may be a sole but insignificant exception in the Japanese criminal procedure, which is known as 'analogical institution of prosecution through judicial action.' However, this exception seems to play an insignificant role in the process because it is rarely used. For example, from 1949 to 1990 only sixteen cases are prosecuted through this procedure. *See* Johnson op. cit. 37 n 25 and Masaki Koyama, 'The Public Prosecutor, Criminal Law and the Rights of Accused in Japan: Yet to Strike a Balance?' in Stuart S. Nagel (ed), *Handbook of Global Legal Policy* (CRC, 2000) 39, 46.

[359] Johnson op. cit. 37.

[360] ibid.

countries.[361]

As we have seen, the power to charge is concentrated on the prosecution service.[362] However, as seen in Table 5.3, some systems open up additional channels for prosecution by private individuals, regulatory agencies or the police. This has its part to play in increasing the accountability of the prosecution service.[363]

Table 5.3 The authorities which have the power to charge

	Public Prosecutors	**The Police**	**Private Individuals**	**Regulatory Agencies**
Monopolised	Japan	N/A	N/A	N/A
	Korea		N/A	N/A
Separated	England and Wales* The USA * France* Germany*			

Note. * In those jurisdictions, it is difficult to obtain statistics in relation to the prosecutions as they are conducted by various channels. As a result, between four jurisdictions, the extent of the prosecutions conducted by other legal actors than the prosecution service may be hardly compared with each other.

5.3. Discretion at the Prosecution Stage

The public prosecutors make a decision on the nature of the charge. In addition, they can either decide not to file an indictment or impose a penal order rather than stand

[361] Johnson suggested the South Korean system as one of the main exceptions to this argument. *See* ibid.
[362] In most countries of OECD, 'In principle, the public prosecutor's office is empowered to bring cases to court, while investigative bodies are not. However, some countries make a different distinction ... They are prosecuted by the police in case of minor offences and by the state prosecution in case of serious offences in the same way as other criminal offences.' *See* János Bertók, *Trust in Government: Ethics Measures in OECD Countries* (OECD, 2000), 62.
[363] Van Aaken et al. stated that various methods to separate the power of the prosecutors to charge the offenders can be interpreted as an important element to increase their accountability. *See* Anne Van Aaken, Lars P. Feld and Stefan Voigt. 'Power over Prosecutors Corrupts Politicians: Cross Country Evidence Using a New Indicator' (2008) CESifo Working Paper No. 2245, 10 and Anne Van Aaken, Eli Salzberger and Stefan Voigt. 'The Prosecution of Public Figures and the Separation of Powers. Confusion within the Executive Branch–A Conceptual Framework' (2004) 15(3) Constitutional Political Economy 261, 270.

trial.[364] Such discretion can make a difference to the perceived status of the public prosecution services. Jehle and others stated such a difference thus:

> [L]arge proportions of mass crimes are not brought before court, but are ended at earlier stages of the criminal justice system with the Public Prosecution Service (PPS) as the key player in terms of selection and diversion of criminal cases. However, this selective function of PPS differs from country to country according to its legal status and competences.[365]

Criminal justice systems provide the public prosecutors with different types of discretion reflecting the context and culture within which they operate. In general, however, the exercise of prosecutorial discretion seeks to reduce the workload of the criminal courts.[366]

5.3.1. Summary Prosecution for Penal Order

The 'penal order proceedings' are as significant an indicator demonstrating that discretionary power as is the decision to prosecute. The penal order procedure can be defined as 'proceedings ending with a formal conviction and sanction, but without an oral hearing at courts level.'[367] In general, such punishment is formally decided by the courts based upon the indictments which are filed by the prosecutors. Yet, such a judgement can 'functionally be understood as a prosecution service decision which is checked and approved by the court.'[368] As the courts routinely accept those proposals without particular modification, the prosecutors predetermine effectively the court's decision and sentence.[369]

---

[364] Wade op. cit. 60-82; Gershman described those roles of the prosecutors as follows: 'The prosecutor decides whether or not to bring criminal charges; who to charge; what charges to bring; whether a defendant will stand trial, plead guilty, or enter a correctional program in lieu of criminal charges; and whether to confer immunity from prosecution. The prosecutor effectively has the power to invoke or deny punishment, and in those jurisdictions that authorize capital punishment, the power literally over life and death.' *See* Bennett L. Gershman. 'The New Prosecutors' (1991) 53 U.Pitt.L.Rev. 393, 405 n 74.

[365] Jörg-Martin Jehle, Paul Smit and Josef Zila. 'The Public Prosecutor as Key-Player: Prosecutorial Case-Ending Decisions' (2008) 14(2) European Journal on Criminal Policy and Research 161, 161-162.

[366] ibid 178 (Jehle et al. stated that 'criminal justice systems in Europe present complex structures *that tend to cope with a high workload by finding ways for diversion, creating vents at police and prosecution level and establishing simplifying and shortcutting procedures.* The range and nature of case-ending decisions falling into the mandate of PPS differ from country to country. They have to be evaluated in the whole context of equivalent forms of diversionary and discretionary strategies in the respective European countries.') (Emphasis added)

[367] ibid 168.

[368] ibid 169.

[369] ibid (Jehle et al. argued that the public prosecutor 'proposes the sentence, which can be only be accepted by the court; otherwise, it has to reject the whole penal order proceedings.')

Such penal order proceedings do not exist in the English and United States systems. However, elsewhere, many cases are dealt with through the procedure. For instance, in Korea, 1,154,522 penal orders were imposed on defendants (47.5 per cent of all convictions) in 2001.[370] In the same year, the Japanese system dealt with 852,613 penal order proceedings (33.4 per cent of all offenders).[371] Those orders also play an important part in German and French criminal procedure even though the number of disposals is smaller than in Korea and Japan.[372]

However, there are some differences in the procedure between those jurisdictions. In France, public prosecutors propose a particular penalty to the court for petty crimes.[373] The courts impose the penalty proposed unless they think the order inappropriate.[374] The defendant can appeal against such a decision within thirty days.[375]

In Germany, the procedure [*Stratbefehlsverfarhren*] applies to some crimes which are punishable by a fine or imprisonment of up to one year.[376] The procedure is similar to the French, but the period to appeal against the decision of the court is shorter than in France.[377] In addition, unlike the French, the German prosecutors do not need to send the files to the court, but instead a short written explanation is sufficient.[378] The Korean system of penal order was established with reference to the procedure in Germany.[379] However, unlike the German, the offences for penal order proceedings are limited to crimes which are punishable by a fine.[380] The offenders can appeal against the penal order within seven days.[381]

The Japanese public prosecutors also deal with petty crimes through the penal order

---

[370] Dong Hee Lee et al. op. cit. 745.
[371] ibid.
[372] In Germany and France, 623,051 (20 %) and 159,180 (9 %) penal orders were respectively imposed on the offenders in 2004. *See* Jörg-Martin Jehle, Paul Smit and Josef Zila. 'The Public Prosecutor as Key-Player: Prosecutorial Case-Ending Decisions' (2008) 14(2) European Journal on Criminal Policy and Research 161, 167 fig 2.
[373] The contraventions of 1-5 class can be punished by the penal order. However, the penal orders of 1-5 class are imposed by police and controlled by police court. The offences of 5th class are dealt with by the public prosecutors. *See* ibid 169.
[374] Ministry of Justice and John R. Spencer (trs), France, *Code of Criminal Procedure* (2000) art 525; Valerie Dervieux, 'The French system' in Mireille Delmas-Marty and John R. Spencer (eds), *European Criminal Procedures* (Cambridge University Press, 2002) 218, 245
[375] Ministry of Justice and John R. Spencer (trs), France, *Code of Criminal Procedure* (2000) art 527.
[376] Federal Ministry of Justice (tr), Germany, *Criminal Procedure Code [Strafprozeßordnung]* (1987) s 407; Rodolphe Juy-Birmann, 'The German system' in Mireille Delmas-Marty and John R. Spencer (eds), *European Criminal Procedures* (Cambridge University Press, 2002) 292, 316.
[377] German Criminal Procedure Code op. cit. s 410.
[378] Jehle et al. op. cit. 169.
[379] Jae-Sang Lee op. cit. 794.
[380] The Korean Ministry of Justice (tr), *Criminal Procedure Act [Hyungsasosongbeop] partially amended on 21 December 2007 No. 8730* (1954) art 448 (1).
[381] ibid art 451.

procedure. However, the Japanese procedure, unlike other countries, requires the prosecutors to receive prior consent from defendants before applying for the order.[382] Except for this, it does differ from other systems. The offenders, as in Germany, can have fourteen days to appeal against the decision.[383]

5.3.2. The Decision not to Prosecute

Along with the decisions to charge, the public prosecutors exercise considerable discretion in relation to the decisions not to initiate a prosecution. This discretionary power can be expanded considerably when they decide not to prosecute by taking the 'public interest' into account.[384]

With respect to the decisions not to charge or to discontinue, the prosecutor in general must consider two criteria. The first rule is sufficiency of evidence. It should be wrong for a person to be prosecuted with insufficient evidence.[385] The criminal process requires the public prosecutor to review the investigations and drop the cases, where there is insufficient evidence. This is the main reason for most jurisdictions to establish an independent prosecution service.[386] However, the prosecutor is limited by the principle of legality and thus does not exercise much discretion as to the evidentiary sufficiency test.[387]

On the other hand, the public prosecutors can decline to prosecute some offences even if they have sufficient evidence for a successful prosecution. This standard, as termed in England and Wales, can be called 'public interest.'[388] This term, as Jehle and others argued, 'might not fit easily all systems, but it is used to describe the PPS [public prosecution service] balancing the interest in going to court with other factors relevant to the good of society.'[389] The decision not to prosecute based on consideration of public interest factors may be seen as an exception to the principle of legality. The prosecutors can choose not to bring the cases to court after considering non-evidential

---

[382] The Ministry of Justice (tr), Japan, *Code of Criminal Procedure (Act no. 131)* (1948) art 461-2

[383] ibid art 465(1).

[384] Jehle et al. op. cit. 173 (Jehle, Smit, and Zila stated that 'Two forms of ending public prosecution refer to a true discretionary power of PPS: because of lacking public interest or on policy reasons. The question as to what criteria form the basis for public interest or policy related decisions is a complex one with a variety of answers.')

[385] Ashworth and Redmayne op. cit. 178.

[386] For the details on the establishment of the independent prosecution service, *see* pt 2 'The Development of the Modern Public Prosecution Systems' (The English System)

[387] Jehle et al. op. cit. 165.

[388] The Code for Crown Prosecutors 2010 paras 4.10-4.20.

[389] Jehle et al. op. cit. 173.

and non-legal factors.[390] Thus, in England and Wales, the discretion is provided for in the Code of Crown Prosecutors:

> Assessing the public interest is not simply a matter of adding up the number of factors on each side and seeing which side has the greater number. Each case must be considered on its own facts and on its own merits. Prosecutors must decide the importance of each public interest factor in the circumstances of each case and go on to make an overall assessment. It is quite possible that one factor alone may outweigh a number of other factors which tend in the opposite direction. Although there may be public interest factors tending against prosecution in a particular case, prosecutors should consider whether nonetheless a prosecution should go ahead and for those factors to be put to the court for consideration when sentence is passed.[391]

The English system requires the prosecutors to bring the cases to the court unless there are public interest reasons against prosecution.

All jurisdictions in this study allow the public prosecutors not to bring the cases to the court on the basis of public interest criteria. This discretion is generally regulated by either law or guidelines.[392] In England and Wales, as seen above, the Code of Crown Prosecutors provides various standards for the public interest test.[393] In France and Germany, the guidelines for the public interest test are generally issued at a regional or local level although, in Germany, the main regulations are national ministerial guidelines. [394] In the USA, such discretion of the public prosecutors is provided in the Standards of Criminal Justice which allow public prosecutors to decline to prosecute 'in some circumstances and for good cause consistent with the public interest.'[395]

This discretionary power plays a considerable role in Japanese and Korean criminal proceedings. Both systems provide for such discretion by law. In Japan, article 248 of

---

[390] ibid; Regarding non-evidential factors, LaFave suggested five common situations where the public prosecutors decline to prosecute typically: '(a) When the victim has expressed a desire that the offender not be prosecuted...(b) When the costs of prosecution would be excessive, considering the nature of the violation....(c) When the mere fact of prosecution would, in the prosecutor's judgment, cause undue harm to the offender...(d) When the offender, if not prosecuted, will likely aid in achieving other enforcement goals...(e) When the "harm" done by the offender can be corrected without prosecution.' *See* Wayne R. LaFave. 'The Prosecutor's Discretion in the United States' (1970) 18(3) The American Journal of Comparative Law 532, 534-535.

[391] The Code for Crown Prosecutors 2010 para 4.13 (Emphasis added) In addition to this provision, paragraphs 4.16 and 4.17 describe specifically the factors for public interest test.

[392] Jehle et al. op. cit. 173.

[393] The Code for Crown Prosecutors 2010 paras 4.10-4.20.

[394] Jehle et al. op. cit.

[395] American Bar Association, *Standards for Criminal Justice: Prosecution and Defense Function* (3rd edn ABA, New York 1993) standard 3-3.9 [Discretion in the charging decision].

the Code of Criminal Procedure provides that 'Where prosecution is deemed unnecessary owing to the character, age, environment, gravity of the offense, circumstances or situation after the offense, prosecution need not be instituted.'[396] The Japanese law allows public prosecutors to take into account the propriety of the prosecution. This is similar to Korea which also provides discretion in the KCPA, which is very similar to article 248 of Japanese code of criminal procedure:

> A public prosecutor may decide not to institute a public prosecution, considering the matters under Article 51 of the Criminal Act[397]: (1) The age, character and conduct, intelligence and environment of the offender; (2) Offender's relation to the victim; (3) The motive for the commission of the crime, the means and the result; (4) Circumstance after the commission of the crime.[398]

This allows prosecutors to decide not to prosecute, having taken into account a number of elements relevant to sentencing.[399] As such, they act as if they are the sentencing judge.

5.3.3. Conditional Disposals

Often public prosecutors can dismiss cases, but attach conditions to the offender such as participation in a rehabilitation programme or reparation.[400] For instance, in England and Wales, the public prosecutors can choose the conditional caution in lieu of the prosecution of offences.[401] The public prosecutors can administer this to a person 18 or over who has admitted guilt.[402] The Criminal Justice Act 2003 requires five elements for this conditional caution:

> The first requirement is that the authorised person has evidence that the offender has committed an offence. The second requirement is that a relevant prosecutor decides - (a) that there is sufficient evidence to charge the offender with the offence, and (b) that a

---

396 The Ministry of Justice (tr), Japan, *Code of Criminal Procedure (Act no. 131)* (1948).
397 The Korean Ministry of Justice (tr), *Criminal Procedure Act [Hyungsasosongbeop] partially amended on 21 December 2007 No. 8730* (1954) art 247.
398 They are conditions which shall be taken into account when the judges determine the punishment. *See* Criminal Act [*Hyungbeop*] 1953 partially amended on 29 July 2005 No.7623 art 51.
399 Kuk Cho. 'The Ongoing Reconstruction of the Korean Criminal Justice System' (2006) 5(1) Santa Clara Journal of International Law 100, 113.
400 Jehle et al. op. cit. 174; Ashworth and Redmayne op. cit. 149.
401 Criminal Justice Act 2003 ss 22-27.
402 ibid s 22 [Conditional Cautions].

> conditional caution should be given to the offender in respect of the offence. The third requirement is that the offender admits to the authorised person that he committed the offence. The fourth requirement is that the authorised person explains the effect of the conditional caution to the offender and warns him that failure to comply with any of the conditions attached to the caution may result in his being prosecuted for the offence. The fifth requirement is that the offender signs a document which contains (a) details of the offence, (b) an admission by him that he committed the offence, (c) his consent to being given the conditional caution, and (d) the conditions attached to the caution.[403]

Similarly, in Germany, the public prosecutors can decide not to charge offenders who have committed less serious crimes but impose conditions upon them.[404] The German code of criminal procedure, as in England and Wales, requires certain criteria:

> (1) [Making] a certain contribution towards reparation for damage caused by the offense, (2) [paying] a sum of money to a non-profit-making institution or to the Treasury, (3) [performing] some other service of a non-profit-making nature, (4) [complying] with duties to pay maintenance at a certain level, or (5) [participating] in a seminar pursuant [in some circumstances] [405]

However, unlike the English, the German prosecutors need the consent from the court as well as from the defendants in order to forego a public trial. Those conditional disposals generally occupy five per cent of all prosecutorial decisions.[406]

The French system also allows public prosecutors not to file a charge but to impose certain conditions on the offender. Those conditions can be separated into two groups – 'low degree of offender involvement' and 'significant involvement of the offender and the public prosecutors'.[407] The former includes several conditions: 'giving the victim compensation, setting an illegal situation straight, or showing that one is trying to improve one's social or occupational situation,' whereas in the latter, the offenders are

---

[403] ibid s 23 [Five requirements].
[404] Federal Ministry of Justice (tr), Germany, *Criminal Procedure Code [Strafprozeßordnung]* (1987) s 153a (1).
[405] ibid.
[406] Beatrix Elsner and Julia Peters, 'The Prosecution Service Function within the German Criminal Justice System' in Jörg-Martin Jehle and Marianne Wade (eds), *Coping with Overloaded Criminal Justice Systems* (Springer, Berlin; Heidelberg 2006) 207, 223.
[407] Bruno Aubusson de Cavarlay, 'The Prosecution Service Function within the French Criminal Justice System' in Jörg-Martin Jehle and Marianne Wade (eds), *Coping with Overloaded Criminal Justice Systems: The Rise of Prosecutorial Power Across Europe* (Springer, Berlin; Heidelberg 2006) 185–205, 193-195.

generally required to do 'penal mediation' for adults or 'reparation' for juveniles.[408]

In the USA, the public prosecutors can generally decide not to prosecute and impose conditions on the offenders although there may be some differences between jurisdictions.[409] For instance, in San Diego and New Orleans, about seven per cent of all decisions not to prosecute are conditional disposals, which mostly require the offenders to take part in diversion programmes.[410]

In Korea, conditional disposal is more strictly applied than in other jurisdictions. The Korean criminal proceedings only permit the prosecutors to deal with juvenile offenders by way of conditional disposal.[411] Therefore, the prosecutors may require juvenile offenders to participate in the diversion programmes.[412]

In Japan, unlike the French, German and Korean, public prosecutors do not have the discretion to deal with the cases by conditional disposals. Even when they dispose of juvenile offences, they send the offenders to the family court when there is evidence of an offence rather than, as in other jurisdictions, end the cases by conditional disposals.[413] The Japanese criminal procedure provides prosecutors with extensive discretion 'to divert offenders for the criminal process by not instituting formal charges,' but does not allow them to impose certain conditions on the offenders in lieu of prosecution.[414]

5.4. The Statistical Comparison of Discretion

As is apparent, at the pre-trial stage in most jurisdictions, public prosecutors exercise considerable discretion. There are differences in procedure, which are not necessarily apparent through simple comparison. Thus, statistical analysis has been often used to compare the different discretionary powers of prosecutors.[415] This following discussion aims to compare prosecutorial discretion at the pre-trial stage on this basis. Unlike other

---

[408] ibid 193-194.
[409] George F. Cole and Christopher E. Smith, *The American System of Criminal Justice* (12th edn Wadsworth, Belmont 2010) 692, 372.
[410] ibid.
[411] Jae-Sang Lee op. cit. 353.
[412] Juvenile Act [*Sonyunbeop*] 1958 partially amended on 21 December 2007 No.8722 art 49-3
[413] Elmer H. Johnson and Carol H. Johnson, *Linking community and corrections in Japan* (Southern Illinois Univ Pr, 2000), 162; Dong Hee Lee et al. op. cit. 631-638; Japanese Juvenile Act 1948 No. 168 art 42.
[414] David T. Johnson, *The Japanese Way of Justice: Prosecuting Crime in Japan* (Studies on law and social control, Oxford University Press, Oxford; New York 2002), 37.
[415] Jehle et al. op. cit. ; Marianne Wade, 'The Power to Decide - Prosecutorial Control, Diversion and Punishment in European Criminal Justice Systems Today' in Jörg-Martin Jehle and Marianne Wade (eds), *Coping with Overloaded Criminal Justice Systems: The Rise of Prosecutorial Power Across Europe* (Springer, Berlin; Heidelberg 2006) 27.

studies which have mainly dealt with prosecutorial discretion, this study also looks at police discretion. Such a comparison indicates not only the differences in police and prosecutorial discretion between six jurisdictions, but also the relationship between the police and prosecutors. The statistical analysis shows the great variety of decisions taken by prosecution service and the police in the pre-trial procedure.[416]

5.4.1. Data collection

To conduct this study, various statistics were collected from each jurisdiction. In Korea, the annual reports of the public prosecutor's office gave the information about those criminal cases which were managed by the prosecution service.[417] However, those reports did not include the information about police prosecutions which was the only discretion exercised by the police in Korea. Such statistics were obtained in the Judicial Statistics Reports which were published by the Supreme Court.[418]

The Japanese statistics on prosecutorial decisions were obtained in the white paper on crime published by the Ministry of Justice.[419] The information on the discretion of the police was collected from the criminal statistics which were annually published by the Japanese Police Agency.[420] This information included the number of minor cases which were dropped by the police based upon the public interest test. This was the only discretion that the Japanese police could conduct under the guidelines of the prosecutors.[421]

In England and Wales, the Ministry of Justice annually publishes criminal statistics, which have most of the information on the disposals by the police and prosecution service.[422] This statistical information included police cautions, formal warnings, penalty notices for disorder, and discontinued cases by the prosecutors.[423] However, it

---

[416] Jehle et al. op. cit. 168 (In this study, they compared the statistics of five systems of public prosecution in Europe to examine the different functions of the public prosecutors).
[417] Korean Supreme Prosecutors' Office, *The Annual Report of the Public Prosecutors' Office in 2007 [Keomchalyeongam]* (KSPO, Seoul 2008), 490-491.
[418] Korean Supreme Court, 'Judicial Statistics in 2007 [*Sabeopyeongam*]' KSC (Seoul) s 13 Police Prosecution.
[419] The Japanese Ministry of Justice, *White Paper on Crime* (MOJ, 2006) pt 2 ch 2 s 3.
[420] The Japanese National Police Agency, *Criminal Statistics in 2005* (JNPA, Tokyo 2006) translated by Susumu Togashi.
[421] *See* above pt 5.1 'Discretion at the Investigation Stage'
[422] Ministry of Justice, 'Criminal Statistics in 2007' Office for Criminal Justice Reform (London)
[423] In 2007, all offences were 4,951,000. Of them, 1,374,000 offences were detected by the police, whereas the others were dropped. Among the detected offences, 363,000 cautions were issued and 127,300 reprimands and final warnings were given to the juveniles by the police. In addition, 207,500 penalty notices for disorder were issued, and 98,300 formal warnings for cannabis possession were given to the offenders. On the other hand, 673,000 offences were charged or summonsed. Among them, 100,000

did not include information about conditional cautions.[424] This was obtained from a report on conditional cautioning published by the Office for the Criminal Justice Reform.[425]

In the USA, every state has different standards and practices for prosecution of crimes.[426] The statistical information on prosecution practices in all states is difficult to obtain.[427] Thus, the cases handled by the federal prosecutors, who were called the 'U.S. Attorney', were used rather than by the state prosecutors.[428] In respect to the discretion of the police, the Federal Bureau of Investigation provided the statistics on the cases dealt with by the 13,760 agencies in the USA.[429] Even though this information did not include the in-depth statistics on individual agency, the general practice of the law enforcements in relation to charging or dropping cases could be shown.[430]

Finally, the statistical information on the German and French system of public prosecution was obtained in Jehle's study which included most of the information which

---

cases were discontinued by the discretion of the crown prosecutors. *See* ibid 11-40.

[424] Ashworth and Redmayne op. cit. 149-150; Jehle et al. op. cit. 174 (However, Jehle et al. seem to overlook that the public prosecutors in England and Wales can make a decision on the conditional cautions. They stated that 'In England and Wales it is a power formally held by the police (cautioning, cautioning plus etc.).')

[425] Francis Habgood and Robert Stevenson, *Conditional Cautioning Update* (Office for Criminal Justice Reform, London September 2007), 4.

[426] For instance, with regard to the prosecution of felony, 54 per cent of cases are dropped by the prosecutors due to the insufficient evidence in San Diego, whereas in New Orleans, such cases occupy 38 per cent. In addition, the drop of cases caused by the public interest test may be different depending on jurisdictions: San Diego (9%); Manhattan (4%). *See* George F. Cole and Christopher E. Smith, *The American System of Criminal Justice* (12th edn Wadsworth, Belmont 2010) 692, 297.

[427] Although the sourcebook of criminal justice statistics provides various statistical information, such information is limited to some fields. For example, the statistics on the prosecution of crimes in the state criminal proceedings may give information mainly related to the felony, and moreover, may not present details on the reasons not to prosecute some offences. *See* U.S. Department of Justice, Bureau of Justice Statistics. 'Sourcebook of Criminal Justice Statistics' <http://www.albany.edu/sourcebook/index.html>

[428] ibid Table 5.7 2006.

[429] U.S. Department of Justice, Federal Bureau of Investigation. 'Crime in the United States in 2006' <http://www.fbi.gov/ucr/cius2006/data/table_25.html> accessed 15 January 2010 Table 25 Per cent of Offences Cleared by Arrest or Exceptional Means.

[430] In 2006, 69.5 per cent are dropped by the police, and 30.5 per cent of case are cleared and moved to the next stage in the criminal procedure. Such cleared cases by the police include a number of factors: 'In the UCR Program, a law enforcement agency reports that an offense is cleared by arrest, or solved for crime reporting purposes, when all of the following conditions have been met for at least one person: Arrested, Charged with the commission of the offense, Turned over to the court for prosecution (whether following arrest, court summons, or law enforcement notice).' Or 'In certain situations, elements beyond law enforcement's control prevent the agency from arresting and formally charging the offender. When this occurs, the agency can ... clear the offense exceptionally. Law enforcement agencies must meet all of the following conditions in order to clear an offense by exceptional means. The agency must have: Identified the offender; Gathered enough evidence to support an arrest, make a charge, and turn over the offender to the court for prosecution; Identified the offender's exact location so that the suspect could be taken into custody immediately; Encountered a circumstance outside the control of law enforcement that prohibits the agency from arresting, charging, and prosecuting the offender.' *See* ibid table 25 Overview and Clearances.

was necessary for the analysis.[431] However, the study did not provide the statistical information on police discretion. These statistics were obtained in the Aubusson de Cavarlay's study.[432] However, even there the information did not necessarily include all in-depth statistics relating to police discretion. The study illustrated as follows:

> 'Some cases go no further than the police docket, which is now being computerized, and which contains a day-to-day listing of those interventions and demands which do not immediately lead to the writing for a police report ... This register mostly contains information on facts that do not constitute offences, but for some entries it is really a sort of preliminary to a police report of an offence, for which there may not be any follow-up. It is impossible to measure the number of those cases.'[433]

However, unlike the French, in Germany, all cases dealt with by the police are sent to the prosecutor's office due to the principle of legality.[434] Therefore, there are no official statistics on the cases terminated by the police. Elsner and Peters stated that 'German criminal procedure does not include an option for the police to end the cases independently. The police role ... ends with its function as an investigative agency controlled by PPS instructions.'[435]

Most of the statistical information for this study was produced between 2004 and 2007. As the statistics on the police discretion was quite difficult to obtain, the statistical information on the decisions of the French police was used exceptionally even though they were produced before 2004 fiscal year. With respect to this data collection, there are three limitations.

First, regarding the decisions of the federal investigative authorities in the USA, I used estimated statistics by depending on the 'clearance rate', which could reflect the decisions of all United States investigative agencies since there are no specific statistics on them. Thus, there may be a difference between the statistical information and real practice.

Second, even if the statistics, as in England and Wales, include precise disposals by the police, those figures do not necessarily reflect the definite discretion exercised by

---

[431] Jehle et al. op. cit. 167.
[432] Cavarlay op. cit. 188-189.
[433] ibid 198-199.
[434] *See* above pt 5.1 'Discretion to Drop the Case at the Investigation Stage'.
[435] Elsner and Peters op. cit. 224; Elsner, Smit, and Zila indicated that only 'Some guidelines exist in several federal states giving the police the competence to prepare a PPS disposal.' *See* Beatrix Elsner, Paul Smit and Josef Zila. 'Police Case-Ending Possibilities within Criminal Investigations' (2008) 14(2-3) European Journal on Criminal Policy and Research 11, 195 n 16.

the police and prosecutors. For instance, the English police, in theory, drop the cases by exercising diverse discretion without the intervention of the public prosecutors. However, after the statutory charging scheme, the public prosecutor are involved in the decision making process by the police through consultation.[436] In this circumstance, even though it would be very difficult to measure the involvement of the prosecutors in the police decision, it must be true that the prosecution service has an impact and the statistical information cannot show this influence.

Finally, as the statistics on the decisions of the French police and prosecutors were produced in different fiscal years, they may not accurately reflect the difference in the practices. The statistics on the prosecutorial decisions in France was generated in 2005. However the decisions of the police, which were compared to the prosecutorial decisions, were made in 2002. In other words, there may be a discrepancy caused by the statistics produced in different time.

Due to these limitations, the statistical information is indicative and may not show precisely the discretion of the legal professionals in the criminal process. Nevertheless, this statistical analysis can reveal the general trend which reflects the discretion of the police and prosecution service in each system of criminal justice.

5.4.2. Methods

From previous parts, six categories were chosen for a comparison of the discretion at the pre-trial stage:

(1) Cases concluded by the police
(2) Cases dropped by the public prosecutors due to insufficient evidence
(3) Cases dropped by the public prosecutors not in public interest
(4) Cases dropped by the public prosecutors by selecting conditional disposals
(5) Summary prosecution for penal orders
(6) Formal prosecution

Among those categories, police discretion was not separated into subgroups since it is, unlike prosecutorial discretion, permitted in a limited way in most jurisdictions.

---

[436] Sanders and Young op. cit. 332 (Sanders and Young stated that 'Under the statutory charging scheme, prosecutors are now based in police stations so that they can make prosecution decisions as speedily as custody officers did hitherto, and with the advantage of being able to discuss cases with the investigating officers. When decisions need to be taken "out of hours", officers can call "CPS Direct"-a call-centre-style service headed by a Chief Crown Prosecutor.')

The numbers of decisions by the police and public prosecutors, which are compatible with those categories, were collected from each jurisdiction. However, a number of statistics may be incompatible with those categories. For instance, the annual reports of the CPS present the number of discontinuances of prosecutions rather than separated information for category (2) and (3).[437] Thus, in this circumstance, the number of decisions not to prosecute by evidential sufficiency and public interest tests was replaced by the overall number of discontinuances.

As might be expected, each system of public prosecution does not have all categories. For instance, in Korea, conditional disposals began to be made in 2008. Therefore the number of conditional disposals was not included in the statistics for this study.[438] In this instance, such a category was excluded from the comparison. This kind of exclusion can be observed in the category of summary prosecution for penal orders since the English and United States systems do not have this procedure.[439] As this study aims to explore the overall discretionary powers of the public prosecution services, those limitations may not have any significant effect on the comparison.

Finally, each category was divided by the total number of decisions at the pre-trial stage. Then, the percentage of each category was compared with each other. For instance, in one jurisdiction, the public prosecutors may bring fifty per cent of cases to the court for a formal trial whereas in another jurisdiction, such a portion can be ten per cent which means most cases are dealt with by the prosecutors or the police. As a result, such a difference may indicate a different level of discretion of the prosecution service and the police in the criminal proceedings.[440]

5.4.3. Results

The discretion of the prosecutors, as seen in Figure 5.1 and Table 5.4, are significantly

---

[437] The Crown Prosecution Service, *Annual Report and Resource Accounts: For the period April 2006 - March 2007* (HMSO, London July 2007), 86 (This report defined the discontinuances as follows: 'Consideration of the evidence and of the public interest may lead the CPS to discontinue proceedings at any time before the start of the trial. The figures include both cases discontinued in advance of the hearing and those withdrawn at court.')

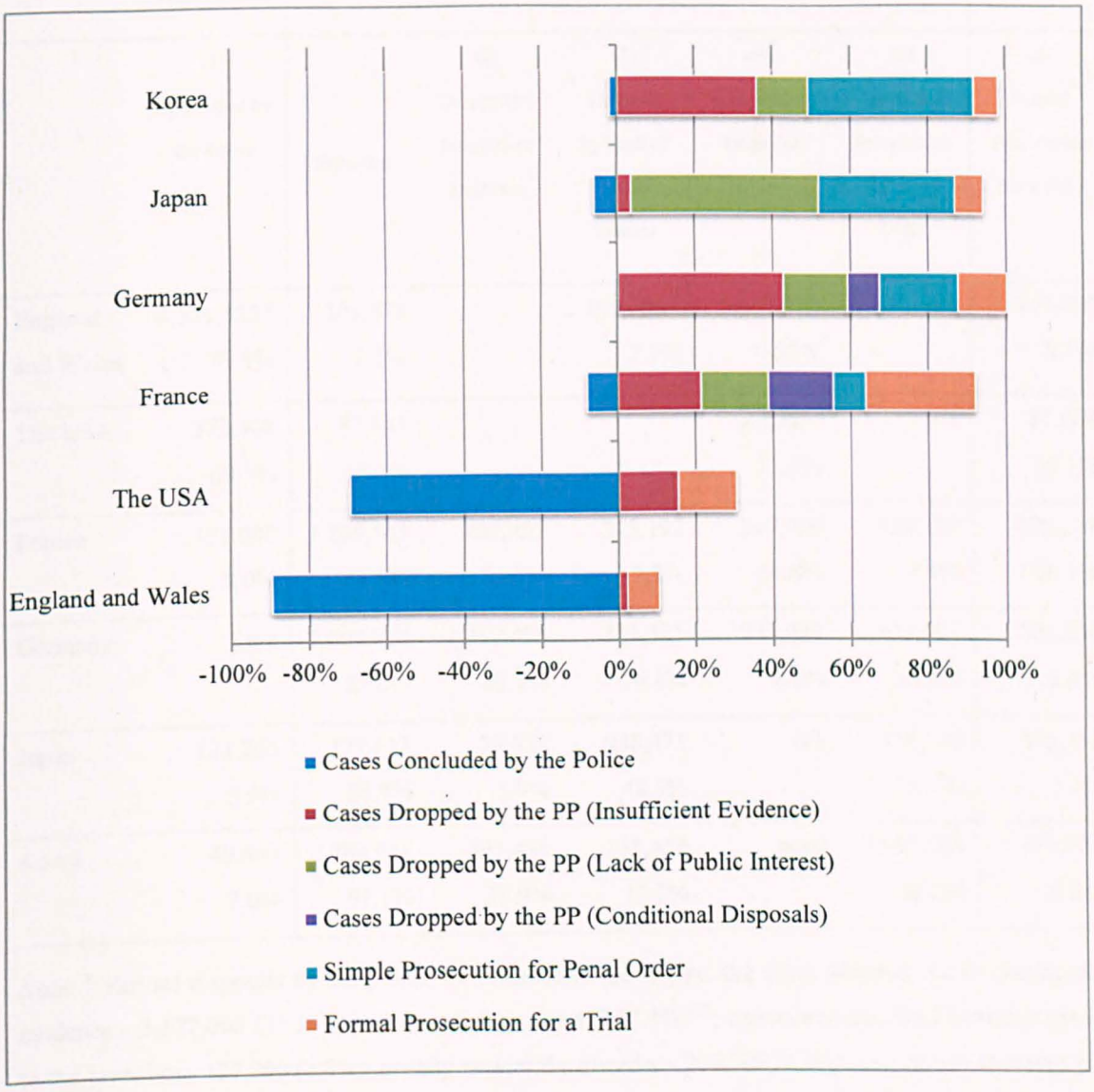
[438] Jae-Sang Lee op. cit. 353.

[439] *See* above pt 5.3.1 'Summary Prosecution for Penal Order'.

[440] Jehle, Smit, and Zila accounted for such different discretion of the public prosecutors by giving examples of Poland and other European countries: 'There are countries (e.g. Poland) in which the prosecuting authority has neither the discretion to drop a case nor the ability to impose conditions/sanctions upon an offender; in accordance with a strict principle of legality the prosecuting authority merely has the function of preparing a case for court. Here ... all cases have to be brought before a court. In many European countries the prosecuting authority doesn't only drop cases in accordance with the principle of legality but additionally has discretion whether or not to prosecute.' *See* Jehle et al. op. cit. 165.

different from each other depending on the systems of criminal justice.

Figure 5.1 The comparison of discretion by the police and public prosecutors (PP)



Note In the England & Wales and the USA, as seen in Table 5.4, there were no separated statistics on dropped cases by insufficient evidence and lack of public interest. Thus I respectively included the discontinued cases by the English or US prosecutors in the red category - the cases dropped by insufficient evidence. In the English system, the police can exercise considerable discretion such as police cautions, warnings and penalty notices for disorder.[441] In Germany, almost all decisions by the prosecutors are reviewed by the judges and occasionally need consent.[442]

---

[441] For details on those statistics, *see* Table 5.4

[442] *See* below pt 7 'The Accountability of the Public Prosecution Service'; In respect to such limitations to the prosecutorial discretion, Pizzi stated thus: 'A German prosecutor's discretion with respect to the

Table 5.4 Details on discretion at the pre-trial stage

	Police Discretion	**Public Prosecutor's Discretion**					**Courts Decisions**
	(1) Concluded by the Police	Subtotal	(2) Dropped by Insufficient Evidence	(3) Dropped by Lack of Public Interest	(4) Conditional Disposals	(5) Summary Prosecution for Penal Order	(6) Formal Prosecution for a Trial
England and Wales	4,371,522 [a] 89.6%	101,578 2.1%		100,000 [b] 2.1%	1,578 0.03%	n/a	404,855 8.3%
The USA	372,408 69.5%	82,343 15.4%			82,343 [c] 15.4%	n/a	81,088 15.1%
France	151,000 8.0%	1,209,543 63.9%	407,451 21.5%	325,192 17.2%	317,720 16.8%	159,180 8.4%	532,279 28.1%
Germany	n/a	2,693,276 87.6%	1,312,495 42.7%	505,125 16.4%	252,635 8.2%	623,021 20.3%	382,286 12.4%
Japan	121,265 5.9%	177,617 86.9%	73,028 3.6%	988,473 48.3%	n/a	716,116 35.0%	146,352 7.2%
Korea	49,967 2.0%	2,286,533 91.7%	893,491 35.9%	331,456 13.3%	n/a [d]	1,061,586 42.6%	155,704 6.2%

Note. [a] Various disposals by the police are included in this figure: the cases dropped due to insufficient evidence – 3,577,000 (73.3%); police cautions - 361,422 (7.4%)[443]; reprimands and final warnings given to the juveniles - 127,300 (2.6%); penalty notices for disorder - 207,500 (4.3%); and formal warnings for cannabis possession - 98,300 (2.0%); [b] This figure includes both (2) and (3) which are discontinued by crown prosecutors; [c] This figure includes the transfers, dismissals other than by court, pre-trial diversions and proceedings suspended indefinitely by court; [d] The conditional disposal has been made since 2008. Thus, this analysis did not include the information on such a measure.

decision whether or not to file criminal charges is more limited in comparison to United States prosecutors.' *See* William T. Pizzi. 'Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform' (1993) 54 Ohio St.LJ 1325, 1332.

[443] This figure was calculated by excluding conditional cautions (1,578) by prosecutors from all cautions (363,000) issued in 2007.

In England and the US, the police play a main role in deciding the sufficiency of evidence. A large number of cases, which have insufficient evidence, are dropped based on the decisions taken by the police. Of all offences, those cases occupy respectively seventy-three per cent in the England & Wales and sixty-nine per cent in the USA. Particularly, in the English system, the police not only drop the cases depending on evidentiary sufficiency, but they can also give cautions to adults (7.4%), reprimands and final warnings to juveniles (2.6%), penalty notices for disorder (4.3%) and formal warnings for cannabis possession (2.0%). In other words, 89.6 per cent of cases are concluded by the police. On the other hand, very few (2.1 per cent) cases are dropped by prosecutors in England and 15.4 per cent in the USA.

In contrast, in Korea and Japan, about ninety per cent of cases are concluded by the decisions of the public prosecutors. In particular, in Korea, around ninety-two per cent of cases are concluded by the decisions of the public prosecutors. However, there is a difference in the main method used. Where the Japanese prosecutors drop most cases (48.3%) based upon the public interest test, their counterparts in Korea end the cases by relying on mostly summary prosecution for penal orders (42.6%). In both systems, the number of cases, which can be concluded by the police, is very small: two per cent in Korea and five per cent in Japan.

In France, along with the cases discontinued as a result of insufficient evidence (21.5%), public prosecutors do not bring cases to court on grounds of public interest (17.2%) or by using conditional disposals (16.8%) and summary prosecutions for penal orders (8.4%). The cases brought to the court, unlike the Korean and Japanese, are over twenty-eight per cent of all offences. But nearly two thirds of cases (63.9%) are concluded by the public prosecutors. Unlike the Korean and Japanese, in the French system of criminal justice, the police deal with a significant number of cases (8%) using their own discretion.

Germany, as in France, allows prosecutors to dispose of a large number of cases on the basis of their discretion. This amounts to about eighty-seven per cent of all offences. Apart from the cases dropped due to insufficient evidence, the cases concluded by prosecutorial discretion take about fifty per cent of all cases. However, unlike other jurisdictions, there are no cases, which can be concluded by the police. Subsequently, almost all cases are, in theory, reviewed and concluded by the public prosecutors.[444]

[444] *See* pt 5.1 'Discretion to Drop the Cases at the Investigation Stage'.

5.4.4. Discussion

At this pre-trial stage, public prosecutors can conclude the cases by exercising considerable discretion. However, such discretion is different depending on the jurisdiction. These differences demonstrate distinctive prosecutorial roles. Based upon findings above, I would propose four models of the prosecutorial role at this stage: supplementary filter, key filter, benevolent paternalist and monopolist.

First, in the English, US and French systems, the public prosecution service acts as a 'supplementary filter.' In England and the USA, the police review cases as a gatekeeper before any prosecutorial review. As a result, a large number of cases are initially discontinued by the police. Then, the prosecution service acts as a supplementary filter. As Professor Uglow stated, in the English and US criminal process, two filters exist in order to prevent innocent suspects from being charged and convicted.[445]

In particular, in England, the police drop cases by considering not simply evidentiary sufficiency, but also public interest. Thus, prosecutors have relatively less discretion. The discretion of the police is more extensive than in the USA. In addition, the Code for Crown Prosecutors not only provides specific conditions for the public interest test,[446] but it emphasises that such factors can be taken into account at sentencing in the trial rather than requiring pre-trial decisions by prosecutors.[447] As a result, the English law does not allow the prosecution to have extensive discretion, but requires them to serve as a supplementary filter.

In France, the role of preliminary filter is assigned not only to the police, but also to the investigating judge. Minor offences are firstly dropped by the police, and serious crimes, where there is no sufficient evidence, are discontinued by the investigating judges. Then, those filtered cases are reviewed again by the public prosecutors. In other words, the French system of criminal justice does not permit the prosecution service to monopolise the pre-trial stage, but tries to separate the discretion and leads the police and the judges to be involved more actively in the pre-trial process.

The second model is illustrated by Germany where the prosecution service acts as a 'key filter'. In Germany, all cases can, in theory, be concluded only by the public

---

[445] Steve Uglow, *Criminal Justice* (2nd edn Sweet & Maxwell, London 2002), 195-196 (Professor Uglow stated that 'the police as a preliminary filter, removing cases from the conveyer-belt of justice, by decisions either to take no further action or to caution. The CPS acts as a second filter using their power to discontinue prosecutions.')

[446] The Code for Crown Prosecutors 2010 paras 4.16 - 4.17.

[447] ibid para 4.13. 'Although there may The Code for Crown Prosecutors be public interest factors tending against prosecution in a particular case, prosecutors should consider whether nonetheless a prosecution should go ahead and for those factors to be put to the court for consideration when sentence is passed.'

prosecutors at the pre-trial stage as the police do not have discretion to discontinue. Nevertheless, the function of the German prosecutors, unlike their counterparts in Korea, can be defined as a filter rather than monopolist because most prosecutorial decisions are, as we shall see below in Part 7, monitored by the court. Furthermore, cases where there is sufficient evidence cannot be discontinued by the prosecutors due to the principle of compulsory prosecution. In other words, the prosecution service simply serves as a filter, albeit a key one to screen the cases.

An example of the third model is Japan where the prosecution service can be described as 'benevolent paternalist'.[448] The Japanese law provides public prosecutors with considerable discretion. Unlike their counterparts in Germany, about ninety per cent of cases are concluded by the public prosecutors without intervention from the court.[449] In particular, most cases are dropped based on application of the public interest test. The concept of public interest is interpreted more broadly than in other jurisdictions. Prosecutors will often refuse to file an indictment where they regard the prosecution as inappropriate considering the circumstances of the offence and the offender, even where the offender has confessed and there is ample evidence.[450] This leads to the description of Japanese prosecutors acting as a benevolent paternalist.

However, they do not monopolise pre-trial procedure and in general cannot intervene in the police investigation. After the police finish the investigation, the prosecutors can direct the police to conduct supplementary investigations or may conduct investigation with their own units. However, unlike in Korea, these units are only installed in some offices rather than in all branches. In other words, investigations by the prosecutors are limited. Moreover, the prosecutorial decisions to charge, as we shall see in Part 7, are controlled by an independent committee consisting of citizens. By use of their considerable discretion, prosecutors discontinue a large number of cases. Nevertheless, the system of criminal justice does not allow the prosecutors to

---

[448] Foote described the Japanese system of criminal justice as 'benevolent paternalism': 'The Japanese criminal-justice system is benevolent in that its goal is to achieve reformation and reintegration into society through lenient sanctions tailored to the offender's particular circumstances. The system is paternalism in that it allows substantial discretion to the state in both gathering and using information about the offender and the offense.' In this model, it is the public prosecutor who plays a considerable benevolent discretion. Thus, I propose that the Japanese public prosecutor acts as a benevolent paternalist. For more benevolent paternalism, *see* Foote op. cit.

[449] Such substantial discretion has helped the Japanese criminal justice system to be described as the 'paradise for a prosecutor,' 'the prosecutor kingdom.' *See* Johnson op. cit. 21- 22 (Johnson identified five key contexts to facilitate prosecution in Japan: 'prosecutors confront little serious crime, carry light caseloads, are insulated from public demands and political pressure, benefit from enabling laws of criminal procedure that confer extensive powers to investigate crimes and dispose of cases, and try cases before judges instead of juries.')

[450] West op. cit. 689-690

monopolise the procedure.

The final model is the 'monopolist', which is exemplified by the Korean prosecution service where over ninety per cent of criminal cases are concluded as a result of decisions by the prosecution. In addition to this, all investigations are conducted either by the police under the supervision of the prosecutors or by the prosecutors themselves utilising their own investigation units. Furthermore, as we shall discuss in Part 7, prosecutorial decisions in general are not reviewed by either the court or any independent body. Thus, if the prosecutor decides to charge or not to charge a suspect, there is no independent filter to screen the prosecutorial decisions before the trial. Such a monopoly has led the Korean criminal procedure to be described as the 'prosecutorial justice system.'[451]

To summarise, the public prosecution service plays a filtering role. There are differences through the enabling statutes, their relationship with the police and the existence of investigating judges. Two countries stand out. In Japan, the public prosecutor does not simply filter cases, but they also have the right to 'forgive' the offenders by considering various conditions as if they were quasi-judges. This is a quite unique feature which is not observed in other jurisdictions. The Korean prosecutors, however, have the most considerable powers among six systems. They monopolise whole pre-trial process. Furthermore, their decisions are hardly reviewed and disputed.

This statistical comparative study of discretion has a major limitation. Plea-bargaining is significant element contributing to the discretion of the prosecution service in England and the USA.[452] However, we do not find this in the other countries in this study. A further complication is the difficulty in distinguishing between convictions based on guilty pleas in the English as well as US systems and the judgements of guilty based on confessions in the other jurisdictions. Due to those difficulties, this study did not taken into account such discretion, but further comparative research on the guilty plea should provide new insight into the prosecutorial discretion.

---

[451] Kuk Cho. 'The Unfinished "Criminal Procedure Revolution" of Post-Democratization South Korea' (2002) 30(3) Denver J Int Law Policy 377, 385-386.

[452] In the English and US systems, the prosecutors have the authority to give concessions to the defendants such as charging with a lesser offence or reducing charges given that they plead guilty. For further discussion about guilty pleas, *see* Andrew Sanders, Richard Young and Mandy Burton, *Criminal Justice* (4th edn Oxford University Press, Oxford 2010), 438-498; Ashworth and Redmayne op. cit. 264; LaFave op. cit. 532 (Lafave stated that 'One of the most striking features of the United States system of criminal justice is the broad range of largely uncontrolled discretion exercised by the prosecutor. Particularly noteworthy are these kinds of discretionary decisions: (1) the decision not to prosecute an individual notwithstanding sufficient evidence to meet the legal requirements for commencing a prosecution; and (2) the decision to tender concessions to a charged individual on the condition that he pleads guilty rather than stand trial.')

6. The Influence of the Prosecutors upon the Trial

As well as their impact on pre-trial decisions, the powers of the prosecutors can have an influence on the decisions by the trial courts. For instance, public prosecutors can recommend a sentence to the trial judge and this plays a significant role in the final outcome.[453]

Such powers have been often discussed in comparative studies. For instance, in order to assess the sentencing roles of the prosecutors, Professor Fionda analysed several elements in her study of 'public prosecutors and discretion.'[454] She explored the process of choosing the mode of trial, the charges, the power to recommend a sentence and the ways to appeal against judgements.[455] In Damaska's study of 'structures of authority and comparative criminal procedure', he did not explore directly the prosecutorial impact on a trial.[456] However, his work on both the scope of the sentencing power of the judges and the importance of official documents in the criminal procedures are closely related to the role of the prosecution in sentencing.[457]

This part is divided into two sections. The first considers prosecutorial powers which influence verdict and sentence by recommending as well as appealing. Secondly, the important element in the Korean criminal proceedings, namely the impact of the investigative dossier on a trial, is discussed in comparison to the other jurisdictions. A common thread is that these influences, as noted by Damaska, may be different depending on the legal traditions, namely the common law, civil law, and hybrid systems. [458]

6.1. The Elements Influencing the Outcomes of a Trial

The trial is an important stage of the criminal process and is central to any evaluation of the Korean prosecution service. Two elements are considered: recommending a sentence and appealing against verdicts as well as sentences.[459]

---

[453] *See* ch 3.
[454] Fionda op. cit.
[455] ibid 41-57, 146-151.
[456] Damaska op. cit.
[457] ibid 487-521.
[458] ibid.
[459] As noted in Professor Fionda's study, a choice of mode of trial and charges can have an indirect impact on the judgements. However, those elements are already discussed in the part of prosecutorial discretion. Thus, they are excluded in this section.

The English and United States Systems

In the English crown court, the jury is only concerned with making a decision on guilt or innocence and not with sentence.[460] Nor do prosecutors have any statutory authority to recommend a sentence.[461] The decision on a sentence is within the exclusive authority of the judges.[462] In terms of sentencing, the Code for Crown Prosecutors describes the role of the prosecutors as follows:

> Sentencing is a decision for the court, but prosecutors have a duty to offer assistance to the sentencing court in reaching its decision as to the appropriate sentence by drawing the court's attention to the following factors: a) any aggravating or mitigating factors disclosed by the prosecution case; b) any Victim Personal Statement; c) where appropriate, evidence of the impact of the offending on a community; d) any statutory provisions, sentencing guidelines, or guideline cases which may assist; and e) any relevant statutory provisions relating to ancillary orders (such as anti-social behaviour orders).[463]

The prosecutors provide the judges with information which is helpful to the decision rather than directly recommending a sentence. The reason to prohibit such a prosecutorial recommendation, as Professor Fionda stated, is to both avoid 'undue influence over judicial decisions' and enable 'judges to remain autonomous in their field.'[464]

This is also the case in the US. However, in relation to plea bargaining, prosecutorial recommendation for sentencing is permitted.[465] The law does not provide general authority to recommend a sentence, but in the case of a plea bargain, gives the prosecutors the right to agree a sentence with a defendant.[466] In theory, the judges are

---

[460] John R. Spencer, 'The English system' in Mireille Delmas-Marty and John R. Spencer (eds), *European Criminal Procedures* (Cambridge University Press, 2002) 142, 212-213.
[461] Fionda op. cit. 41; Spencer op. cit. 212-213.
[462] ibid.
[463] The Code for Crown Prosecutors 2010 s 11 Prosecutor's Role in Sentencing.
[464] Fionda op. cit. 45; Rodney Brazier, *Constitutional Reform* (Clarendon Press, Oxford 1991)
[465] Albert W. Alschuler. 'The Trial Judge's Role in Plea Bargaining, Part I' (1976) 76 Colum L Rev 1059, 1063-1064. (Alschuler stated that 'on the basis of a second sample of 1000 cases, that three of the ten judges who then sat in felony cases followed the prosecutor's recommendation in 100% of the cases that came before them; one other judge followed the prosecutor's recommendation in 99% of his cases, two in 98%, one in 96%, one in 92%, and one-Judge Sam W. Davis-in 88%.')
[466] Federal Rules of Criminal Procedure 2008 Rule 11 Pleas (c) Plea Agreement Procedure (1) In General. 'An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. ... If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will: (A) not bring, or will move to dismiss, other charges; (B) *recommend, or agree not to oppose the defendant's request*, that a particular sentence or sentencing range is appropriate or that a

not subject to the recommendation from the prosecutors.[467] Therefore, they can impose a sentence either more severe or more lenient than the sentence offered by the prosecutors.[468] However, as Alschuler argued, 'prosecutorial sentence recommendations are so universally followed that their effect is virtually indistinguishable from that of judicial promises of specific sentences.'[469]

In addition, the English and American prosecutors, in principle, are not entitled to appeal against acquittals. Such limitation is not applied only to the prosecutors, but the defendants also, as Damaska put it, have comparatively severe limits as to the grounds on which to challenge the decision.[470] Neither defendant nor prosecutors can dispute the findings of fact, unlike many civil law systems.[471] With respect to this limited scope of appeal, Damaska said:

> Even when error can be appealed, direct reconsideration of the adjudication, as in the continental system, is not involved [in common law systems]. Following the pattern quite understandable in the setting of the jury trial with its inscrutable general verdict, what is actually reviewed is the propriety of the material submitted to the decision-maker for decision, rather than his "correct" use of the material. In light of foregoing it is not at all surprising that

---

particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or (C) *agree that a specific sentence or sentencing range* is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).' (Emphasis added)

However, the English law requires judges to consider the discount of sentence rather than gives the prosecutors the right to recommend a sentence. *See* s 144 of the Criminal Justice Act 2003 '(1) In determining what sentence to pass on an offender who has pleaded guilty to an offence in proceedings before that or another court, a court must take into account— . (a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and (b) the circumstances in which this indication was given.'

[467] ibid Rule 11 (3) Judicial Consideration of a Plea Agreement. '(A) To the extent the plea agreement is of the type specified in Rule 11(c) (1) (A) or (C) the court *may accept the agreement, reject it, or defer a decision* until the court has reviewed the presentence report.' (Emphasis added).

[468] Albert W. Alschuler. 'The Trial Judge's Role in Plea Bargaining, Part I' (1976) 76 Colum L Rev 1059, 1062.

[469] ibid 1107.

[470] Mirjan Damaska. 'Structures of Authority and Comparative Criminal Procedure' (1974) 84 Yale LJ 480, 514-515.

[471] ibid; Ashworth and Redmayne op. cit. 360 (Ashworth and Redmayne suggested that 'Where prosecutors do have appeal rights, as in the magistrates' court, these tend to be restricted so as to allow appeals on points of law, rather than challenges to fact-finding.'); Fionda op. cit. 46-51 (Professor Fionda stated that 'A new power given to the prosecutors under the Criminal Justice Act 1988, s. 36, has given them a direct influence over the sentence given by a court. Section 36 allows the prosecution to appeal against an 'unduly lenient sentence'. Under this power, the Attorney-General may refer cases of indictable offences to the Court of Appeal for review of a sentence he thinks is too low.')

> the right to appeal is not nearly so important in [common law systems] ...as it is in continental systems, and that it is generally not accorded constitutional stature.[472]

The legal tradition based on the jury trial makes the prosecutorial power to appeal less important in the common law than in the continental systems.

However, the English law has allowed appeals on points of law since section 36 of the Criminal Justice Act 1972 with the system of the 'attorney general's reference' although this does not affect the acquittal. They may also appeal under the Criminal Justice Act 1988, against an unduly lenient sentence. A further extension came with the Criminal Justice Act 2003 gives the public prosecutors the ways to appeal acquittals based on factual grounds and to obtain a fresh trial.[473] This challenge is regarded as an exception to the double jeopardy principle.[474]

Unlike the English, the US system still prohibits the public prosecutors from challenging acquittals. The US Supreme Court, in *Kepner* v. *United States*, held that the government may not appeal an acquittal.[475] Prior to this judgement, the general rule against appeal of the prosecutors was established in *Ball* v. *United States* holding:

> The Constitution of the United States, in the Fifth Amendment, declares, "nor shall any person be subject to be twice put in jeopardy of life or limb." The prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial.[476]

---

[472] Damaska op. cit. 515.

[473] Criminal Justice Act 2003 Part 10 Retrial For Serious Offences s 75 Cases that may be retried '(1) This Part applies where a person has been acquitted of a qualifying offence in proceedings (a) on indictment in England and Wales, (b) on appeal against a conviction, verdict or finding in proceedings on indictment in England and Wales, or (c) on appeal from a decision on such an appeal ...' s 76 Application to Court of Appeal '(1) A prosecutor may apply to the Court of Appeal for an order (a) quashing a person's acquittal in proceedings within section 75(1), and (b) ordering him to be retried for the qualifying offence ...' s 78 New and compelling evidence '(1) The requirements of this section are met if there is new and compelling evidence against the acquitted person in relation to the qualifying offence. (2) Evidence is new if it was not adduced in the proceedings in which the person was acquitted (nor, if those were appeal proceedings, in earlier proceedings to which the appeal related) ...'

[474] Ashworth and Redmayne op. cit. 360 (Ashworth and Redmayne stated that 'The traditional double jeopardy principle meant that jury acquittals were final, as were acquittals by the magistrates once the appeals process was over. ... In 1996 an exception to the double jeopardy principle was introduced, allowing an acquittal to be quashed and a new trial to take place in cases where the acquittal is found to be 'tainted' by the commission of an 'administration of justice offence involving interference with or intimidation of a juror or witness'. ... The Criminal Justice Act 2003 goes much further. It creates a 'fresh evidence' exception to the double jeopardy principle.')

[475] *Kepner v United States* (1904) 195 U.S. 100 (The U.S. Supreme Court)

[476] *United States v. Ball* (1896) 163 U.S. 662 (The U.S. Supreme Court), 669.

Due to those decisions, the right to appeal against acquittals is, in principle, not allowed in the United States criminal proceedings. Therefore, as Khanna stated, in the USA, there seem to be 'asymmetric appeal rights' referring to 'the fact that criminal defendants may appeal convictions, but prosecutors have highly attenuated rights to appeal acquittals.'[477] This 'absolute' ban on prosecutorial appeals of acquittals permits only two exceptions.[478] First, the US criminal procedure allows the public prosecutor to appeal against an acquittal where such an appeal does not lead to a retrial.[479] Second, when the defendants bribe a juror or the judge, the public prosecutor has the right to appeal against acquittal. In those circumstances, the initial trial is not regarded as jeopardy for the defendant.[480] In short, the English and US systems permit the prosecutorial rights to appeal against judgments only in a limited way.

The French and German Systems

The French and German prosecutors, unlike the English and United States, have the authority to recommend a sentence to the trial judge.[481] This recommendation does not formally bind or restrict the decisions of the courts, but rather, has a part to play in guiding sentences because the judges often give a lesser sentence than that recommended.[482] This practice does not attract much attention, since such a recommendation has no binding effect in law. However, the recommendation of the prosecutor, as Professor Fionda suggested, may play a significant role: 'a recommendation of sentence provides the judge with guidance about the sentencing

---

[477] Vikramaditya S. Khanna. 'Double Jeopardy's Asymmetric Appeal Rights: What Purpose Do They Serve' (2002) 82 B U L Rev 341, 342-343.

[478] ibid 350.

[479] *United States v. Wilson* (1975) 420 U.S. 332 (The U.S. Supreme Court), 335-353 (In this case, the U.S. Supreme Court held: 'When a trial judge rules in favor of the defendant after a guilty verdict has been entered by the trier of fact, the Government may appeal from that ruling without contravening the Double Jeopardy Clause. (a) That Clause protects against Government appeals only where there is a danger of subjecting the defendant to a second trial for the same offense, and hence such protection does not attach to a trial judge's post-verdict correction of an error of law which would not grant the prosecution a new trial or subject the defendant to multiple prosecutions. (b) Here, the District Court's ruling in respondent's favor could be disposed of on appeal without subjecting him to a second trial at the Government's behest. If he prevails on appeal, the matter will become final, and the Government will not be permitted to bring a second prosecution for the same offense, whereas, if he loses, the case must return to the District Court for disposition of his remaining motions.')

[480] Vikramaditya S. Khanna. 'Double Jeopardy's Asymmetric Appeal Rights: What Purpose Do They Serve' (2002) 82 B U L Rev 341, 351; *The People of the State of Illinois v. Aleman* (1996) 281 Ill. App. 3d 991 (Appellate Court of Illinois, First District, Second Division), 625 (In this case, the court made a ruling that 'That jeopardy cannot attach to proceedings infected with fraud or collusion is ineluctable.')

[481] Marianne Wade, Paul Smit and Bruno Aubusson de Cavarlay. 'Prosecution Role Where Courts Decide Cases' (2008) 14(2-3) European Journal on Criminal Policy and Research 11, 137; Fionda op. cit. 148-149.

[482] Wade et al. op. cit. 137.

legislation and the prosecutor can make an informed suggestion since he or she may know more about the accused than the judge, who will only have seen the offender in court.'[483]

In addition to recommending a sentence, the French and German prosecutors, have the power to appeal against verdict and sentence.[484] As Khanna and Rizzolli put it, in France and Germany, symmetrical appeal powers between the government and defendants are the dominant rule.[485] Since prosecutors can appeal against both acquittals and convictions, the German prosecutors have wider appeal rights than the defendants, who appeal against convictions although in limited circumstances can file an appeal against an acquittal.[486] Further, the prosecutor can appeal against sentence.[487] As a quasi-judicial officer they have a duty to protect the defendants and can appeal not only when the sentence is considered too lenient, but also when they think it is too severe.[488]

In France, the decisions by Indicting Chambers, Courts of Appeal, Correctional and Police Courts, and Assize Courts (jury-like trial) can be appealed equally by both the prosecutors and defendants.[489] However, the initial trial acquittal by the Assize Court cannot be overturned by an appeal, but instead, such an appeal has a role to play in clarifying the law.[490]

---

[483] Fionda op. cit. 149.

[484] Wade et al. op. cit.; Beatrix Elsner and Julia Peters, 'The Prosecution Service Function within the German Criminal Justice System' in Jörg-Martin Jehle and Marianne Wade (eds), *Coping with Overloaded Criminal Justice Systems* (Springer, Berlin; Heidelberg 2006) 207, 213; Federal Ministry of Justice (tr), Germany, *Criminal Procedure Code [Strafprozeßordnung]* (1987) s 296 '(1) Both the public prosecution office and the accused shall be entitled to file the remedies admissible against court decisions. (2) The public prosecution office may also make use of them for the accused's benefit'; Jong Gu Kim, *The Reform of the Korean Criminal Justice System* (2nd edn BuB-Mun-Sa, Seoul 2004), 148-150.

[485] Vikramaditya S. Khanna. 'How does Double Jeopardy Help Defendants?' (2001) Discussion Paper no. 315, 14 (Khanna indicated that in addition to the French and German, in Italy, Spain, Argentina, the Russian Federation, China, and Japan, the government may have the power to appeal acquittals); Matteo Rizzolli. 'Why Public Prosecutors Cannot Appeal Acquittals' (2008) JEL Classifications K4 Working Paper Series, 9.

[486] Khanna op. cit. 14 n 60.

[487] Fionda op. cit. 151.

[488] ibid.

[489] Khanna op. cit. 15 n 61.

[490] ibid; Jong Gu Kim, *The Reform of the Korean Criminal Justice System* (2nd edn BuB-Mun-Sa, Seoul 2004), 148-150; Ministry of Justice and John R. Spencer (trs), France, *Code of Criminal Procedure* (2000) art 380-1 'Decisions by the assize court in the first instance imposing convictions may be appealed from as provided for by the present chapter. This appeal is brought before another assize court, nominated by the criminal chamber of the Court of Cassation. This assize court proceeds to re-examine the case according to the terms and the conditions set out in chapters II to VII of the present title.

The court rules without the presence of jurors in the following cases: 1) Where the accused, committed to the assize court solely for a misdemeanour related to a felony, is the only appellant; 2) Where the appeal from the public prosecutor's office against a conviction of an acquittal concerns a misdemeanour related to a felony, and no appeal has been lodged against the felony conviction.'

In short, the German and French prosecutors, unlike their English and United States counterparts, have extensive rights of appeal. Damaska sees this difference in the light of the 'centrifugal tendency' of the continental countries:

> There are in the continental judicial systems two decisive weapons to cope with centrifugal tendencies in administering criminal justice. One is the comprehensive and widely used system of appeals ... As befits a system in which decisions of subordinates are supervised by those closer to the center of power, appellate review was from its inception conceived as a comprehensive device that permitted, at least at the first level of review, a complete reconsideration of the case. Thus criminal appeal in all modern continental systems implies a review not only of alleged legal error, but also of factual findings and even the punishment imposed. Nor is it surprising, in light of centuries of tradition, that appellate review gradually became associated with fairness in the administration of justice. Indeed, in modern continental countries, the "right of appeal" is usually elevated to the constitutional level. The appellate process is made very inexpensive, and is not risky for the parties. In large classes of criminal cases even supreme courts can be reached as a matter of right through the mechanism of appeals.[491]

Appellate review is one of the important methods to secure the uniformity in the centralised criminal procedures and judicial decisions should be subject to reconsideration. Consequently, the finality of a trial and execution of judgment have to be postponed until the normal means of review have been exhausted.[492]

The Japanese and Korean Systems

Japanese and Korean prosecutors, as in France and Germany, have the right to recommend a sentence to the judge and appeal against acquittals. Such a recommendation has a direct influence upon the decisions of the court.[493] The sentence recommendations by the Korean prosecutor and their impact in guiding the judge's decision have been already discussed in Chapter 3.

---

[491] Mirjan Damaska. 'Structures of Authority and Comparative Criminal Procedure' (1974) 84 Yale LJ 480, 488-490.

[492] ibid 491.

[493] Koichi Hamai and Tom Ellis. 'Genbatsuka: Growing Penal Populism and the Changing Role of Public Prosecutors in Japan?' (2008) 33 Japanese Journal of Sociological Criminology 67, 77 (Hamai and Ellis suggested that 'it is important to note here that judges appear to offer little in the way of effective gatekeeping in Japan, such that prosecutors remain the powerful primary determinant of the outcome of criminal justice processes, both outside and within the court process.')

In Japan, a formal trial can begin with the prosecutor's recommendation for sentence. As Hamai and Ellis describe, 'If they consider that the case is very serious and the offender deserves imprisonment, they will process the case for a formal trial with a recommendation that the court considers a custodial sentence.'[494] However, in general, the Japanese prosecutors, as their counterparts in Korea, only recommend a sentence during the final argument.[495] Such a recommendation guides the judgement of the courts. For example, 'suspended prison sentences are generally indicated by a prosecutor's recommendation of less than 3 years imprisonment. In such cases, judges are highly likely to sentence the offender to a suspended prison sentence.'[496] Regarding the significance of prosecutor's recommendation in Japan, Hamai and Ellis illustrated it thus:

> About 7% of the offenders processed through the public prosecutor's office, are currently then committed for formal trial, and 99.9% of these are convicted, with many receiving a custodial sentence ... It is fairly clear then, that once offenders are committed for a formal trial, the guilty verdict is almost certain, and the trial is a formality ... it is important to note here that judges appear to offer little in the way of effective gatekeeping in Japan, such that *prosecutors remain the powerful primary determinant of the outcome of criminal justice processes*, both outside and within the court process.[497]

Despite this, there may be cases in which the requests of the prosecutors are not met, e.g. a lenient sentence or even a finding of not guilty. In those instances, 'it is almost certain that the prosecutor will appeal against this loss of face and ask for the intervention of the appeal courts.'[498]

With regard to the right to appeal against judicial decisions, Korean and Japanese laws, as in France and German, provide the prosecutors with as wide a latitude as the defence. The Korean and Japanese prosecutors can appeal twice: once to the High Courts and finally to the Supreme Court.[499] Yet, there is a difference in the appeals to the Supreme Court between the Japanese and Korean systems. In Japan, the appeals to the Supreme Court are permitted only on the basis of points of law. In other words, the

---

[494] ibid 75.
[495] Jae-Sang Lee op. cit. 457.
[496] Hamai and Ellis op. cit. 77.
[497] ibid (Emphasis added)
[498] ibid; Such appeals, as Johnson put it, are more favourable to the prosecutors than the defendants: 'in the ten years between 1982 and 1991, prosecutors reversed an average of 75 percent of the cases they appealed to the High Courts, while defendants succeeded in less than 17 percent of their appeals.' *See* Johnson op. cit. 41-42.
[499] ibid; Jae-Sang Lee op. cit. 689-723.

prosecutors can appeal in cases where the decision of the lower court contradicts the Constitution or Supreme Court precedent.[500] On the other hand, in Korea, the prosecutor and defendant can appeal to the Supreme Court against findings on grounds of either fact or law. In other words, wider appeals are allowed in the Korean criminal procedure.[501]

To sum up, most jurisdictions give the prosecution the right to recommend a sentence and appeal. However, in the English and US jurisdictions, such rights are considered as an exception to the principles such as double jeopardy. In contrast, the French, German, Japanese and Korean laws, in principle, give the prosecutors considerable leeway. Thus, in these systems, the public prosecutors can exercise almost the same appeal rights as the defendants.

6.2. The Impact of the Dossier in the Criminal Trials

The right to recommend a sentence and the power to appeal against the decisions of the courts are important elements which have prosecutorial impact on the verdict and sentence of the court. However, in the Korean system of criminal justice, as noted in Chapter 6, the investigative dossiers written by the public prosecutors tend to exert even more influence upon the judicial decisions than the other factors. Criminal trials are conducted based on the dossiers, and the statements in the dossiers are used as significant evidence to prove the guilt of defendants.

Dossiers also play an important role in the continental systems. Damaska stated that 'Implicit in the ubiquitous hierarchical control of the continental machinery of criminal justice is the importance of documentation.'[502] For effective review by superiors, all activities of the legal actors must be recorded in the dossiers.[503] Most of this

---

[500] Johnson op. cit. 41.

[501] The Korean Ministry of Justice (tr), *Criminal Procedure Act [Hyungsasosongbeop] partially amended on 21 December 2007 No. 8730* (1954) art 383 'An appeal may be lodged against a judgment in the original instance rendered by the High Court for the following grounds: <Amended by Act No. 705, Sep. 1, 1961; Act No. 1500, Dec. 13, 1953> 1. In cases where there has been a violation of the Constitution of the Republic of Korea, Acts, Ordinances or regulations which have affected a decision of the court; 2. In cases where punishment is abolished or changed, or general amnesty has been proclaimed after a decision of the court has been rendered; 3. In cases where there is a reason to request for a review; and 4. Regarding those cases for which punishment of death, a life term or an imprisonment or imprisonment without labor for more than ten years has been imposed, when the judgment attached was affected by grave mistake of the fact or when the amount of the punishment is extremely improper.'; Jae-Sang Lee op. cit. 740.

[502] Damaska op. cit. 506.

[503] ibid.

documentation ends up in the file, and is used as important source for examination at trial.[504]

In the French and German systems, the main function of the prosecutor is 'to control the investigation of any reported crime, to assemble a complete and balanced file or 'dossier' that would contain the results of that investigation, and to file appropriate criminal charges if the evidence shows that a crime has been committed.'[505] Preparing a dossier for a trial is regarded as one of the main roles of the prosecutors.

The dossier is not only used to review the decisions of the prosecutors, but it also plays an important role in the trial process.[506] Once the public prosecutors file an indictment, the dossiers are sent to the trial judges.[507] On the basis of the investigative dossiers, the judges make a decision 'which witnesses will testify and who will conduct the bulk of questioning of those witnesses during the trial.'[508] Furthermore, the trial judge, as Damaska put it, 'studies the file in advance of trial' and many important parts of the dossiers may be used as evidence in court.[509] Due to this, the French and German prosecutors place more emphasis on preparing dossiers than on examining witnesses at trial.[510] As a result, their main task is to ensure that the investigative dossier includes all relevant evidence as to the case as well as information on the background of the

---

[504] ibid 506-507; Mirjan Damaska. 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study' (1972) 121 University of Pennsylvania Law Review 506, 519 (Damaska stated that 'evidence which has not been brought out during trial may not be used in arriving at the decision. Evidentiary material contained in the dossier technically does not constitute evidence, although it does in fact influence the presiding judge and, through him, other members of the adjudicating panel. But, even disregarding actual practice, once evidence contained in the dossier has been brought out (by reading out summaries of interrogation or in some other way), it may legally be used for substantive purposes.')

[505] William T. Pizzi. 'Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform' (1993) 54 Ohio St.LJ 1325, 1332 (Emphasis added); John H. Langbein. 'Controlling Prosecutorial Discretion in Germany' (1974) 41(3) The University of Chicago Law Review 439, 446-448.

[506] Abraham S. Goldstein. 'Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure' (1973) 26 Stan.L.Rev. 1009, 1018-1019; Richard S. Frase. 'Comparative Criminal Justice as a Guide to American Law Reform: How do the French do it, how can we find out, and why should we care' (1990) 78 Calif Law Rev 539, 608.

[507] Richard S. Frase and Thomas Weigend. 'German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions' (1995) 18 Boston College International and Comparative Law Review 317, 342 (Frase and Weigend illustrated that 'German trials are conducted by the presiding judge ...the court is responsible for gathering all the evidence necessary to 'determine the truth'.'); Goldstein op. cit. 1019.

[508] Pizzi op. cit. 1334.

[509] Mirjan Damaska. 'Structures of Authority and Comparative Criminal Procedure' (1974) 84 Yale LJ 480, 507; In addition to the judges, 'the accused may gain an overall picture of the evidence gathered only by studying the dossier.' *See* Valerie Dervieux, 'The French system' in Mireille Delmas-Marty and John R. Spencer (eds), *European Criminal Procedures* (Cambridge University Press, 2002) 218, 265.

[510] Pizzi op. cit. 1350.

defendant.[511] In France and Germany, the investigative dossier 'constitutes the backbone of the criminal proceedings.'[512]

However, the decisions by presiding judges are not based only on the written file. Although important facts are included in the dossier, unless they are brought out in court, such evidence cannot be used in arriving at the decision due to the 'principle of immediacy'.[513]

Unlike the French and German systems, in the English and US criminal procedures, official documentation recorded in the pre-trial stage is regarded as relatively insignificant.[514] The adversarial trial is based on admissible evidence adduced through the witness box.[515] Professor Uglow described this paradigm as follows:

> [T]he presentation of information (evidence), the argument and the decision all take place within a trial which is separated, geographically, chronologically and formally, from all the previous events such as the police investigation, the review of the evidence by the prosecution, or any preliminary hearings before judges or magistrates. It is only the information which is given in evidence at the trial itself which can form the basis of any decision. The judge, in common with the jury and the spectators in the public gallery, will be hearing the evidence for the first time.[516]

In the English and US systems there is greater reliance on oral testimony and no real counterpart of the investigative dossiers in France and Germany.[517] Much of the Anglo-American law of evidence has been created to regulate the use of documentary evidence in courts.[518] Damaska argued that 'Summaries of testimony or of visits to the scene of crime, for example, assume the character of lifeless bureaucratic residues of reality,

---

[511] ibid.

[512] Damaska op. cit. 507.

[513] ibid 506; Frase and Weigend op. cit. 343 (Frase and Weigend suggested that the principle of immediacy, which refers to a preference of oral over written proof, is the most important rule of trial evidence.); Dervieux op. cit. 233; Ministry of Justice and John R. Spencer (trs), France, *Code of Criminal Procedure* (2000) art 427 para 2 'The judge may only base his decision on evidence which was submitted in the course of the hearing and adversarially discussed before him.'

[514] Damaska op. cit. 521 (Damaska noted that 'The autonomous manner of exercising authority that is so characteristic of the Anglo-United States machinery of criminal justice must inevitably decrease the importance of official documentation.')

[515] Steve Uglow, *Evidence: Text and Materials* (2nd edn Sweet & Maxwell, London 2006) 802, 5-6.

[516] ibid 6.

[517] Damaska op. cit. 521; However, adjudications do not necessarily rely on oral statements. *See* Goldstein op. cit. 1020-1021.

[518] Damaska op. cit. 521; Frase and Weigend op. cit. 342 (Frase and Weigend stated that 'Because of the court's overriding responsibility for determining the truth, rules of trial evidence are less strict in Germany than in the United States.')

always defective, often spurious, and therefore such evidence is normally inadmissible at trial.'[519]

However, in Korea and Japan, trials are conducted based on investigative dossiers. First of all, the Japanese law permits prosecutors and the police to compose a summary of the suspects' statements. Such statements in the dossier are mostly admitted as evidence in courts without the need for oral evidence. The burden is on defendants to prove the unreliability of the accounts.[520] Due to such provisions in the code of criminal procedure, Japanese trials rely heavily on the dossiers prepared by the police and prosecutors.[521] As Foote stated, 'the trial consists primarily of confirming the results of the investigation as reported in this file.'[522]

Johnson described the investigative dossier as 'prosecutor essays': 'they are analytical and interpretive compositions written from a limited personal standpoint, and they are efforts to persuade judges of a particular point of view... [However] the pressure to produce persuasive compositions can compel prosecutors (and the police) to fabricate or distort the content [of the investigative dossiers].'[523] A murder case in the 1990s illustrates well this situation in Japan:

> The investigating prosecutor had three years' experience and only a handful of colleagues in his small, rural office. He was bound by law to make the charge decision by a certain Friday. His boss – the branch chief – demanded a punctiliously detailed dossier. A few days before the charging deadline the prosecutor got the suspect to sign a statement making incriminating

---

[519] Damaska op. cit. 521.

[520] The Ministry of Justice (tr), Japan, *Code of Criminal Procedure (Act no. 131)* (1948) art 322 (1) 'A written statement made by the accused or a written statement recording the statement of the accused and which has his/her signature and seal affixed by him/her *may be used as evidence, when the statement contains an admission of a disadvantageous fact*, or is made under circumstances that afford special credibility; provided, however, that even if the admission is not a confession, a document which contains an admission of a disadvantageous fact may not be used as evidence when there is doubt about it being voluntary...' (Emphasis added)

[521] The investigative dossier includes statements not only of suspects, but also of witnesses. In addition, both of them are admissible at trials. *See* ibid art 321 'A written statement made by a person other than the accused, or a written statement recording the statement of that person and with the signature or the seal affixed by that person may be used as evidence only in the following circumstances ...'; Dong Hee Lee et al. op. cit. 718-719; Johnson op. cit. 248.

[522] Daniel H. Foote. 'The Benevolent Paternalism of Japanese Criminal Justice' (1992) 80 Cal.L.Rev. 317, 338-339 (Foote noted that '[t]his prosecutorial dominance has led to widespread characterizations of Japan's criminal justice system as "prosecutorial justice" (kensatsukanshiho) and "trial by dossier" (chcusho saiban). And it is this aspect of Japanese criminal justice in particular that Judge Ishimatsu was focusing on when he asserted that 'criminal defendants in Japan do not receive trials by judges.' In Ishimatsu's view, "criminal trials ... are conducted in closed rooms by the investigators, and the proceedings in open court are merely a formal ceremony [to confirm the conclusions of the investigators]".')

[523] Johnson op. cit. 248.

> but incomplete admission of guilt. ... [T]he branch chief judged the statement inadequate. "What are you going to do if the case ends in acquittal?" bellowed the boss. "Or is that just fine with you?" After his harangue the chief xeroxed the dossier and edited his copy to read as desired. He then instructed his subordinate to remove the defective pages from the original and insert the designated changes. The prosecutor returned to his office and, with the aid of his assistant, did as instructed, reluctantly but illegally incorporating alterations in the text without gaining the consent of the suspect whose statement this ostensibly was. The prosecutors got their conviction. Some time later the branch chief pressured the same prosecutor to fabricate parts of another dossier. This time the prosecutor resigned, choosing to become a private attorney rather than face another discomfiting dilemma.[524]

Not only does this case identify the process of preparing investigative dossiers and their impact on the outcomes of a trial, but it also indicates the problems that can occur in proceedings heavily reliant on the dossier.

The situation in Korea is very similar to the one in Japan. The public prosecutors and the police have the statutory authority to draft the statements of the suspects and witnesses.[525] Such investigative dossiers are accepted into evidence at trials under certain conditions.[526] As in Japan, the judge conducts a trial on the basis of investigation dossiers. The statements recorded in the document, as noted in detail in Chapter 6, are subject to very little scrutiny and yet play a considerable role in determining guilt of defendants. Due to this practice, the Korean criminal trials are often criticised as '*Jo-Seo Jae-Pan*' which means the trial depending on dossier without hearings.

In Korea, the procedures in preparing dossiers are similar to the Japanese. However, there is a significant difference in their impact. In Japan, the dossier composed by the prosecutors is treated similarly to that of the police.[527] All investigative dossiers are

---

[524] ibid 248-249.

[525] The Korean Ministry of Justice (tr), *Criminal Procedure Act [Hyungsasosongbeop] partially amended on 21 December 2007 No. 8730* (1954) arts 200, 221.

[526] ibid art 312 (1) '*A protocol in which the public prosecutor recorded a statement of a defendant when the defendant was at the stage of suspect is admissible as evidence*, only if it was prepared in compliance with the due process and proper method, the defendant admits in his pleading in a preparatory hearing or a trial that its contents are the same as he stated, and it is proved that the statement recorded in the protocol was made in a particularly reliable state.' (3) 'A protocol prepared by *any investigative institution other than a public prosecutor* for examination of a suspect is admissible as evidence, only if it was prepared in compliance with the due process and proper method and the defendant, who was the suspect at the time, or his defense counsel admits its contents in a preparatory hearing or a trial.' (Emphasis added)

[527] Dong Hee Lee and others, *Investigation Systems: A Comparative Study [Bigyosusajedoron]* (Pakyoungsa, Seoul 2004), 718.

admissible as evidence under the same conditions.[528] However, in Korea, the prosecutor's dossiers are readily accepted into evidence unlike those by the police.[529] Defendants have substantial difficulty in refuting the statements included in the prosecutor's dossiers.[530]

In the English and United States systems, the files detailing the investigation dossiers have no part to play in the proceedings as the trials are mainly based on oral testimony in hearings in open court. By contrast, documents are regarded as one of the most important elements in the French and German systems. However, they restrict the trials based solely on the dossiers, but instead, require all evidence to be examined in the open courts. Unlike those jurisdictions, the trials in Japan and Korea are mostly conducted on the basis of investigation dossiers. In particular, the Korean law provides for very little scrutiny of the prosecutor's documents, in particular the interview records, with the consequence that the dossier has a very powerful evidentiary impact which effectively determines the verdict.

7. Accountability of the Public Prosecution Service

Prosecutors in general conduct various functions based on extensive discretion. Such discretion, as Bibas argued, has the potential for abuse because 'prosecution is low-visibility process about which the public has poor information and little right to participate.'[531] Discretionary powers mean that prosecutors to 'have great leeway to abuse their powers and indulge their self interests, biases, or arbitrariness.'[532] Thus, every jurisdiction establishes accountability mechanisms to check that discretion and to guarantee that the public prosecutors carry out their functions and powers properly.[533]

---

[528] The Ministry of Justice (tr), Japan, *Code of Criminal Procedure (Act no. 131)* (1948) art 321 para 1 subparas 2, 3.

[529] For further discussion, *see* ch 6.

[530] Dong-Woon Shin stated that 'if there is a confession in the interview records written by the public prosecutor, it is almost impossible to expect a judgement of acquittal' *See* Dong-Woon Shin. 'The Reform of the Korean Public Prosecution' (1988) 29(2) Seoul Law Journal 39, 55.

[531] Stephanos Bibas. 'Prosecutorial Regulation Versus Prosecutorial Accountability' (2008) 157 U Pa L Rev 959, 961; Stephanos Bibas. 'Transparency and Participation in Criminal Procedure' (2006) 81 NYUL Rev. 911, 923-931 (Bibas noted that 'Criminal justice outsiders see the system quite differently. Much of the criminal justice system is hidden from their view ... Prosecutors rarely explain publicly why they have declined prosecution, pursued felony charges, or bargained away imprisonment.'

[532] Stephanos Bibas op. cit. (2008) 961.

[533] Hans-Jorg Albrecht. 'Criminal Prosecution: Developments, Trends and Open Questions in the Federal Republic of Germany' (2000) 8 European Journal of Crime, Criminal Law and Criminal Justice 245, 254 (Albrecht noted that 'control and supervision of public prosecutors certainly are necessary insofar as the legal substance is concerned and as regards the implementation of prosecution policies which must be

By use of such mechanisms, transparency can be increased. As a result, the rights of individuals can be protected ensuring discretion not to be abused.[534] As Sanders and Young stated, 'Accountability is needed in order to ensure the appropriateness for the enforcement policy of any agency which employs discretion on the basis of the agency's own criteria and working rules.'[535]

There are several methods to achieve accountability of the prosecution service, as seen in Professor Fionda's comparative study.[536] Even though each system has placed emphasis on a different method, guaranteeing accountability has been regarded important in most jurisdictions.[537] This part explores prosecutorial accountability in each jurisdiction. However, the political accountability of the public prosecution service to the Parliament is not discussed since this is common to all and is regarded as a fundamental mechanism to control the agencies of the government. [538] As a consequence, four aspects will be examined: the internal accountability of the prosecution service, judicial review, accountability to the victims, and the independent schemes.

7.1. The English System

In England and Wales, the decisions of the public prosecutors are generally controlled by the internal hierarchy and the courts. Furthermore, decisions not to prosecute can be challenged, albeit rarely, by private prosecution. In particular, the criminal justice system has an independent inspectorate to assess the performance of the prosecution

---

based upon discretion.'); Ashworth and Redmayne op. cit. 76 (Ashworth and Redmayne argued that 'Methods of accountability should include proper scrutiny of general policies, rules, and/ or guidelines for decision making; active supervision of practice; avenues for challenging decisions; and openness rather than secrecy at key stages.')

[534] ibid 77; For further discussion about the importance of accountability of the prosecution service, *see* Julia Fionda and Andrew Ashworth. 'The New Code for Crown Prosecutors: Part 1: Prosecution, Accountability and the Public Interest' (1994) (Dec) Criminal Law Review 894.

[535] Andrew Sanders and Richard Young, *Criminal Justice* (3rd edn Oxford University Press, Oxford 2007), 372.

[536] Julia Fionda, *Public Prosecutors and Discretion: A Comparative Study* ([Oxford monographs on criminal law and criminal justice], Clarendon Press; Oxford University Press, Oxford; New York 1995) 268

[537] Professor Fionda illustrated the accountability in the four jurisdictions: England and Wales, Scotland, Netherland, and Germany. *See* ibid 60-62, 89-91, 124-128, 160-162.

[538] Ashworth and Redmayne op. cit. 201; Fionda op. cit. 60; 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 283, 285-286; Dervieux op. cit. 224; Elsner and Peters op. cit. 207-208; Johnson op. cit. 119-120; Ho Jung Lee. 'Reformation and Democratic Control of the Public Prosecution Service' (2008) 9(2) Seo-Kang Law Journal 43, 62-63.

service.[539]

First, prosecutors are internally accountable to their superiors, and such lines of management and accountability extend to the Director of the Public Prosecutions (DPP), who is in charge of the service. In turn, the DPP is answerable to the Attorney-General.[540] The Attorney-General has the ministerial and political responsibility and issues the general policies for the public prosecutors. However, with respect to the decisions of individual cases, they do not give instructions to the public prosecutors.[541]

Second, prosecutor's decisions are controlled by the court in individual cases.[542] In the English criminal procedure, the courts play an active role in reviewing prosecutorial discretion.[543] The House of Lords held that a decision to prosecute can be reviewed by the court if there is 'any claim of dishonesty, bad faith or other exceptional circumstance.'[544] In addition to such a review on the decision to charge, the courts have displayed willingness to check the decisions not to prosecute. The courts can review not only the individual decisions to decline prosecutions,[545] but also a general policy not to file indictments of certain classes of offences, e.g. non-prosecution of all thefts with a value below £100.[546] However, the English system has not developed either a formal judicial appeal procedure or a formal internal appeals process dealing with the decisions of the prosecutors, which are considered unfair, unlawful, or improper by an interested party.[547] Nevertheless, as Professor Fionda put it, 'the existing common law procedures

---

[539] Ashworth and Redmayne op. cit. 201.

[540] Prosecution of Offences Act 1985 s 2 'The Director of Public Prosecutions (1) The Director of Public Prosecutions shall be appointed by the Attorney General.' And s 3 'Functions of the Director (1) The Director shall discharge his functions under this or any other enactment under the superintendence of the Attorney General.'; Nicola Padfield, *Text and Materials on the Criminal Justice Process* (4th edn Oxford University Press, Oxford; New York 2008) 536, 169; Ashworth and Redmayne op. cit. 201.

[541] ibid.

[542] Spencer op. cit. 209 (Spencer stated that 'in principle, the decision to prosecute (or refrain from prosecuting) is one that is open to the courts to control by means of judicial review.')

[543] Ashworth and Redmayne op. cit. 202.

[544] *Regina v Director of Public Prosecutions* [2000] 2 A C 326 (HL); Ashworth and Redmayne noted that 'The presumption [of this case] is that, if a prosecution cannot be challenged either on these grounds or under the doctrine of abuse of process, it should go ahead and the court should be allowed to decide the case on its merits.' *See* Ashworth and Redmayne op. cit. 203.

[545] *Regina v Director of Public Prosecutions Ex p. Manning* [2001] Q B 330 (HL) (In this case, the Divisional Court quashed the public prosecutor's decision not to prosecute and held that 'although the court would exercise its power of review sparingly, the standard should not be set so high as to deprive an aggrieved citizen of his only effective remedy'); *Regina (B) v Director of Public Prosecutions* [2009] 1 W L R 2072 (QB) (The court, allowing the claim for judicial review, made a ruling that 'when applying the evidential test ... the prosecutor should not apply a purely predictive approach based on past experience of similar cases but should adopt a merits-based approach, imagining himself to be the fact-finder and asking himself whether on balance the evidence was sufficient to merit a conviction taking into account what he knew about the defence case.')

[546] *Regina v Commissioner of Police of the Metropolis, Ex parte Blackburn* [1968] 2 Q B 118 (QB)

[547] Fionda op. cit. 61.

of judicial review, whereby the decisions of any public body can be judged for fairness and reasonableness, may well provide the necessary framework of a system of accountability necessary for the expansion of the prosecutor's role.'[548]

Third, the right of private prosecution may also secure the accountability of the public prosecution service to the victims.[549] As stated earlier, the English criminal proceedings permit the private individuals to prosecute offenders. Thus, if the public prosecutor declines to prosecute certain offences, citizens can bring the offender to the court.[550]

Finally, there is an independent inspectorate for the crown prosecution service, Her Majesty's Crown Prosecution Service Inspectorate (HMCPSI). The HMCPSI is in charge of the independent inspection and assessment of the activities of the prosecution service.[551] On the basis of such operations, it can contribute to the effectiveness and efficiency of the CPS.[552] For instance, in 2008, the HMCPSI undertook the reviews of the new charging arrangements, which was the first independent assessment of the scheme.[553] In addition, 'the role and contribution of the CPS to the safeguarding of children,' 'Victim and witness experiences in the criminal justice system,' or 'thematic review of the duties of disclosure of unused material undertaken by the CPS' are examples of reviews conducted by the HMCPSI.[554]

In short, in England and Wales, the decisions by the public prosecutors are controlled by the internal hierarchy even though the extent of that control is different from those in the continental systems.[555] In addition, the courts and independent inspectorate play a significant role in holding the prosecution service to account.

7.2. The United States System

In the USA, the decisions of the prosecutors are less controlled by internal hierarchy. Rather, the decisions to prosecute are reviewed not only by the court through the preliminary hearings, but also by the citizens through the grand jury system. In addition,

---

[548] ibid.
[549] Sanders and Young op. cit. 379.
[550] ibid 379-380.
[551] HM Crown Prosecution Service Inspectorate, *Assuring Justice: HM Chief Inspector of the Crown Prosecution Service Annual Report 2008-2009* (The Stationary Office, London 2009), 17.
[552] ibid.
[553] ibid 48 (For instance, the report noted that 'The evidence ... showed that police at the operational level valued early input from the Crown Prosecution Service and that there were extensive softer benefits from closer collaboration between the police and prosecutors.')
[554] ibid 35-52.
[555] Damaska op. cit. 483-523.

the decisions not to prosecute are checked by citizen complaints or private prosecution.

First, US public prosecutors are internally accountable to the Attorney-General even though they exercise extensive autonomy. The public prosecutors are separated into two groups: state and federal public prosecutors, who are respectively called the 'District Attorneys' and the 'U.S. Attorneys'. These public prosecutors have different types of accountability. First of all, the state prosecutor's offices are headed by the state attorney-general.[556] However, the local prosecutors enjoy considerable autonomy rather than being controlled by the hierarchy. Mostly, the attorney general of the state deals with criminal appeals and other post-conviction proceedings.[557] In addition, the prosecutors are mostly elected by the local community.[558] Thus, on the state level, the public prosecutors are mainly accountable to the public rather than to their superiors.[559]

Unlike most state prosecutors, the federal prosecutors are appointed by the government rather than elected by the public. Therefore, their decisions are more subject to their superiors than the state prosecutors. The federal prosecutors are directed by the Attorney-General who is the head of the Ministry of Justice. Not only does the Attorney-General lay down general guidelines but they also issue specific directions for individual cases. Nevertheless, the federal prosecutors are still regarded as exercising substantial autonomy and discretion.[560]

Second, the US prosecutors, as in England and Wales, are accountable to the courts. However, unlike the active role of the English courts, the United States judges may play a relatively passive role in reviewing the decisions of the public prosecutors.[561] The courts check prosecutorial discretion by controlling coercive measures e.g., the judges are in charge of issuing warrants for arrest or search and review any request from the prosecutors.[562] The decisions by the prosecutors to subpoena persons who testify or to

---

[556] 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 283, 285.

[557] ibid.

[558] Apart from New Jersey and Connecticut, in most states the public prosecutors are elected by the public. *See* Yue Ma. 'Exploring the Origins of Public Prosecution' (2008) 18(2) International Criminal Justice Review 190, 202; For more details on the development of the elective status of the public prosecutors in the U.S., *see* above pt 2.4 'The United States system'.

[559] Walther stated that 'the United States Prosecutor's Office could be characterized as a "public servant" concept, implying the idea of service for and loyalty towards the people, i.e., the local community that she or he represents.' *See* Walther op. cit. 285.

[560] ibid.

[561] Ma noted that 'Despite the recognized judicial power to constrain prosecutorial excesses, the United States judiciary has traditionally played a passive role in providing supervision over the exercise of prosecutorial discretion.' *See* Yue Ma. 'Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany, and Italy: A Comparative Perspective' (2002) 12 International Criminal Justice Review 22, 45 and Abraham S. Goldstein, *The Passive Judiciary: Prosecutorial Discretion and the Guilty Plea* (Louisiana State University Press, Baton Rouge, 1981)

[562] Walther op. cit. 286.

produce evidence are also reviewed by the courts.[563] The judges also have the authority to review the decisions to prosecute through 'preliminary hearings'. Before the decision to prosecute, the magistrate confirms whether or not criminal charges have sufficient evidence.[564] However, as Kuckes suggested, 'a judge may not question the wisdom of prosecution, but simply assess its legal sufficiency.'[565] Therefore, where the magistrate decides that the evidence presented by the prosecutor demonstrates probable cause to believe that the defendant committed a crime, the case can move on to the next stage for prosecution.[566]

Third, following the decision of the magistrate in a preliminary hearing, most felony cases with probable cause for prosecution are sent to the 'grand jury' which is another filter to review the decisions to prosecute.[567] Goldstein stated that 'The grand jury is unquestionably the most celebrated of the pre-trial screening devices. Originally conceived as an extension of the royal authority over the citizen, it reached its greatest glory as a barrier against the state, refusing to indict for crime where the evidence was inadequate or the law creating the crime unpopular.'[568] The grand jury consists of a group of lay jurors who review criminal cases and approve a charge.[569] In order to secure the approval of grand jury, the prosecutors submit evidence to prove that there is sufficient cause to bring a suspect to trial.[570]

Finally, the US criminal proceedings allow the citizens to complain or file an indictment of crimes.[571] Such private prosecutions play a role in checking the

---

[563] Along with those functions, the court has the authority to permit the withdrawal of the prosecution upon the request of the prosecutors. *See* ibid.

[564] Niki Kuckes. 'The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury' (2006) 94 Georgetown Law J 1265, 1279.

[565] ibid; However, unlike the grand jury as we shall below, this judicial review may be conducted based on adversary examination, which is substantial to protect the right of the defendants. *See* ibid 1282 (Kuckes noted that 'Grand jury indictment also eliminates the defendant's more substantial right to an adversary preliminary examination, at which the judicial magistrate reviews the government's evidence for probable cause. Taking advantage of this doctrine, federal prosecutors routinely time grand jury indictments so as to bypass the adversary preliminary hearing, even though some courts have frowned upon this practice.')

[566] ibid 1279.

[567] The U.S., *The Constitution* (1787) Amendment 5 'No person shall be held to answer for a capital, or otherwise infamous crime, *unless on a presentment or indictment of a Grand Jury*, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.' (Emphasis added)

[568] Abraham S. Goldstein. 'The State and the Accused: Balance of Advantage in Criminal Procedure' (1959) 69 Yale LJ 1149, 1170.

[569] Walther op. cit. 286.

[570] ibid.

[571] American Bar Association, *Standards for Criminal Justice: Prosecution and Defense Function* (3rd edn ABA, New York 1993) standard 3-3.4 (d) 'Where the law permits a citizen to complain directly to a judicial officer or the grand jury, the citizen complainant should be required to present the complaint for prior approval to the prosecutor, and the prosecutor's action or recommendation thereon should be

prosecutorial discretion not to prosecute offences. In particular, as LaFave put it, prosecutorial discretion is controlled effectively 'by exposing the prosecutor's nonenforcement decisions to the public' because they are the electorate to vote for them.[572]

In short, due to their elected status, US prosecutors exercise considerable discretion, but they also enjoy much autonomy free from internal or external accountability. However, their decisions to prosecute are generally reviewed by judges and citizens who have the right of private prosecution.

7.3. The French System

In France, prosecutorial discretion is controlled basically by superiors in the hierarchy. In addition, the prosecutor is accountable to judges and to victims by providing them with the right to screen the prosecutorial decisions.

First of all, hierarchical supervision plays the main role in controlling the prosecutorial discretion. French prosecutors perform their functions within a bureaucratic hierarchy, which is headed by the Minister of Justice.[573] In particular, they have a statutory duty to follow any written instruction from their superiors.[574] Therefore, decisions by prosecutors can be modified by this hierarchical review.[575] By use of this mechanism, prosecution policies may be enforced consistently across the service.[576] In addition, this hierarchical and bureaucratic control may contribute to preserve democratic accountability of the prosecution service [577] but, as seen in the Hodgson's empirical study, the French prosecutors argue that this hierarchical control is inappropriate to guarantee the independence of prosecutors:

> I personally agree that there is no reason for the Minister to intervene. I am responsible for

---

communicated to the judicial officer or grand jury.'; Walther op. cit. 287.

[572] Wayne R. LaFave. 'The Prosecutor's Discretion in the United States' (1970) 18(3) The American Journal of Comparative Law 532, 539.

[573] Richard S. Frase. 'Comparative Criminal Justice as a Guide to American Law Reform: How do the French do it, how can we find out, and why should we care' (1990) 78 Calif Law Rev 539, 559.

[574] Ministry of Justice and John R. Spencer (trs), France, *Code of Criminal Procedure* (2000) art 33 'The public prosecutor is bound to make written submissions in conformity with the instructions...'

[575] However, as Frase stated, '[t]he French apparently recognize the problems of judicial administration that would arise if individual prosecutorial decisions were always subject to reversal by superiors. Thus, although the chief prosecutor for each court may be disciplined for his or her decisions, the decisions themselves may not be reversed by superiors even if they are directly contrary to written orders.' *See* Frase op. cit. 559-560.

[576] ibid; Jacqueline Hodgson. 'Hierarchy, Bureaucracy, and Ideology in French Criminal Justice: Some Empirical Observations' (2002) 29(2) Journal of Law and Society 227, 228.

[577] ibid.

> my own decisions and they are regulated by the court and can even be challenged by the victim if they decide to act. It does not seem evident that my actions must be justified to the hierarchy of the *procureur general* and the Minister of Justice.[578]

This argument shows a tension between hierarchical accountability and independence of the service.[579]

Second, prosecutorial decisions to file felony charges are strictly reviewed by the court, particularly by investigating judges and the indicting chamber. [580] The investigating judges have the authority to review the sufficiency of evidence and the propriety of charges.[581] They not only dismiss cases for insufficient evidence,[582] but also reduce the level of charges to *delit* or *contraventions*[583] when they conclude that the charges are inappropriate.[584] In this latter instance, such cases are sent to the correctional or police court based on the decisions by the investigating judges.[585]

Once the investigating judges conclude that the offence may constitute a felony and sufficient evidence supports the charge of felony, the case is transferred to the indicting chamber which consists of three judges.[586] The indicting chamber, which is entitled to order a dismissal or a prosecution on lesser charges, also plays a role in reviewing the decisions to prosecute before trial.[587] After the examination, a decree of indictment is issued by the chamber if the charge of felony is regarded as appropriate.[588] However, those judicial screenings are limited to the felony cases. The prosecution of *delits* and *contraventions* are determined by prosecutors without judicial review.[589]

---

[578] ibid 238-239.

[579] ibid (Hodgson noted that the public prosecutors 'agreed that the hierarchical control of the Minister of Justice should be weakened, though most were insufficiently senior to have felt its effects in practice to any significant extent.')

[580] Frase op. cit. 625.

[581] ibid.

[582] In 1980, the investigating judges dismissed 20 per cent of cases referred to them because of insufficient evidence. *See* Geraldine S. Moohr. 'Prosecutorial Power in an Adversarial System: Lessons from Current White Collar Cases and the Inquisitorial Model' (2004) 8(1) Buffalo Criminal Law Review 165, 202.

[583] The *delit* and *contraventions* are less significant offences than felony in the French criminal code, which are respectively tried in the correctional court and instance tribunal. *See* Abraham S. Goldstein and Martin Marcus. 'The Myth of Judicial Supervision in Three Inquisitorial Systems: France, Italy, and Germany' (1977) 87 Yale LJ 240, 250-251 and Pieter Verrest. 'French Public Prosecution Service' (2000) 8 European Journal of Crime, Criminal Law and Criminal Justice 210, 213.

[584] Frase op. cit. 625.

[585] ibid.

[586] Moohr op. cit. 202.

[587] ibid; However, Frase argued that 'the indicting chamber almost always approves the felony charges recommended by the examining magistrate.' *See* Frase op. cit. 625 n 462.

[588] ibid 625.

[589] Goldstein and Marcus noted that 'For delits, which are punishable by imprisonment for two months to five years and are triable in the Correctional Court, the prosecutor has discretion to order a judicial

Finally, the public prosecutors, as their counterparts in England and the USA, are accountable to the victims. But, unlike common law countries, victims are able to join the prosecution as a party.[590] In addition, they can appeal against decisions not to prosecute to the prosecutor's superiors or to the courts.[591] Frase suggests that although the role of the victim is limited in practice, it 'seems as a useful check on actual or perceived abuses of the discretion to decline prosecution.'[592]

In short, the French criminal proceedings employ various filters to review the prosecutorial discretion such as an internal check by superiors, judicial reviews by investigating judges as well as indicting chamber, and an external check by citizens.

7.4. The German System

In Germany, public prosecutors are mainly accountable to the court on the basis of the principle of compulsory prosecution. In addition, German law provides citizens with the power to appeal against prosecutorial decisions, which can contribute to the accountability of the prosecution service.

First, the principle of legality plays a significant role in constraining the discretion of prosecutors.[593] While the service monopolise the prosecution of crime, there is also the mandatory obligation to charge on the prosecutors. As a result, the prosecutors, in principle, must file an indictment for all offences which have sufficient evidence for a successful prosecution.[594] Fundamentally they do not have the discretion not to prosecute on grounds of the public interest.

The court, as Albrecht put it, 'actually has assumed that the public prosecutor is obliged to prosecute a case if uniform and persistent superior court decisions have ruled that certain behaviour is punishable behaviour.'[595] Goldstein and Marcus stated: 'the judiciary must play a central role in assuring that the Code is properly applied: only

---

examination, but he rarely does so.' *See* Goldstein and Marcus op. cit. 250.

[590] Frase op. cit. 616.

[591] ibid; Matti Joutsen. 'Listening to the victim: The victim's role in European criminal justice systems' (1987) 34 Wayne L Rev 95, 110.

[592] Frase op. cit.

[593] Goldstein and Marcus op. cit. 247 (Goldstein and Marcus stated that 'the principle of legality ... makes prosecution compulsory and discretion in charging impermissible unless specifically authorized by statutes.')

[594] However, as Juy-Birmann put it, this principle is mainly applied to a certain level of offences: 'a development linked to the growth of petty and moderate crime ... has gradually replaced the principle of legality with that of discretion to prosecute... Thus, in various areas, the public prosecutor can decide to drop the charges absolutely, or drop them subject to conditions.' *See* Rodolphe Juy-Birmann, 'The German system' in Mireille Delmas-Marty and John R. Spencer (eds), *European Criminal Procedures* (Cambridge University Press, 2002) 292, 309.

[595] Albrecht op. cit. 254.

judges are sufficiently impartial to be entirely trusted with its enforcement.'[596] For similar reasons, judges also review decisions to charge through preliminary hearings.[597] Unless there is sufficient reason to file an indictment, they can dismiss the application by prosecutors.[598]

Second, the decisions by prosecutors are internally reviewed and controlled by the superiors.[599] For instance, regarding important cases, at least three public prosecutors in the hierarchy will be involved in the decision: 'the public prosecutor to whom the case is assigned, the head of the department and finally the head of the public prosecutor's office.'[600] Thus, in theory, the German prosecutors are subject to greater control by superiors than in the English and United States systems where there is no provision to force the public prosecutors to follow instructions from above.[601] However, this subordination of the prosecutors should not infringe on the principle of compulsory prosecution. Therefore, the public prosecutors are obliged to file an indictment based on the principle of legality even if the superior instructs them not to prosecute certain crimes.[602]

Finally, citizens have a part to play in controlling the discretion of the prosecutors by conducting private prosecutions or by requesting judicial or departmental review. First, the citizens themselves can bring the offenders to trial although private prosecution applies only to a narrow class of misdemeanours and has other limitations.[603] The private prosecution is, as Langbein stated, 'mostly designed to protect private dignitary and property interests.'[604] However, it can play an important role in diminishing the 'significance of the power of the public prosecutor.'[605]

---

[596] Goldstein and Marcus op. cit. 247.

[597] Federal Ministry of Justice (tr), Germany, *Criminal Procedure Code [Strafprozeßordnung]* (1987) s 173

[598] ibid ss 174, 175.

[599] German Criminal Procedure Code op. cit. s 146 'The officials of the public prosecution office must comply with the official instructions of their superiors.' s 147 'The right of supervision and direction shall lie with: (1) the Federal Minister of Justice in respect of the Federal Prosecutor General and the federal prosecutors; (2) the Land agency for the administration of justice in respect of all the officials of the public prosecution office of the Land concerned; (3) the highest-ranking official of the public prosecution office at the higher regional courts and the regional courts in respect of all the officials of the public prosecution office of the given courts district.'; Jong Gu Kim op. cit. 321.

[600] Albrecht op. cit. 254.

[601] Goldstein and Marcus op. cit. 247.

[602] Juy-Birmann op. cit. 299.

[603] German Criminal Procedure Code op. cit. s 374 [Admissibility; Persons Entitled to Prosecute] '(1) An aggrieved party may bring a private prosecution in respect of the following offenses without needing to have recourse to the public prosecution office first: 1. trespass ...; 2. defamation ...; 3. violation ...; 4. bodily injury ...; 5. threat ...; 5a. taking or offering a bribe in business transactions ...; 6. criminal damage to property ...' etc.

[604] Langbein op. cit. 461.

[605] ibid 462.

Second, the citizen has the right to request the court to review the prosecutorial decision not to file a charge.[606] Upon the application, the courts begin to examine the cases. If they conclude that the decision not to prosecute is inappropriate, they may order the prosecution service to file an indictment.[607] However, this right is not given to all citizens. Only victims can apply for the judicial review.[608] In addition, this judicial review is limited to certain decisions.[609] Notwithstanding such limitation, this remedy is, as Langbein identified, 'constitute significant controls over and deterrents against abuse of prosecutorial authority.'[610]

Finally, the citizen can institute a departmental complaint against non-prosecution decisions, which is called *Dienstaufsichtbeschwerde*.[611] This is not provided by the code of criminal procedure but by German administrative law which provides the citizens with the right to file a complaint concerning the neglect of duty or abuse of power by public employees.[612] This mechanism also can be exercised to check prosecutorial decisions.[613] However, unlike judicial review, it has limitation that the review is internally conducted by superiors.[614]

In short, the German criminal procedure controls the prosecutorial discretion by the principle of compulsory prosecution. In addition, although it is limited to certain decisions, the victims have the right to apply for the judicial review which can independently screen decisions not to prosecute.

7.5. The Japanese System

The discretion of the Japanese prosecutors, as in other jurisdictions, is controlled by internal and external mechanisms. First of all, all decisions by prosecutors are in principle reviewed by superiors before making a decision on either prosecution or non-

---

[606] German Criminal Procedure Code op. cit. s 172 (2) 'The applicant may, within one month of receipt of notification, apply for a court decision in respect of the dismissal of the complaint by the superior official of the public prosecution office ...'

[607] ibid s 175.

[608] ibid s 172 (1).

[609] The cases dismissed based on sections 153 and 153a of the German Code of Criminal Procedure may not be appealed by the victims. *See* Albrecht op. cit. 248 and German Criminal Procedure Code op. cit. s 172 (2) para 2; Langbein op. cit. 464.

[610] ibid 463.

[611] ibid 465-466; Albrecht op. cit. 248 (However, Albrecht stated that this internal procedure of complaint 'is used very rarely and, moreover, does not lead to successful interventions of crime victims.')

[612] Langbein op. cit. 466.

[613] ibid.

[614] However, Langbein argued that because of the hierarchical structure of the prosecutorial corps, 'German legal academics tend to believe that the risk of a *dienstaufsichtbeshcwerde* is a greater deterrent to prosecutorial malpractice than the possibility of [judicial review].' *See* ibid.

prosecution of crimes.[615] Such hierarchical checks are relatively uncommon in England and the USA, but ubiquitous in Japan.[616] The Japanese public prosecutors regard the review by superiors as far more important than the external controls.[617] One Japanese prosecutor described such a hierarchical review as follows:

> It is often said that Japan has a three-layered court system, made up of District Courts, High Courts, and the Supreme Court. Actually it has four, if you include the *kessai* review [of the superiors] at the pre-charge stage. *Kessaikan* [superior] should allow cases to go to trial only if they are 100 percent sure they will result in conviction. If there is any doubt whatsoever, the *kessaikan* should not let it proceed further. Japan's acquittal rate is low not because judges fail to do their jobs or because trials are unfair to the accused, *but because prosecutors act like judges at the kessai stage, and because frontline prosecutors have internalized the kessai standards themselves.*[618]

The internal controls are mainly exercised by three methods, namely standards, audits and consultations.[619] Through those schemes, the prosecutor's offices can secure consistency nationwide.[620] Firstly, the standards give prosecutors the internal guidelines which they have to rely on. They must consider not only the presumptions underlying those standards, but also prior charging decisions based on such guidelines. Secondly, a sample of uncharged cases is reviewed by after-the-fact audits [*Kamsa*].[621] Mostly, the superiors try to check the propriety of non-prosecution decisions through the audits. Finally, the Japanese prosecutors must have the approval of superiors in order to make a decision on the prosecution. This process is called '*Kessai*' [consultation] system.[622] Johnson states that in the consultation system, the superior plays four main functions: 'As manager he makes sure like cases are treated alike. As teacher he instructs operators about how to conduct their work. As teammate he provides practical help and moral support in difficult cases. And as judge he reviews the adequacy of the evidence.'[623]

In addition to the internal control, the Japanese criminal justice system has two main

---

615 West op. cit. 692 (West noted that 'Prosecutor's offices are pyramidic in structure, and decisions by individual prosecutors must be approved by superiors.')
616 Johnson op. cit. 225; Damaska op. cit. 483-523.
617 Johnson op. cit. 225.
618 ibid 226 (Emphasis added).
619 ibid 225.
620 West op. cit. 692; Johnson op. cit. 225.
621 ibid.
622 ibid (Johnson stated that 'in order to dispose of a case by making a charge decision and sentence recommendation, a prosecutor ordinarily must gain the approval of two or three superiors.')
623 ibid 225-226.

external control schemes: the 'prosecution review commission' and the 'analogical institution of prosecution.' The prosecution review commissions are lay advisory bodies which respectively consist of eleven citizens.[624] The main role of the commission is to review the decisions of the prosecutors not to file an indictment, and all over the country there are 207 prosecution review commissions performing such a role.[625]

With respect to the non-prosecution decisions, the victims or their proxies can apply for a commission hearing.[626] In particular, the commissions can conduct an investigation on their own initiative.[627] Through those investigations, they can draw a conclusion on the propriety of prosecutorial discretion. Once they conclude that the decision not to prosecute is inappropriate, they have the authority to recommend that the prosecution service file an indictment or reconsider the decisions not to charge.[628] However, as such recommendations are advisory, the prosecutors, in theory, are not bound by the conclusions of the Prosecution Review Commissions.[629] Nevertheless, as West put it, 'commissions impose a social check on prosecutorial power' because 'No prosecutor wants to see his name pasted across the front page in a negative fashion, the sure result of ignoring a prosecution review commission in a case on which the public has strong opinions.'[630]

Finally, the Japanese courts, as in Germany, can review the decisions not to prosecute based on the request by victims. This is called 'analogical institution of prosecution' [*Fushimpan seikyu*].[631] By use of this scheme, the victim can appeal directly to the court which can order the prosecution of offences.[632] Such a prosecution is carried out by the special prosecutor who is appointed by the court.[633] However, this mechanism does not apply to all offences. Those injured by an abuse of official authority can be protected by this process.[634]

---

[624] West op. cit. 697; Johnson op. cit. 222.

[625] Such reviewable cases accommodate most decisions in relation to the non-prosecution, e.g. the drops by evidence sufficiency test and public interest test including the suspension of prosecution. *See* West op. cit. 697 n 70; Johnson op. cit. 222-223.

[626] West op. cit. 697.

[627] To conduct such an investigation, the commissions can summon witnesses for examination, question the prosecutor, and ask for expert advice. *See* ibid 697-698.

[628] ibid 698; Johnson op. cit. 223.

[629] ibid (Johnson noted that 'These recommendations are merely advisory. Prosecutors can ignore them, and usually they do.'); In 1994, 1,691 cases were dealt with by the prosecution review commissions. Among them, 209 cases were recommended for prosecution by the commissions. However, only 28 per cent of those cases were charged by the prosecutors according to the recommendation. *See* A. Didrick Castberg. 'Prosecutorial Independence in Japan' (1997) 16 UCLA Pac.Basin LJ 38, 61-62.

[630] West op. cit. 703.

[631] Johnson op. cit. 223.

[632] West op. cit. 693.

[633] ibid 694.

[634] Johnson op. cit. 223.

In short, the prosecutorial discretion in Japan is controlled mainly by hierarchical superiors. However, there is an important system to monitor non-prosecution decisions by providing the citizens with the authority to review prosecutorial discretion, which is called 'prosecution review commission'. In addition, the courts can play a role in screening the decisions of the prosecutors although their reviews are fundamentally limited to a small number of offences.

7.6. The Korean System

The decisions by prosecutors in Korea are mostly reviewed by the superiors in the hierarchy. There is no independent authority to check the prosecutorial discretion except for the court which, as we have seen, plays a passive role in reviewing the prosecutor's decisions.

First, the Korean criminal procedure, as in France, Germany and Japan, requires the prosecutors to follow the instructions from superiors.[635] This restriction not only contributes to the conformity of prosecutorial policies nationwide, but it also plays a role in checking the discretion of the prosecutors.[636] However, unlike the French, the superiors in Korean system do not need to use written instructions. Most hierarchical supervisions are conducted by word of mouth.[637]

Second, the victims, as in Germany and Japan, can request for the review by the court in relation to the prosecutor's decisions not to charge.[638] Prior to 2008, this authority had been, as in Japan, limited to certain crimes.[639] However, the reform of the Korean criminal procedure in 2007 abolished such limitation. Under the new legislation, the victims are entitled to request judicial review with regard to all offences.[640]

Apart from these internal controls and adjudicative reviews, the Korean system of criminal justice, unlike in other jurisdictions, does not have an independent mechanism

---

[635] The Korean Ministry of Justice (tr), *Public Prosecutor's Office Act [Geomchalcheongbeop] partially amended on 21 December 2007 No. 8717* (1949) art 7 (1) 'A public prosecutor shall follow the direction and supervision by his superiors with respect to prosecutorial affairs.'

[636] Ho Jung Lee. 'Reformation and Democratic Control of the Public Prosecution Service' (2008) 9(2) Seo-Kang Law Journal 43, 56-63.

[637] ibid.

[638] The Korean Ministry of Justice (tr), *Criminal Procedure Act [Hyungsasosongbeop] partially amended on 21 December 2007 No. 8730* (1954) art 260 'A person ... may, if he receives a notice of non-prosecution from the public prosecutor, file a petition for adjudication to find whether such disposition is properly made with the High Court having jurisdiction over the venue where the district public prosecutor's office to which the public prosecutor belong is situated.'

[639] Ho Jung Lee op. cit. 43, 65.

[640] However, such a scheme may not be regarded as good enough to screen the prosecutorial decisions. For further discussion, *see* ch 7.

to screen the prosecutorial discretion. For instance, the French criminal procedure has investigating judges and indicting chambers to review the decisions to charge. Similarly, the US prosecutor's decision to charge a felony is screened through the preliminary hearings by the court and grand jury. In Japan, unlike in France and the USA, the criminal procedure does not have mechanisms to review the decisions to file an indictment. Rather, it has an independent commission to reconsider non-prosecution decisions.

In England and Wales, there seems to be no scheme to review the individual decisions by prosecutors. However, the general policies are laid down by the DPP. In addition, the courts play a relatively active role in screening the prosecutor's decisions. This judicial role can also be noted in German system of criminal justice where the prosecutors exercise relatively limited powers due to the principle of compulsory prosecution. Fundamentally, all decisions to prosecute are reviewed by the court. Moreover, the prosecutorial decisions not to charge based upon the public interest test must be approved by judges.[641]

The differences between five jurisdictions, as seen in Table 5.5, can be readily observed through the comparison of various schemes.

[641] Federal Ministry of Justice (tr), Germany, *Criminal Procedure Code [Strafprozeßordnung]* (1987) s 153 '(1) If a less serious criminal offense is the subject of the proceedings, the public prosecution office may dispense with prosecution *with the approval of the court competent for the opening of the main proceedings* if the perpetrator's culpability is considered to be of a minor nature and there is no public interest in the prosecution. The approval of the court shall be not required in the case of a less serious criminal offense which is not subject to an increased minimum penalty and where the consequences ensuing from the offense are minimal.' (Emphasis added)

Table 5.5 The methods to achieve accountability of the prosecution service

	Internal Check [a]	Review by the Court		Private Prosecution [b]	Independent Reviewing System [c]
		Decisions to Charge	Decisions Not to Charge		
England and Wales		●	●	●	●
The USA		●	●	●	●
France	●	●	●	●	
Germany	●	●	●	●	
Japan	●		●		●
Korea	●		●		

Note. [a] This internal check is based on the statutory duty of the public prosecutors to follow the instructions from the superiors in the hierarchy; [b] For the details on private prosecution, *see* part 5.2.1 'The Decision to Charge'; [c] The HMCPSI in England and Wales may independently assess the policies of the public prosecution service. However, both the 'Grand Jury' in the USA and the 'Prosecution Review Commissions' in Japan deal with the individual decisions of the prosecutors.

8. Conclusion

The prosecution service has various functions. These functions and their related powers are very different between systems of criminal justice as each system has its own legal tradition and culture. Nevertheless, several trends, which are applicable to most jurisdictions, can be noted between the representative systems.

Firstly, prosecutors become involved in the criminal investigation by either giving advice to the police or directing them. Yet, their main role is to file an indictment of offences, and in courts, to prove the guilt of the defendants as a party. More importantly,

although prosecutors become involved in the police investigation, they do not carry out directly an investigation of crime.

Secondly, the authority to charge is not monopolised by the prosecution service in most jurisdictions. Other authorities including private individuals are entitled to charge the offenders. In addition, the decisions to charge are mostly reviewed by the courts.

Thirdly, in the continental systems as well as in Korea and Japan, the prosecutors have the authority to appeal an acquittal and recommend a sentence to the judge. By use of those powers, the prosecutors can have an influence upon a sentence. In particular, the pre-trial dossiers prepared by the prosecutors play a significant role at trials in those systems. However, most systems place an emphasis on the statements in open court rather than those in the dossiers.

Finally, each system tries to secure the accountability of the public prosecution service by establishing various mechanisms including the courts, which review prosecutorial discretion.

However, the roles, discretion, and accountability of the Korean prosecution service do not correspond to such international standards. The wide ranging powers and functions of the Korean prosecutor over the whole of the criminal justice system means that they can be convincingly described as 'monopolist'. Their role is very different from that in other representative systems. In particular, direct investigation with the prosecutors' own investigation units are very distinctive features of the Korean criminal justice system. Exceptionally, the Japanese prosecution service has its own investigation units. However, they are installed only in some offices, and moreover, their investigations are limited to certain crimes such as high profile corruption and organised crimes. In addition, there is, unlike in Korea, no difference in the evidentiary impact of the interviews recorded by the police and prosecutors.

In England and Wales, the USA, Germany, Japan, and France, the role of prosecution service is more limited to prosecution itself. The various powers and discretion over investigation and prosecution are exercised by a number of different bodies rather than monopolised by the prosecutors. In particular, most prosecution services focus their attention on reviewing rather than repeating the police investigation. Similarly, prosecutorial decisions are also screened, either by citizens, judges, or independent reviewing mechanism. In this regard, the prosecutorial role in the representative systems can be classified as a 'filter'.

The police, as a gate keeper, play a filtering role. Cases where there is insufficient evidence for the prosecution will be discontinued by the police. The prosecution screens the continuing cases as a second filter. Between the jurisdictions, there are differences,

e.g. in France, investigating judges have a filtering role in serious criminal cases and in Germany, the prosecution service acts as a key filter rather than a supplementary filter. Each system puts prosecutorial decisions under scrutiny of courts, citizens, or independent monitoring mechanisms.

In short, the ideal role of public prosecutors is to screen the results of investigations as an objective filter. This comparative study proposes such a combined model to indicate the direction in which the prosecution services should be developed. Based on the ideal model and unique features of the Korean prosecution service, various suggestions can be given for adjusting the prosecutorial roles. As a result, this study, along with the theoretical framework, provides another significant tool to analyse and critique the roles, duties, discretion, and accountability of the prosecution service. In the subsequent chapters, several impacts on the criminal proceedings are explored which are caused by the dominant position of the prosecution service in Korea.

Chapter 6 The Prosecutor's Interview with Suspects

1. Introduction

Korean criminal trials, as briefly discussed in Chapter 2, have been often called '*Jo-Seo Jae-Pan*' i.e. trials heavily depending on the investigation dosser written by prosecutor.[1] The judges do no more than confirm evidence in the prosecutorial documents.[2] Particularly, interview reports play a crucial role in determining the conviction as they provide the courts with a confession, which is often referred to as the most potent of weapons for the prosecution and which develops other evidence against the accused.[3]

As we have seen, in Korea, the prosecutors as well as the police directly question the suspects. The results of prosecutorial interview are recorded in the documents, and then, presented to the court. The Korean Criminal Procedure Act (KCPA) allows these prosecutorial interview reports to be accepted into evidence regardless of defendant's statements in court:

> 1 *A protocol in which the public prosecutor recorded a statement of a defendant when the defendant was at the stage of suspect is admissible as evidence*, only if it was prepared in compliance with the due process and proper method, the defendant admits in his pleading in a preparatory hearing or a trial that its contents are the same as he stated, and it is proved that the statement recorded in the protocol was made in a particularly reliable state.
>
> 2 Notwithstanding paragraph 1, if the defendant denies the authenticity in formation of the protocol, it is admissible as evidence, only when it is proved by a video-recorded product or

[1] Presidential Committee on the Judicial Reform, 'Committee Report (IV): From 14th to 27th Conference' PCJR (Seoul January 2005) 267.
[2] ibid 337.
[3] Mike McConville and John Baldwin. 'The Role of Interrogation in Crime Discovery and Conviction' (1982) 22(2) Br J Criminol 165, 169 (McConville and Baldwin stated that 'A confession is a prized piece of prosecution evidence because, if it is not challenged in court, it can be the most potent evidence against the accused and, as we have noted earlier, it is frequently decisive to the outcome of the case.'); John Baldwin. 'Police Interview Techniques: Establishing Truth or Proof?' (1993) 33(3)ibid325 (Baldwin stated that 'A confession may obviate the need for further enquiry and, more fundamentally, it can provide an alternative to investigation itself.'); Wayne T. Westling. 'Something is Rotten in the Interrogation Room: Let's Try Video Oversight' (2000) 34 J Marshall L Rev 537, 546 (According to Westling, a survey found that '61% of prosecutors identified confessions as "essential" or "important" for conviction.').

> any other objective means that the statement recorded in the protocol is the same as the defendant stated and was made in a particularly reliable state.
>
> 3 A protocol prepared by any investigative institution other than a public prosecutor for examination of a suspect is admissible as evidence, only if it was prepared in compliance with the due process and proper method and the defendant, who was the suspect at the time, or his defence counsel admits its contents in a preparatory hearing or a trial.[4]

In the prosecutorial interview report, the signature of the suspect itself proves the contents of prosecutorial investigative records.[5] Therefore, unless there is a particular procedural problem such as a violation of the right to silence or the right to legal counsel, the statements in the documents are admitted into evidence.[6] By contrast, as seen paragraph 3 of article 312 above, the police investigative documents cannot be admitted as evidence unless they are confirmed by the defendants in court regardless of the existence of a signature.[7]

The courts rarely question the prosecutorial interview documents, and as a result, they are routinely accepted into evidence.[8] Surprisingly, from the establishment of KCPA in 1954 to 1995, such reliance on the prosecutorial records has been quashed only in four cases.[9] As a result, the preliminary investigation phase, specifically what conducted by prosecutors, serves as a central plank of criminal proceedings.

This chapter aims to explore the reliability of such prosecutorial interview documents and the problems caused by criminal trials depending on them so heavily. First, I will briefly examine the general function of the investigative interview. Then, the necessity to regulate interrogations is discussed. Third, I will investigate unanticipated consequences resulting from the Korean measure which was created to safeguard suspects against inappropriate interviewing methods by the police. Finally, a number of safeguards to both increase the reliability of investigative interview and amend the

---

[4] The Korean Ministry of Justice (tr), *Criminal Procedure Act [Hyungsasosongbeop] partially amended on 21 December 2007 No. 8730* (1954) art 312 (Protocol Prepared by Public Prosecutor or judicial Police Officer).

[5] Kyung Ock Ahn. 'The Admissibility of Police Interrogation Documents: A Comparative Study' (2009) 25 Journal of Public Security [*Chian-Nonchong*] 101, 119-120

[6] ibid 119-120

[7] ibid 124; Dong Kwon Son. 'A Trial based on the Statements in Court and the Reform of the Pre-Trial Investigation' (2008) 30 Journal of Korean Public Safety and Criminal Justice [Kongan Hangjung Hakhoebo] 80, 97-98; The emphases in the article of CPA were added by the author.

[8] Ahn op. cit. 112-113 (He suggests that the cases whose statements of defendants are challenged and rejected in courts are very rare.)

[9] Presidential Committee on the Judicial Reform, 'Committee Report (IV): From 14th to 27th Conference' PCJR (Seoul January 2005), 341.

distortions in the criminal process will be explored.

Before moving on, an important proviso is in order. Due to surprising absence of research on prosecutorial interview records, many of the conclusions of this chapter are supported by reference to studies on police questioning. Such a limitation is a natural outcome because the prosecutorial investigation, as seen in Chapter 5, is a distinctive feature in the Korean criminal justice system. However, as we shall see below, since there is no significant difference between the police and prosecutorial questioning in terms of methods and contents, the conclusions of this study would not be considerably affected.

2. The Function of the Investigative Interview

The interview with suspects has been regarded as one of the key investigative practices which can elicit confessions, provide incriminatory evidence, and generate information pertaining to the other offences.[10] It can indicate, for instance, the evidence of intent and motive, knowledge of accomplices, and extent of involvement.[11] This point is well illustrated by the statements of the prosecutors whom I interviewed:

> [*PP5-IC*] The only person who exactly knows what's happened is the offender. If he doesn't say anything, nobody can get the fact. Indeed, it's not easy to find a fact even though the suspect says something. However, unless he confesses, we can't help but to rely on assumption. So the confession and interrogation is very important.[12]

> [*PP3-IS2*] If there's no confession, it's very difficult to resolve the case. Without the confession, we can't remove concerns about the certainty. In other words, I can't exclude the possibility that there must be facts that I don't know. So, through the interrogation, I try to get admissions and confessions from the suspects.

---

[10] James W. Williams. 'Interrogating Justice: A Critical Analysis of the Police Interrogation and Its Role in the Criminal Justice Process' (2000) 42(2) Can J Criminol 209, 214-215; Richard A. Leo. 'Police Interrogation and Social Control' (1994) 3 Social and Legal Studies 93, 99.

[11] ibid 99.

[12] Similarly, McConville and Baldwin illustrated that 'the justifications for police questioning do not rest solely upon success in obtaining confessions; interrogations are said to serve other purposes. Interrogations may be helpful to the police, for example, in obtaining evidence from a suspect about his accomplices, in the gathering of criminal " intelligence," in recovering stolen property, and in clearing the books of undetected offences.' *See* Mike McConville and John Baldwin. 'The Role of Interrogation in Crime Discovery and Conviction' (1982) 22(2) Br J Criminol 165, 166-167.

The function of the interview can be explained in two aspects: reconstructing the crime and building a case. Firstly, interviews with suspects, victims, and witnesses are an essential aspect of investigative agencies for reconstructing offences.[13] A number of researchers have conceived them as a social process relying on the interpretative work and social interactions of individual investigators under conditions of autonomy and low visibility.[14] Interviews, as McConville and others suggested, are 'social encounters fashioned to confirm and legitimate a police narrative.'[15]

In particular, the crucial part of the process of reconstruction is 'the reconciliation of any lingering ambiguities with the official account of the event.'[16] Hence, the contents of interview reports, as Walton stated, 'must be neither puzzling vague nor confusingly ambiguous and must be interpreted as accurately as possible.'[17] However, in this process, the suspect's viewpoint can be either ignored or incorporated into the investigator's accounts.[18] One prosecutor talked about the simplification of the suspect's statements as follows:

> [*PP5-IC*] Five-hour interview with a suspect is documented as a five-page interview report. Mostly, simplified accounts are recorded in the prosecutorial interview dossiers. Indeed, this process can cause a problem. However, once the suspect agrees with the statements in the interview report, there should be no problem at all. All participants in trials are happy with the result.

The ambiguities and complexities of life events, as Williams illustrated, are rendered 'into stabilized, organizationally supported narratives that offer clear lines of organizational action.'[19] The investigator's account is supported by this reorganising

---

[13] Mike McConville, Andrew Sanders and Roger Leng, *The Case for the Prosecution : Police Suspects and the Construction of Criminality* (Routledge, London 1991) 227, 327; James W. Williams. 'Interrogating Justice: A Critical Analysis of the Police Interrogation and Its Role in the Criminal Justice Process' (2000) 42(2) Can J Criminol 209, 215.

[14] Peter K. Manning, *Symbolic Communication: Signifying Calls and the Police Response* (The MIT press, 1988), 141 (Manning emphasised the function of interpretation in policing: 'The salience of a given bit can shift as external events 'intrude' into message analysis and interpretation. Furthermore, it is clear that the matter of priorities and internal message analysis are closely related, for policing is a practical art. The aim of interpretation is to act.'); McConville et al., op. cit.; James W. Williams, op. cit.; Richard A. Leo and Kimberly D. Richman. 'Mandate the Electronic Recording of Police Interrogations' (2007) 6(4) Criminology and Public Policy 791; Petter Gottschalk, *Knowledge Management Systems in Law Enforcement: Technologies and Techniques* (IGI Global, 2007).

[15] McConville et al. op. cit. 327.

[16] Williams op. cit. 216.

[17] Douglas Walton. 'The Interrogation as a Type of Dialogue' (2003) 35(12) Journal of pragmatics 1771, 1775.

[18] McConville et al. op. cit. 76-77; Williams op. cit. 216.

[19] ibid 217.

process, in which the investigators articulate the case in their own words rather than suspects'.

The second function of investigative interviews is to construct a case. Through the interview, the investigators have the opportunity to confirm their previous suspicions about a case.[20] As Baldwin stated, the investigative interview is, as a rule, designed to construct proof based on suspicions:

> It is evident, therefore, that the idea that police interviewing is, or is becoming, a neutral or objective search for truth cannot be sustained, because any interview inevitably involves exploring with a suspect the details of allegations within a framework of the points that might at a later date need to be proved. Instead of a search for truth, it is much more realistic to see interviews as mechanisms directed towards the 'construction of proof'.[21]

Hence, investigators tend to reproduce the events through the manipulation of the suspect's understanding of his actions. Often, they systematically exclude competing accounts.[22] Williams described such a tendency as a 'self-fulfilling prophesy': investigators 'reinforce their commitments to a series of accounts which they themselves have constructed in accordance with the routine demands and structures of their work.'[23]

Through the interviews, reasonable doubt can be resolved.[24] In the criminal process, investigators take charge of constructing as strong a case as possible against the defendant. The law does not require them to establish the truth of the matter, but instead makes them prove the case beyond reasonable doubt.[25]

In short, through the reconstruction of the suspect's statements, investigators can translate the complexities and ambiguities of daily life into the codified accounts creating a foundation for the subsequent treatment of suspects. At the same time, the investigators try to construct a case which the suspects are transformed into defendants and processed through the system of criminal justice.[26] In this respect, the investigative

---

[20] Mike McConville and John Baldwin. 'The Role of Interrogation in Crime Discovery and Conviction' (1982) 22(2) Br J Criminol 165 170; McConville et al. op. cit. 77 (McConville et al. illustrated that 'It is routine police work not to follow up evidence raised by an accused which may support a defence.'); John Baldwin. 'Police Interview Techniques: Establishing Truth or Proof?' (1993) 33(3) Br J Criminol 325, 340-344.

[21] ibid 327.

[22] Williams op. cit. 219.

[23] ibid.

[24] McConville and Baldwin op. cit. 170.

[25] ibid.

[26] Williams op. cit. 219-220.

interview has a considerable part to play in determining the outcomes. McConville and Baldwin illustrated such a significant role of interview thus:

> As the police have become more professionalised, so they have acquired much greater control of the prosecution; and as this has happened, so the really crucial exchanges in the criminal process have shifted from courts into police interrogation rooms. It is these exchanges that, in a majority of cases, colour what happens at later stages in the criminal process. Indeed, often they determine the outcome of cases at trial. Questioning provides information classifiable in legally defined ways, resolves doubts, is administratively efficient and fulfils certain psychological needs. Questioning has come to dominate police work and, as a result, police perceptions of reality have come to dominate the criminal process.[27]

The investigative interview contributes to case construction, and subsequently, has a considerable effect on the outcome of trials. Hence, the implications of interview recording methods and strategies have been regarded as important features for the principles of fairness and due process.[28]

3. Regulation of the Investigative Interview

Confessions are occasionally unreliable. Miscarriages of justice cases show that interrogation is one of the significant elements leading to unreliable confessions.[29] For instance, as we shall see later, four juveniles were found guilty of murder at the first instance in Korea because of wrongful confessions by coercion.[30] For an effective

---

[27] McConville and Baldwin op. cit. 174; Similarly, Baldwin stated that 'It has now become something of a truism to observe that, in most criminal cases, the crucial stage is the interview at the police station, for it is at that stage that a suspect's fate is as a rule sealed.' *See* Baldwin op. cit. 326.

[28] McConville and Baldwin op. cit.; McConville et al. op. cit.; Baldwin op. cit.; David J. Smith. 'Case Construction and the Goals of Criminal Process' (1997) 37(3) Br J Criminol 319; Wayne T. Westling. 'Something is Rotten in the Interrogation Room: Let's Try Video Oversight' (2000) 34 J Marshall L Rev 537; Thomas P. Sullivan. 'Electronic Recording of Custodial Interrogations: Everybody Wins' (2005) 95(3) Journal of Criminal Law and Criminology 1127; Giulio Illuminati. 'Frustrated Turn to Adversarial Procedure in Italy (Italian Criminal Procedure Code of 1988), The' (2005) 4 Washington University Global Studies Law Review 567; Richard A. Leo and Kimberly D. Richman. 'Mandate the Electronic Recording of Police Interrogations' (2007) 6(4) Criminology and Public Policy 791; David Dixon. 'Interrogating Myths. A Comparative Study of Practices, Research, and Regulation' (2010) University of New South Wales Faculty of Law Research Series 40

[29] Clive Walker and Keir Starmer (eds), *Miscarriages of Justice: A Review of Justice in Error* (Oxford University Press 1999).

[30] *See* n 84 below.

interview, investigators strategically employ various techniques to control actions and attitudes of suspects. According to McConville and others' study, the suspect's accounts are largely translated, simplified, and often ignored by the investigators:

> The interview is not designed to elicit the suspect's own account of the incident, rather the suspect is invited to accede to the officer's view of the case. Where the suspect asserts innocence or introduces evidence which would support a defence, this is generally ignored.[31]

The investigator's ability is measured by their capability to exercise psychological and behavioural control over a suspect and eventually to obtain confessions and admissions.[32] Toward this end, investigators apply psychological strategies to manipulate the suspect's emotions and attitudes leading them to be 'almost powerless in stopping the flow of information.'[33] The suspect is in general shaped, coaxed, cajoled, tricked or simply persuaded into confessing.[34] Under these circumstances, as Professor Uglow argued, 'even non-vulnerable people are also likely to make admissions which are not true, not realising that once a statement had been made, there is great difficulty in retracting it.'[35]

3.1. False Confessions

The Korean law, unlike in England and Wales, does not have a specific definition for confession or false confession. In the English criminal procedure, a confession is defined as 'any statement wholly or partly adverse to the person who made it, whether made to a person in authority or not and whether made in words or otherwise.'[36] By

---

[31] McConville et al. op. cit. 77.
[32] Richard A. Leo. 'Police Interrogation and Social Control' (1994) 3 Social and Legal Studies 93, 100.
[33] Robert F. Royal and Steven R. Schutt, *The Gentle Art of Interviewing and Interrogation: A Professional Manual and Guide* (Prentice-Hall, 1976) quoted in Richard A. Leo. 'Police Interrogation and Social Control' (1994) 3 Social and Legal Studies 93, 100; Steve Uglow, *Evidence: Text and Materials* (2nd edn Sweet & Maxwell, London 2006) 802, 148.
[34] Leo op. cit. 100.
[35] Steve Uglow, *Evidence: Text and Materials* (2nd edn Sweet & Maxwell, London 2006) 802, 148.
[36] Police and Criminal Evidence Act 1984 (c. 60) s. 82; Given the deleterious consequences, it is remarkable that suspects make a confession during the investigative interview. Various theoretical models have been suggested to explain why people confess to crimes. For more details on these models, *see* E. Linden Hilgendorf and Barrie Irving, 'A Decision-making Model of Confessions' in Sally M. Lloyd-Bostock (ed), *Psychology in Legal Contexts. Applications and Limitations* (MacMillan, London 1981) 67–84 (Irving and Hilgendorf present a conceptual model for understanding criminal confessions. Based on their two studies, they suggest that when suspects are interviewed they become involved in a complicated and demanding decision-making process); Brian C. Jayne, 'The psychological principles of

means of interview, investigators elicit confessions not only from perpetrators, but also from innocent people.[37] The confessions from innocent people can be identified as a false confession, which is any 'detailed admission to a criminal act that the confessor either did not commit or is, in fact, ignorant of having committed.'[38]

The frequency of false confessions is not well known because, as Kassin and Gudjonsson argued, many of them are discovered before trials, are not reported by the investigative agencies, and are not publicised by the media.[39] Therefore, the known cases of false confession, in particular being induced by investigative interview, as Drizin and Leo suggested, represent 'only the tip of a much larger iceberg.'[40]

A number of empirical studies have indicated the frequency and grounds of false confessions. For instance, in the studies of Gudjonsson and Sigurdsson on the frequency of false confessions, twelve per cent of surveyed inmates in Icelandic prison described that they had made a false confession at some time in their lives.[41] In terms of reasons of false confessions, they found that the most frequently mentioned reason (51%) was to escape from the pressure during the investigative interview.[42] Given the influence of investigative interview and vulnerabilities of the suspect, a false confession may be one of the unavoidable results being induced by the interrogation.[43]

---

criminal interrogation' in Fred E. Inbau, John E. Reid and Joseph P. Buckley (eds), *Criminal Interrogation and Confessions* (3rd edn Williams & Wilkins, Baltimore 1986) 327 (Focusing on the Reid techniques, Jayne offers an informative model describing an investigative interview as a psychological process to undo a denial, which is a kind of presumed equivalent of deception); Gisli H. Gudjonsson, *The Psychology of Interrogations and Confessions: A Handbook* (John Wiley & Sons Ltd, 2003), 124-128 (Based on a cognitive-behavioural perspective, Gudjonsson proposes that a particular relationship between the suspect, the environment, and significant others within the environment leads to confessions.)

[37] Fred E. Inbau and others, *Criminal Interrogation and Confessions* (4th edn Jones & Bartlett Learning, 2004), 411 (Inbau et al. stated that 'There is no question that interrogations have resulted in false confessions from innocent suspects. However, the reported incidence of false confessions varies widely.')

[38] Richard J. Ofshe and Richard A. Leo. 'The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions' (1997) 16 STUDIES IN LAW POLITICS AND SOCIETY 189, 240.

[39] Saul M. Kassin and Gisli H. Gudjonsson. 'The Psychology of Confessions' (2004) 5(2) Psychological Science in the Public Interest 33, 48.

[40] Steven A. Drizin and Richard A. Leo. 'The Problem of False Confessions in the Post-DNA World' (2004) 82 N C Law Rev 891, 921.

[41] Gisli H. Gudjonsson and Jon F. Sigurdsson. 'How Frequently do False Confessions Occur? An Empirical Study among Prison Inmates' (1994) 1(1) Psychology, Crime & Law 21; Jon F. Sigurdsson and Gisli H. Gudjonsson. 'The Psychological Characteristics of 'False Confessors': A Study among Icelandic Prison Inmates and Juvenile Offenders' (1996) 20(3) Personality and Individual Differences 321, 324.

[42] ibid 324.

[43] For more detailed information on false confessions and case examples, *see* Saul M. Kassin and Lawrence S. Wrightsman, 'Confession evidence' in Saul M. Kassin and Lawrence S. Wrightsman (eds), *The psychology of evidence and trial procedure* (Sage Beverly Hills, CA, 1985) 67; Saul M. Kassin. 'The Psychology of Confession Evidence' (1997) 52(3) Am Psychol 221, 224-227; Gisli H. Gudjonsson, *The Psychology of Interrogations and Confessions: A Handbook* (John Wiley & Sons Ltd, 2003), 193-197; Fred E. Inbau and others, *Criminal Interrogation and Confessions* (4th edn Jones & Bartlett Learning, 2004), 411-447.

3.2. Regulatory Safeguards

False confessions may lead to wrongful convictions. In particular, unreliable statements being induced by coercive interrogation can decrease the reliability of the investigative interview itself even though it is one of the most important activities of the law enforcements. Indeed, this has led to the establishment in many jurisdictions of procedural safeguards for the appropriate protection of the defendant's rights.[44] With respect to the interrogation, certain guidelines and procedures are regarded as important safeguards against investigator's impropriety, false confessions, and wrongful convictions.[45] For instance, in England and Wales, the investigative interview process and confession evidence are largely regulated by the Police and Criminal Evidence Act 1984 (PACE) and accompanying Codes of Practice.[46]

The Codes give several guidelines to the investigators in terms of procedures and the proper treatment of suspects. Firstly, Code C states the issues of the fitness to be interviewed by providing guidance on the detention, treatment and questioning of persons.[47] The key safeguards being provided in Code C include:[48]

> 1. Whenever a person is interviewed they must be informed of the nature of the offence, or further offence [11.1]
> 2. [T]he interviewer should remind the suspect of their entitlement to free legal advice [11.2]
> 3. A juvenile or person who is mentally disordered or otherwise mentally vulnerable must not be interviewed regarding their involvement or suspected involvement in a criminal offence or offences, or asked to provide or sign a written statement under caution or record of interview, in the absence of the appropriate adult [11.15]
> 4. [I]n any period of 24 hours a detainee must be allowed a continuous period of at least 8 hours for rest, free from questioning, travel or any interruption in connection with the investigation concerned [12.2]

Moreover, the introduction of a new Code of Practice on Tape Recording in 1988 (Code

---

[44] In addition to procedural safeguards such as guidelines for interviewing, constitutional safeguards are regarded as the basis for protecting defence. *See* Welsh S. White. 'False Confessions and the Constitution: Safeguards against Untrustworthy Confessions' (1997) 32 Harvard Civil Rights-Civil Liberties Law Review 105.
[45] Gudjonsson op. cit. 24-25.
[46] Police and Criminal Evidence Act 1984 (c. 60); Police and Criminal Evidence Act 1984 Code of Practice C 2008.
[47] ibid; Saul M. Kassin and others. 'Police-Induced Confessions: Risk Factors and Recommendations' (2010) 34(1) Law Hum Behav 3, 13.
[48] Police and Criminal Evidence Act 1984 Code of Practice C 2008.

E) has led all interviews concerning indictable and either-way cases to be tape-recorded on a mandatory basis.[49] There is also provision for visual recording of interviews, which was established by s.76 of the Criminal Justice and Police Act 2001.[50]

In particular, the right to counsel during the interrogation seems to be considered as one of the most significant measures in many countries. For instance, in France, a number of safeguards are administered in order to protect the suspects against false confessions.[51] These measures are mainly carried out by the police. Various rights of the suspects must be informed immediately after detention. These rights include as following: 'to see a doctor within three hours; to see a lawyer for 30 minutes "without delay"; and to be informed of the nature of the offence in connection with which she is being detained.'[52] In particular, after the first meeting with counsel, the suspects may have additional assistance from the counsel after 20 hours and 36 hours if the detention is extended.[53] Indeed, the police must inform the counsel of the nature of the suspect's offence. However, the defence counsel can neither participate in the interrogation nor have access to the dossier of evidence.[54]

In addition to the right to counsel, the police officer, who is in charge of the detention, must record not only the duration of custody, but also interview times, rest periods, and meal times during the interrogation.[55] Finally, the results of the interview with the suspect and witnesses must be written down by the police. Indeed, the contents of this report must be confirmed by the interviewees.[56] Unlike in England and Wales, most interviews are not electronically recorded in France. However, the interviews with juveniles must be visually recorded by law since June 2001.[57]

For another example, in Germany, the safeguards against false confession resulting

---

[49] Police and Criminal Evidence Act 1984 Code of Practice E 2010; Steve Uglow, *Evidence: Text and Materials* (2nd edn Sweet & Maxwell, London 2006) 802, 158; Andrew Sanders and Richard Young, *Criminal Justice* (3rd edn Oxford University Press, Oxford 2007), 241.

[50] This visual recording is not mandatory and applies only to investigations of serious crimes on the basis of Code F. *See* Uglow op. cit. 159; Police and Criminal Evidence Act 1984 Code of Practice F 2010 para 3.1.

[51] In this section the safeguards only in France and Germany are briefly introduced because a broad comparative study will be conducted in chapter 8.

[52] Ministry of Justice and John R. Spencer (trs), France, *Code of Criminal Procedure* (2000), art 63 quoted in Jacqueline Hodgson. 'The detention and interrogation of suspects in police custody in France' (2004) 1(2) European Journal of Criminology 163, 173.

[53] ibid.

[54] ibid; Yue Ma. 'A Comparative View of the Law of Interrogation' (2007) 17(1) International Criminal Justice Review 5, 15 (Accordingly, the confessions being obtained by the police after failing to grant appropriate access to counsel have been excluded at the lower courts.)

[55] Ministry of Justice and John R. Spencer (trs), France, *Code of Criminal Procedure* (2000), arts 64, 65.

[56] Jacqueline Hodgson. 'The detention and interrogation of suspects in police custody in France' (2004) 1(2) European Journal of Criminology 163, 173.

[57] ibid 173 n 21.

from coercive interrogation are mainly based upon the assistance of the counsel and the exclusionary rule. Firstly, as in other jurisdictions, the suspects must be informed of a number of rights prior to formal interviews. The German law requires the police to inform the suspects of the nature of the accused offence and their rights to silence and counsel.[58] The suspects also have an opportunity to explain away any suspicion against them. In addition, they have the right to demand the police and prosecutors to preserve the exculpatory evidence. These rights must be informed by the police.[59]

Secondly, suspects may consult with counsel at the pre-trial stage.[60] Once suspects want to seek counsel, the police must make a reasonable effort to find an appropriate lawyer.[61] However, the scope of counsel's participation in the interrogation differs depending on the interviewers. In Germany, in addition to the police, the prosecutors as well as the judges can interview the suspects before the trial. When a prosecutor or a judge questions a suspect, defence counsel can be present during the interview. However, if the suspect is questioned by the police, defence counsel cannot participate in the interrogation. In this instance, the suspect can consult with the counsel prior to the interrogation.

Finally, section 136a of the German Code of Criminal Procedure provides the mandatory exclusion of confessions obtained by 'mistreatment, exhaustion, bodily invasion, administration of drugs, torture, deception, hypnosis, illegal compulsion or threat, and illegal promises or measures that may interfere with a person's mental ability.'[62] Thus, in case that the police use the prohibited methods, the confession is excluded by the court although the police can prove that such a confession was voluntarily made by the suspect.[63]

To sum up, because of the possibility that the statements of the suspects can be manipulated during the interrogation, various procedural safeguards have been established in each jurisdiction. Generally, most systems try to protect the suspects against false confessions by preserving the suspect's basic rights such as right to silence and to see counsel. In particular, the assistance of the defence counsel is regarded as a fundamental requirement to protect the suspect during the interrogation. In addition, the

---

[58] Federal Ministry of Justice (tr), Germany, *Criminal Procedure Code [Strafprozeßordnung]* (1987), s 136.
[59] ibid s 136.
[60] ibid s 137.
[61] Yue Ma. 'A Comparative View of the Law of Interrogation' (2007) 17(1) International Criminal Justice Review 5, 16-17.
[62] ibid.
[63] Kuk Cho. '"Procedural weakness" of German Criminal Justice and its Unique Exclusionary Rules based on the Right of Personality' (2001) 15(1) Temple International and Comparative Law Journal 1, 12-13.

time for interrogation is limited by regulations, and during the interview, the police are required to provide the suspects with proper rests and meals. Furthermore, mandatory electronic recordings of interview sessions are either wholly or partially articulated by law.

Unlike those measures, the drafters of KCPA introduced an extraordinary safeguard that can be rarely observed in other jurisdictions.[64] In order to prevent 'third degree' tactics by the police, they made, as seen in Chapter 3, a considerable difference between prosecutorial and police documents as to whether the documents can be admissible into evidence.[65]

4. Intended and Unintended Consequences

In Korea, the power to investigate and interview was given to prosecutors under article 312 of the KCPA. The Korean legislators did not have sufficient time to consider the various consequences of this because they had to establish a legal system in a short time after colonial period and the Korean War. In addition, as Professor Shin argued, long-term interests were probably ignored in order to secure short-term interests, i.e. social control and efficiency.[66] It may be argued that this measure has had 'unanticipated consequences' in the Korean criminal justice system.[67]

According to Merton, unanticipated outcomes generally result from ignorance, error, and immediate interests overriding long-term interests.[68] Particularly, in the criminal process, consequences of the new legislation are very difficult to anticipate because, as Houston and others noted, 'The criminal justice organization does not exist in the vacuum.'[69] Because events and individuals constantly have an impact on the process, even well-intended laws often have unintended outcomes.[70]

---

[64] *See* ch 5.

[65] For more details on 'third degree tactics', *see* Richard A. Leo, *Police Interrogation and American Justice* (Harvard Univ Pr, 2008).

[66] Dong-Woon Shin. 'The Reform of the Korean Legal System and the Revision of the Law of Evidence' (2006) 47(1) Seoul Law Journal 107-132, 113.

[67] The concept of 'unanticipated consequences' was popularised by Robert K. Merton. *See* Robert K. Merton. 'The Unanticipated Consequences of Purposive Social Action' (1936) 1(6) Am Sociol Rev 894

[68] ibid 898-902.

[69] James Houston, Phillip B. Bridgmon and William W. Parsons, *Criminal Justice and the Policy Process* (University Press of America, Lanham; Plymouth 2008), 119-120.

[70] ibid; William W. Schwarzer and Russell R. Wheeler. 'On the Federalization of the Administration of Civil and Criminal Justice' (1994) 23 Stetson L.Rev. 651, 667; Similarly, Bottoms illustrated that in England and Wales, 'The widespread use of suspended sentences in place of fines and probation, and the magistrates' tendency to impose longer sentences when suspending, were not legislatively intended.' *See* Anthony E. Bottoms. 'The Suspended Sentence in England, 1967-1978' (1981) 21(1) Br J Criminol 1, 8;

Those consequences in the Korean criminal process can be readily noted. Prosecutors directly interview suspects, victims and witnesses in most indictable cases. In general, they interrogate on the basis of confessions that the suspects already made before the police.[71] This interview is principally conducted by the prosecutors themselves with the participation of one other member of staff in their office and without electronic recording.[72] A number of commentators have made the point that this process is both to confirm the suspect's accounts at the police station and to incorporate them into a prosecutorial record, which the prosecutors use in order to file an indictment, and which is usually accepted as conclusive evidence forming the basis of a conviction.[73]

In short, those activities have gradually helped transform the prosecution service into an investigative agency. As one judge stated, no prosecution service seems to exist in the Korean system of criminal justice. Rather, two agencies - prosecution service and the police – may work together on the investigation. It may be suggested that this is a functional deformity which leads to a number of consequential distortions in the criminal process.

4.1. Waste of Resources – Double Interviewing Structure

The first consequence is a waste of resources resulting from the double-interviewing system. Having been interviewed by the police, suspects are mostly questioned once

---

Margaret Howard. 'The Law of Unintended Consequences' (2006) 31 S Ill ULJ 451, 451(Howard described simply the law of unintended consequences as 'actions have unforeseen effects.'); Roger I. Roots. 'When Laws Backfire' (2004) 47(11) Am Behav Sci 1376, 1378 (Roots suggested that 'The unintended consequences of public policy haunt virtually every legal enactment.')

[71] Dong-Woon Shin. 'The Reform of the Korean Legal System and the Revision of the Law of Evidence' (2006) 47(1) Seoul Law Journal 107-132, 118; Dong Hee Lee. 'The Reality of Interrogation and its Remedy' (2003) 20(1) Journal of Korean Criminal Law [Hyungsabeop Yeonku] 219, 243; Woong Hyuk Lee. 'The Analysis of Multiple Organizational Outcome of the Public Prosecution Service' (2006) 15(1) Korean Journal of Public Administration 3, 29; Kyung Ock Ahn. 'The Admissibility of Police Interrogation Documents: A Comparative Study' (2009) 25 Journal of Public Security [*Chian-Nonchong*] 101, 124-125.

[72] Professor Lee argued that 'given the structure of the interrogation room and participants in the process, the prosecutorial interview is more closed than the police interrogation. In particular, the prosecutors' offices have special interrogation rooms, which are totally separated from outside without mandatory electronic recordings. Subsequently, in 2002, torture could be carried out by the investigators in the prosecutors' office in Seoul and one of the suspects was killed.' *See* Dong Hee Lee op. cit. 242-243; According to the Woong Hyuk Lee's survey, 46.5 per cent of respondents who experienced prosecutorial interview stated that the interrogation process is much closed. Only 17.7 per cent of respondents disagreed with this item. *See* Woong Hyuk Lee op. cit. 21.

[73] Dong-Woon Shin op. cit. 118 (Professor Shin described that that 'the routinized prosecutorial interviews after police questioning are one of the distinctive features in the Korean criminal process.'); Dong Hee Lee op. cit. 243; Woong Hyuk Lee op. cit. 29; Kyung Ock Ahn op. cit. 124-125.

again by the prosecutors.[74] As discussed above, the interview records written by the prosecutors do not generally have new facts different from those the police discovered.[75] One judge said that except for 'less typos' in the prosecutorial documents, there is no major difference between the prosecutorial and police interview records:

> [*J2-IM*] The prosecutorial interview records are almost same as the police documents. The prosecutors repeatedly take a note of the accounts of suspects, which already existed in the police interview documents. ... The only difference between those two interview records is that the prosecutorial documents have less typos.

This inefficient double-interviewing scheme stems from article 312 of the KCPA. The confessions in the police records are easily retracted by defendants. Therefore, the defendants being aware of this provision often withdraw the confessions, which they made in the police station, at trials. For the prosecutors, the most effective method to overcome this situation is to preserve those confessions in their records.[76] Subsequently, the different evidentiary impact causes an inefficient double-interviewing system.[77]

This inefficient structure, indeed, causes considerable workload for the prosecution service. Most prosecutors whom I interviewed pointed to such difficulty:

> [*PP3-IS2*] We have to work a lot. I usually come to work before 8 o'clock, and then, read a few pages of newspapers. After drinking a cup of coffee, I have to read a lot of documents filed up on my desk all day long. Moreover, I have to direct the interviews with the suspects, witnesses, and victims. To be honest, I can't interview all the suspects by myself although all interview reports are written by my name. Many interviews are carried out by the staff. Then, after dinner from 7 P.M., I begin to write a report whether or not to charge the suspects on the basis of the interview results conducted during the day time. In fact, there is too much workload for the prosecutors.

> [*PP3-RC*] For me, the workload is one of the biggest stressful factors. The prosecutors should focus their attentions on every case. There is no case which is insignificant. In order

---

[74] Dong-Woon Shin op. cit. 118.
[75] *See* above n 73 and the accompanying text.
[76] Dong-Woon Shin op. cit.
[77] Woong Hyuk Lee. 'The Analysis of Multiple Organizational Outcome of the Public Prosecution Service' (2006) 15(1) Korean Journal of Public Administration 3, 29 (Professor Lee stated that 'No benefit can be achieved from the double-interviewing structure. The prosecutors just confirm the facts being already found by the police. New findings are rarely discovered by the prosecutorial interview. Subsequently, this structure leads to the loss of money and time.')

> to charge, we have to confirm every statement of the suspect. I didn't have time to read newspapers in the morning. I had been always chased by time (felt pressured by lack of time).
>
> [*PP2-RR*] There are too many cases for the prosecutors to deal with. I think too much workload is the most stressful factor for the prosecutors. In order to deal with all the cases assigned to me, I always have to work even at night time.

This increase of workload was anticipated during the discussion about the establishment of article 312 in 1954. The Lee Sung-Man government (1948-1960) rejected such a draft of a prosposed law. The government argued that 'the strong evidentiary impact of the prosecutorial interview documents will cause a repetition of unnecessary interviews and considerable workload to the prosecution service.'[78] However, the legislators passed the KCPA without any amendment.

The workload might be considered as a prosecutor's duty although it could cause a waste of resources.[79] However, it also wastes the time of interviewees, both suspects and witnesses. Suspects often complain about repetitive interrogation by prosecutors:

> [*PO5-IS*] One day when I finished the interview with a suspect, she asked me about the forward process. So, I told her that she would be interviewed by the prosecutor once again in order to confirm and record the statements. All of a sudden, she was angry at me. Then she said, "I will get any punishment because I know what I did wrong. But, I don't have time to go to the prosecutor's office again. Today, I couldn't open my store because I had to come here. I can't do so any more. Why should I be interviewed again? I've already said everything" ... After this incident, I had an opportunity to meet her again. So, I asked her what happened after the interview. She said that, as I had told her, she had to go the prosecutor's office again because the prosecutor had kept asking her to come. Then, she answered to the same questions as I had already done. Finally, she got a heavy fine.

In other words, repetitive interviewing by the prosecution service plays a role in causing inconvenience not only to the prosecutors, but also to the citizens.[80]

---

[78] Jun Young Mun, *The Establishment of the Court and Prosecution Service in Korea* (Yuksa Bypyung Sa, Seoul 2010) 976, 862.
[79] ibid.
[80] Kyung Ock Ahn. 'The Admissibility of Police Interrogation Documents: A Comparative Study' (2009) 25 Journal of Public Security [*Chian-Nonchong*] 101, 167; Hak-Bae Kim, 'The Reasonable Reallocation of the Investigative Powers between the Police and Prosecutors: The Perspective of the Police' in Supreme Prosecutors' Office and National Police Agency (eds), *Public Hearing for Allocating*

4.2. The Acceptance of the Interview Record

The second consequence is that reliable fact-finding is restricted by a prosecutor's written records. Judges cannot make informed decisions as to whether to admit confessions into evidence and what weight to put on them. Unlike electronic recordings, the documents provide judges with incomplete information to determine whether the prosecutors employed coercive methods or extracted an involuntary and unreliable confession. As Leo stated, wrongful convictions are in general based on interview documents rather than tape-recording or audio-visual.[81] In the interview documents, the accounts of disputants are 'incomplete, selective, and potentially biased about what occurred.'[82] The written interview, as seen above in Part 2, is law enforcement's version of instant replay.[83]

Thus the interview reports, summarised and interpreted by prosecutors, cannot be appropriately reviewed by the courts. The judges do not have sufficient information to determine the propriety of investigation process or to challenge the evidence being provided by the prosecutors. One trial judge whom I interviewed pointed out such a difficulty:

> [*J3-IS*] In case the defendant states differently from the contents in the interview documents written by prosecutors, I try to determine whether the interview records are reliable. However, it's very difficult for the judges to refute the statement in the prosecutorial interview documents. So, the statements in courts are mostly ignored. Only in case the defendant's arguments are strongly supported by other evidence, we can reject the

---

Investigative Powers in Korea (SPO; NPA, Seoul 2005) 2, 17.

[81] Richard A. Leo, *Police Interrogation and American Justice* (Harvard Univ Pr, 2008), 298; In many false confession cases, the confessions, as Drizin and Leo argued, have been deemed voluntary by the trial judges. As the judges have found that the confessions to be reliable evidence of guilt, most false confessions have led to wrongful convictions. *See* Steven A. Drizin and Richard A. Leo. 'The Problem of False Confessions in the Post-DNA World' (2004) 82 N C Law Rev 891.

[82] Leo op. cit. 297.

[83] Thomas P. Sullivan. 'Police Experiences with Recording Custodial Interrogations' (2004) 88(3) Judicature 132, 133 (Unlike written records, electronic recordings was described as 'an incontestable instant replay': 'Experienced officers from several hundred departments described contemporaneous electronic recordings of complete custodial interviews as a powerful law enforcement tool – an incontestable 'instant replay'.'); Indeed, untruthful allegations and faulty recollections can draw attentions from relevant parties in the proceedings. Suspects may falsely accuse the prosecutors of failing to inform them of legal rights such as the right to legal counsel or using coercive tactics. In contrast, prosecutors, as we shall see below in the case examples, may make false claims about the suspect's behaviour and accounts. *See* James H. Barnes and Noah Webster, *Police Interrogation: Tape Recording* (Royal Commission on Criminal Procedure Research Study No. 8, HMSO, London 1980), 2 (Barnes and Webster citing Hyde Committee illustrated that 'Tape-recording would deter, if not prevent, the use of any unfair questioning methods by the police. Conversely, it would reduce, if not remove, the risk of untrue and unfair allegations being made against police officers responsible for conducting interviews.')

> prosecutorial documents. Otherwise, it's almost impossible ...

Judges have difficulty in rejecting confessions being made in the pre-trial process.

This is shown in the recent case of four juveniles wrongfully convicted at the first instance:

> The juveniles denied the murder at the beginning of the interrogation by the prosecutor. However, all of them made confessions before the prosecutor. As the defence counsel argued, the prosecutor often made the defendants wait in the interrogation room for several hours without interviewing them. In addition, only a part of the interviews, in which the defendants confessed to the crime, were visually recorded by the prosecutor. Moreover, notwithstanding the vulnerabilities of the defendants who are all juveniles and homeless, they were interrogated without the participation of their parents, let alone defence counsel. We have considered all those factors. Nevertheless, we cannot find a reasonable ground to exclude the confessions that they made in the prosecutor's interview room.[84]

The defendants were found guilty solely on the basis of the confessions before the prosecutor. The interviews were conducted without the participation of appropriate adults although all defendants were vulnerable street living, homeless juveniles. In addition, there was no other evidence except for the confessions. However, even under these circumstances, the judges did not question the reliability of the confessions. The court, as we shall see in detail in the case examples below, did not have sufficient information to challenge the prosecutorial interview documents because the documents provide them with only limited knowledge skewed toward the views of prosecutors. Furthermore, the trial judges are required to provide written reasons in verdicts in order to justify their suspicion about the reliability of confessions.[85] However, such a requirement itself constrains the judge.[86]

In addition the judges tend to place more trust on the prosecutorial interview records than on the defendant's statements in court. All five judges whom I interviewed told that the statements in the prosecutorial documents are very trustworthy:

---

[84] *2008 KOHAP 45.64.73.117* (2008) 16 July 2008 (Suwon District Court).

[85] KCPA, art 325.

[86] Herbst illustrated that requiring a written justifications impose serious constraints upon a decision making. *See* Karl P. Herbst. 'The Chinese Criminal Process: Revolutionary Ideology and Human Rights' 30 Stanford Law Rev 469, 485; Michele Panzavolta. 'Reforms and Counter-Reforms in the Italian Struggle for an Accusatorial Criminal Law System' (2004) 30 North Carolina Journal of International Law and Commercial Regulation 577, 592.

[*J2-RS*] The reliability of the interrogation documents being prepared by the prosecutors is generally over 80%. I don't think this is good. But, we mostly trust the prosecutorial reports. In practice, about 80 to 90 % of them are trustworthy. Therefore, the confessions in the prosecutorial interrogation reports are rarely quashed.

[*J3-IS*] Largely, I tend to trust the prosecutorial dossiers. But, recently the prosecutors use the interrogation documents in order to maintain their powers. I'm worried about such a situation.

[*J2-IM*] There're lots of people who lie in court although I warn them of perjury. Many of the accused and witnesses tend to make unreasonable statements. Nowadays, the judges try to place the emphasis on the statements in court. However, many judges including me put more trust on the statements in the prosecutorial reports than those in court.

Subsequently, statements in the prosecutor's interrogation room are considered to be more important than those in open court.[87] The Korean criminal courts, as the presidential committee suggested, only confirm confessions and evidence obtained by the prosecutors.[88] In these circumstances, it is reasonable to conclude that the defendant's right to an open trial is merely a nominal right and not a right in practice.

Taken together, written documents provide the courts with insufficient information on the confessions. Prosecutors do not record confessions literally. Instead, they make a summary statement abridging and re-organising the suspect's testimony. This method of constructing a case enables the prosecutors to create 'closely-knit and logically consistent accounts which judges may find difficult to resist.'[89] Moreover, the judges mostly put more trust on the statements in the prosecutorial documents than those in the open courts. As a result, a trial based on such insufficient information cannot guarantee truth-finding. Instead, the facts being constructed by the prosecutors come to be regarded as the truth through the confirmation of the court.

---

[87] Kyung Ock Ahn. 'The Admissibility of Police Interrogation Documents: A Comparative Study' (2009) 25 Journal of Public Security [*Chian-Nonchong*] 101, 164 (Professor Ahn illustrated that 'the admissibility of prosecutorial interview documents into evidence leads the outcome of trials to be manipulated by the prosecutors.')

[88] Presidential Committee on the Judicial Reform, 'Committee Report (IV): From 14th to 27th Conference' PCJR (Seoul January 2005), 267.

[89] Daniel H. Foote. 'Confessions and the Right to Silence in Japan' (1991) 21 Georgia Journal of International and Comparative Law 415, 455. As seen in Chapter 8, the Korean and Japanese systems of criminal justice have a large number of similarities, in particular in terms of evidentiary impact of interview documents.

4.3. Regulating the Prosecutor's Interview

The final consequence is that the prosecutors themselves often use unethical interrogative tactics, e.g. threats and torture, in order to extract a confession from the suspect. In most jurisdictions, the prosecutors play a quasi-judicial role as a significant filter to monitor police investigation including inappropriate interviewing methods.[90] However, in Korea, the risk of abuse by prosecutors themselves cannot be properly controlled as there are weaknesses in interviewing practices.

According to the survey conducted by the Korean presidential committee on human rights, 17.2 per cent (N=116) of the suspects indicated that they had experienced threats during the prosecutorial interrogation. In addition, 12.3 per cent (N=83) of respondents reported that they were forced to give false confessions or admissions. In particular, 2.3 per cent (N=16) of suspects experienced physical violence.[91]

Clearly, unethical methods are not rare during interview, particularly in a closed interrogation room without a proper monitoring mechanism such as electronic recordings. It should be noted that such interview tactics are also still used by the police although their interview records are not accepted into evidence in court.[92]

Interview documents provide only limited information and because of this, judges oversee the prosecutors' behaviour. This also prevents third parties from monitoring the prosecutor's practices.[93] The power resulting from this interviewing process, as Drizin

---

[90] For more details on the quasi-judicial and filtering role, *see* ch 3, 6 and 8.

[91] Presidential Committee on Human Rights, *A Survey on the Infringement on Human Rights During the Investigation* (PCHR, Seoul 2003), 101-109.

[92] In 2010, four police officers were arrested on the suspicion of torture during the interrogation, and found guilty at the court. *See 2010 GOHAP 331* (2010) 48 Kakgong 30 December 2010 (Seoul Southern District Court); Jeong Min Mok. 'Four Police Officers Found Guilty of Torture' *Kyung-Hyang* (30 December 2010); Dong-Woon Shin. 'The Reform of the Korean Legal System and the Revision of the Law of Evidence' (2006) 47(1) Seoul Law Journal 107-132, 117 (Professor Shin stated that 'notwithstanding article 312 [of the KCPA], the police often use improper tactics during the interrogation in order to obtain confessions because they are necessary to detain suspects. For the police officers, this goal is more important than to prove the guilt of the defendants in court.').

In addition to this reason, both the prosecutorial repetitive interviewing and supervising over the police investigation also, as seen in the interviews with police officers, have an impact on the coercive interrogation by the police: [*PO4-IS1*] Police officers try to obtain confessions from the suspects because such confessions just move on to the prosecutor's desk. For example, the prosecutor's questions are like this: "Is the statement true that you've talked to the officer?" In other words, the confessions before the officers are just given to the judge as evidence through the prosecution service; [*PO5-IS*] In order to send the cases to the prosecutors' office, we need to have a confession. Otherwise the prosecutors don't accept the files. So, the prosecutors require us to obtain admissions; [*PO4-IS2*] Confession is necessary to get the warrant for detention of the suspects. ... When the suspect doesn't talk at all, it's really difficult to finish the case. If I were a defence lawyer, I would tell my client not to say anything before the police or prosecutors.

[93] Welsh S. White. 'False Confessions and the Constitution: Safeguards against Untrustworthy Confessions' (1997) 32 Harvard Civil Rights-Civil Liberties Law Review 105, 153.

and Reich noted, can be effectively checked by more detailed knowledge about the interrogation:

> Knowledge would empower [third parties] to become more informed about current problematic tactics, and then to clarify and develop more specific rules ... , in turn giving ... clearer guidance on where the line for acceptable behavior is drawn.[94]

Indeed, due to the lack of information on the interrogation process, trial judges, the appellate courts and executives cannot conduct any systematic oversight of prosecutor's activities.[95]

4.3.1. Weaknesses in Interview Practices

Article 312 of the KCPA has mainly contributed the self-incriminating statements before the prosecutors to be accepted into evidence.[96] This evidentiary impact leads the prosecutors into seeking a confession from the suspects. As a result, this tendency may often tempt the prosecutors to use inappropriate interviewing methods. This is exacerbated by a number of elements, which are favourable to the investigation authorities than to the suspects:

- Secrecy and Abridged Documents
- Length of Detention
- Lack of Disclosure

Firstly, prosecutorial interviews, as discussed earlier, are conducted in a relatively secret way. Although prosecutorial interviews are recorded, this does not eliminate the secrecy of the interrogation room. Prosecutorial interviews are conducted in a closed room by the prosecutor simply with the participation of the one or two members of staff. The interview is not recorded by electronic methods on a mandatory basis.

Under these circumstances, the interrogation process cannot be effectively monitored even by internal methods.[97] As seen above in the accounts of one prosecutor,

---

[94] Steven A. Drizin and Marissa J. Reich. 'Heeding the Lessons of History: The Need For Mandatory Recording of Police Interrogations to accurately Assess the Reliability and Voluntariness of Confessions' (2004) 52 Drake L.Rev. 619, 628.

[95] Richard A. Leo, *Police Interrogation and American Justice* (Harvard Univ Pr, 2008), 299.

[96] As seen in n 92 above, it has failed to restrict inappropriate interview methods by the police.

[97] Sanders described such coercive powers of the investigators as follows: 'if threats and isolation do not work—try covert taping of the suspect's conversations with a co-suspect, solicitor or member of the

a five-hour interrogation is often summarised into a five-page document. These abridged records cannot precisely show what occurred in the prosecutor's room for five hours. In particular, abuses such as torture, threats, and inducements will not be monitored at all in the prosecutor's well-organised essay although such tactics are still used:

> [*DL2-IS2*] Many important statements had been missed out of the prosecutorial documents. In the homeless girl case,[98] fortunately, I could confirm those facts by overseeing visual recordings, which were presented by the prosecutors to prove confessions. Because of the leading questions, all statements in the records were completely constructed for a conviction. Those facts could be easily found through the video recordings. But, none of them were noted in the documents. ... While defending this case, I came to recognise one very serious problem. Interview documents should be one of the most objective information for the judgement. However, they're recorded differently from the real facts. According to the prosecutor's intention, important information for proving innocence is removed from the documents on purpose. Questions of the prosecutor sometimes become the answers of the suspects in the dossiers.

Indeed, such secrecy undermines the privilege against self-incrimination. The courts, as seen above, are not provided with the factual evidence that is necessary to determine whether statements were voluntary or results of coercion. In order to give accurate judgements with respect to voluntariness, the courts would need a complete verbatim record of investigative interview. However, the prosecutorial documents present mostly summarised, selected, and re-organised statements.[99] Hence, the courts cannot properly regulate the interview process. As a result, the suspect's privilege against self-incrimination, as we shall see in the case examples below, cannot be guaranteed properly.[100]

---

family. Or how about deceiving the suspect into thinking there is more evidence than there really is or that his story had been undermined by a co-suspect? Or into thinking that family and friends will be arrested if he or she does not 'cough'? Empathy is another good tactic—many suspects are ready to be befriended by [an investigator] if they are isolated and scared.' *See* Andrew Sanders, 'Can Coercive Powers be Effectively Controlled or Regulated?: The Case for Anchored Pluralism' in Ed Cape and Richard Young (eds), *Regulating Policing: The Police and Criminal Evidence Act 1984 Past, Present and Future* (Hart Pub., Oxford; Portland, Oregon 2008) 45, 58.

[98] *See* n 129 below.

[99] Pofessor Uglow stated that in the UK, summaries made by the police are used, but they can be checked with audio recordings. Steve Uglow, Comments at the Supervision Meeting (2nd December 2011); Richard A. Leo, *Police Interrogation and American Justice* (Harvard Univ Pr, 2008), 299.

[100] Leo illustrated that 'modern interrogation methods are sophisticated and powerful; designed for the guilty, they invariably lead to some false confessions and wrongful convictions when misapplied to the

Secondly, the lengthy detention period in the Korean system increases the inequality of arms between the defence and prosecutors.[101] Social and physical isolation, as Hilgendorf and Irving suggested, are regarded as potentially powerful influences: 'The situation of physical confinement by the police supports and facilitates [the] pressures and the effect becomes more pronounced the longer the total period of detention in police custody.'[102]

In Korea, the prosecutors can detain suspects generally up to 480 hours for investigation which include interrogation.[103] Detention can be extended up to 960 hours for the investigations of crimes against the security of the state.[104] This is employed as an important method to elicit confessions.[105] In this regard, the powers of prosecutors are much greater than their counterparts in other jurisdictions. For instance, in England and Wales, it is the police who make use of detention for investigation. However, they should not hold the suspects for more than 96 hours according to the provisions of PACE.[106] Similarly, the French code of criminal procedure, as the English, specifically provides the duration of the custody by the police.[107] In principle, the police can detain

---

innocent.' *See* ibid 308-309.

[101] The manipulation of statements is generally facilitated by a different level of power between investigators and suspects: [*PO3-IS1*] 'Interrogations are conducted under the pretty unequal relationship between investigators and suspects. So, the statements of suspects are easily manipulated by the intention of the investigators. Probably, most detectives know this fact'; [*DL2-IS2*] 'The power of the state must be enormous. The vulnerable populations can be easily hurt by such a power. In reality, like the boys in my case, the damage resulting from the manipulation of interview records is mainly given to the vulnerable people. I'm certain if there had been their parents beside them, the boys wouldn't have confessed the crime that they didn't commit. They couldn't be the counterpart of the prosecutor at all. ... Only the socially weak persons should face such a dangerous situation.'

[102] E. Linden Hilgendorf and Barrie Irving, 'A Decision-making Model of Confessions' in Sally M. Lloyd-Bostock (ed), *Psychology in Legal Contexts. Applications and Limitations* (MacMillan, London 1981) 67–84, 81 quoted from Gisli H. Gudjonsson, *The Psychology of Interrogations and Confessions: A Handbook* (John Wiley & Sons Ltd, 2003), 122.

[103] *See* The Korean Ministry of Justice (tr), *Criminal Procedure Act [Hyungsasosongbeop] partially amended on 21 December 2007 No. 8730* (1954) art 203 '(Detention Period by Public Prosecutor) If a public prosecutor detains a suspect or receives a suspect from a judicial police officer, the suspect shall be released if a public prosecution is not instituted within ten days,' and art 205 (Extension of Detention Period) '(1) A judge of a district court may, where it is deemed that there is a good reason to continue the investigation, extend the period prescribed in Article 203, upon request of a public prosecutor, and only one such extension shall be granted to the extent not exceeding ten days.'

[104] State Security Act [*Kukgaboanbeop*] 1948 partially amended on 13 December 1997 No.5454 art 19

[105] Presidential Committee on the Judicial Reform, 'Committee Report (III): From 1st to 13th Conference' PCJR (Seoul May 2004), 21.

[106] Police and Criminal Evidence Act 1984 (c. 60) ss 41-43; Steve Uglow op. cit. 152-153 (In terms of the development of regulation on the duration of detention, Professor Uglow stated that 'The courts sought to limit the police powers of interrogation and insisted that a suspect should be taken before a magistrate with all speed, normally within 24 hours. Eventually, it was the judges themselves who took the initiative to resolve this uncertainty by issuing the judges' Rules in 1912 to regulate police procedure over the treatment of detained persons. ... The modern law is contained in the Police and Criminal Evidence Act 1984 which codifies pre-trial procedures.')

[107] Ministry of Justice and John R. Spencer (trs), France, *Code of Criminal Procedure* (2000) art 77 'The

the suspects for up to twenty-four hours.[108] However, with the approval of the prosecutor or investigating judges, such duration can be extended up to forty-eight hours. In relation to the crimes of terrorism or drugs, the suspects can be held for up to 96 hours.[109] In Germany, the code of criminal procedure requires that the defendant detained by a warrant should be brought to the court 'without delay.'[110] Judges examine the accused without delay following the arrest and not later than on the following day. The suspects arrested by the police without a warrant also should be examined by the judges in the same way as the detainees with a warrant.[111]

The long period of detention in the Korean system increases the vulnerability of suspects, so that they may be coerced to confess to crimes that they did not commit. Extending the period of detention has been used as a means of extracting confessions.[112] Limit of detention would be a means of safeguarding suspects against coercive interrogation tactics.[113]

The final factor which may exacerbate the abuse of interviewing tactics is a lack of schemes to guarantee the disclosure of evidence. For a fair trial, the disclosure of exculpatory evidence is one of the most essential elements. However, the Korean system of criminal justice, as will be discussed in Chapter 7, does not have an effective scheme to guarantee disclosure. The prosecutor's written interview records may not preserve exculpatory evidence discovered during the interrogation.

The narratives of interview records, as seen above in Part 2, are created mainly to highlight the suspect's guilt. Therefore, mitigating facts and circumstances are mostly

---

judicial police officer may keep at his disposal for the requirements of the inquiry any person against whom there are one or more plausible reasons to suspect that he has committed or attempted to commit an offence. He informs the district prosecutor of this when the police custody begins. The person under police custody *may not be kept more than twenty-four hours*. Before the twenty-four hours have expired the district prosecutor may extend the police custody by a further period not exceeding twenty-four hours.' (Emphasis added).

[108] ibid.

[109] Dong Hee Lee and others, *Investigation Systems: A Comparative Study [Bigyosusajedoron]* (Pakyoungsa, Seoul 2004), 92-93.

[110] Federal Ministry of Justice (tr), Germany, *Criminal Procedure Code [Strafprozeßordnung]* (1987) s 115.

[111] ibid s 163c (Duration of Custody and Judicial Review)

[112] Steve Uglow, *Evidence: Text and Materials* (2nd edn Sweet & Maxwell, London 2006) 802, 152 (Professor Uglow stated that 'The considerable uncertainty, not to say hostility, with which ... judges regarded police powers to detain and to question suspects led to divergent attitudes towards statements made to the police while in police custody, with some judges happy to admit such statements as evidence while others excluded them.')

[113] ibid 152; Ed Cape and Richard Young (eds), *Regulating Policing: The Police and Criminal Evidence Act 1984 Past, Present and Future* (Hart Pub., Oxford; Portland, Oregon 2008) 74, 9 (Cape and Young illustrated that 'the length of detention is a source of great anxiety for suspects.' Therefore, as Edward described, 'The client's first concerns are always about ancillary matters, primarily about the period for which they will be detained and letting others know where they are.')

excluded from the record.[114] Such discarded evidence can be important exculpatory evidence necessary for the defendant to prove his innocence:

> [*DL2-IS2*] In the video recordings, one boy had strongly refused to confess to murder for 40 minutes. He cried that "I never did that. I'm really innocent. I was in Sung-Nam [another city in *Kyunggi* of Korea] when the girl was killed. I have nothing to do with this murder. Please help me to prove that I wasn't at the crime scene." But those accounts weren't recorded in the interview documents at all. Instead, in the prosecutorial documents, the prosecutor wrote only that "he refused to admit the crime for 10 minutes." There's no specific statement which can prove the suspect's innocence. .... On the basis of this statement in the video recordings, I easily found witnesses who had seen the suspect at Sung-Nam, as he argued.

As Leo suggested, this leads to 'failure to preserve the most important evidence to achieve a fair and accurate trial outcome.'[115]

In conclusion, there are three serious weaknesses in current interview practices: the secrecy of interviewing practices relyin on abridged documents, the lengthy period of detention of the suspects, and a lack of schemes for the disclosure of exonerating evidence.

4.3.2. Abuses of Interviewing Methods: Case examples

It can be argued that the Korean criminal justice system does not adequately monitor prosecutorial interviews, especially given the lack of electronic or even verbatim recording.[116] The case examples are rare which indicate abuse. However, a number of cases have been published.

---

[114] Mike McConville and John Baldwin. 'The Role of Interrogation in Crime Discovery and Conviction' (1982) 22(2) Br J Criminol 165, 170 (McConville and Baldwin stated that 'for practical purposes, what the police offer in the way of evidence is a clear, coherent and compelling account directed towards establishing the guilt of the defendant. ... Conflicts in the stories of witnesses (or in those of multiple defendants) must, so far as is possible, be resolved or reconciled. Indeed, witnesses who might provide a contrary picture are rarely even named in the prosecution case')

[115] Richard A. Leo, *Police Interrogation and American Justice* (Harvard Univ Pr, 2008), 300; Arne F. Soldwedel. 'Testing Japan's Convictions: The Lay Judge System and the Rights of Criminal Defendants' 41 Vanderbilt Journal of Transnational Law 1417, 1465 (Soldwedel stated that by use of electronic recordings, 'investigators could no longer discard evidence that does not conform to their theories about the truth of their cases. This would make more exculpatory evidence available to defense counsel ... Any exculpatory evidence gleaned during interrogation would be instantly 'discovered' when the tapes are reviewed by defense counsel. Moreover, videotaping interrogations would preclude any such evidence from being discarded by investigators.')

[116] *See* n 4 above.

The first tragic affair took place in 2002 when a suspect was tortured to death during the interrogation in the Seoul Central Prosecutors' Office.[117] This suspect was arrested on suspicion of murder on 25th October. The investigative interview began 9 P.M. on the same day. One prosecutor and two members of staff were present. However, the suspect did not confess. The interviewers including a prosecutor began to use physical violence against him. The judgement described the situation as follows:

> The interrogators kicked the suspect's groin and treaded on his fleshy insider of the thigh. They in turn battered the suspect and tortured him in order to obtain a confession. These tortures continued to be used all night until 8:00 in the morning on 26th when the suspect showed some health problems. However, they did not look after him. They made him lie down on the bed in the interrogation room without particular care until 12:41 in the afternoon when his condition was significantly aggravated. Then, they moved him to the hospital. However, in the end, he was dead because of torture at 7:45 P.M. on 26th October 2002.[118]

If the prosecutor had elicited a confession, he would have succeeded in obtaining a conviction, and subsequently, received an award from the Prosecutor General.[119] However, rather than 'warm congratulations', he was charged and found guilty of manslaughter.[120]

After this incident, the Supreme Prosecutors' Office announced a number of measures to prohibit coercive interrogation.[121] These measures include the participation of defence counsel during the interrogation and prohibition of the interrogation after midnight. However, as we shall see later, these are regarded as insufficient measures to protect the suspects as the prosecutors can readily limit the participation of the defence counsel.[122]

The second case was revealed to the public by the electronic recording. However, such a recording was not conducted by the prosecutors. Rather, it was secretly carried out by the suspect. In 2006, there was an illegal lobbying scandal surrounding the

---

[117] 229 *2005 DO 945* (2005) Panre Gongbo 26 May 2005 1092 (Korean Supreme Court); *2006 NA 61873* (2007) 5 April 2007 (Seoul High Court); Chang Hyung Lee. 'Zealous Chase' *Mae-Il Financial* (2 November 2002).

[118] 229 *2005 DO 945* (2005) Panre Gongbo 26 May 2005 1092 (Korean Supreme Court).

[119] Chang Hyun An. 'Probability Caught the Prosecution' *Hankyoreh 21* (14 November 2002).

[120] For more details on the atmosphere in the prosecutor's office with respect to the conviction, *see* ch 7.

[121] Sang Lok Lee. 'The Participation of the Defence Counsel during the Prosecutorial Interrogation' *Dong-Ah Il-bo* (15 November 2002)

[122] *See* nn 160, 187 below and accompanying texts.

nation's largest multi-level marketing firm, JU Group.[123] In relation to this case, Prosecutor-general stated that 'the scandal involving JU Group could become the "biggest fraud case in history" and ordered prosecutors to expand their investigation.'[124] But on 5th February 2007, one suspect of this case argued that the public prosecutor had forced him to lie during the interrogation. In particular, he provided the media with an audio tape recording the investigative interview process in the prosecutor's room.[125] The prosecutor used threats and inducements:[126]

[*Prosecutor*] Will you make a confession that I want to have? Clearly.

[Suspect] If the defendant proves my false testimony, I will get a punishment.

[*Prosecutor*] There's no way to prove your perjury.

[Suspect] Do you want me to lie?

[*Prosecutor*] Lie here. And lie in court.

[Suspect] That's not a good way, Prosecutor?

[*Prosecutor*] Now, I'm very upset. Please let me know a good method. Just sacrifice you. This deal isn't a loss to you. Instead, it's a loss to me. I'm just requiring you to help me to convict Jung-Wha Kang and Jae-Sung Lee [who was the high rank public servant working at the Presidential Office].

[Suspect] How long will you recommend a sentence for me?

[*Prosecutor*] Two years.

[Suspect] Is it lenient?

[*Prosecutor*] Do you want me to recommend one year and to ask for suspension of execution? Minimum is one year. It's better for you to be punished with a minor offence because you're involved in many other offences.

[Suspect] ... ...

[*Prosecutor*] For your confession, I think you need to be more pressed. Uh? Do you want me to use another method in order to make you confess? I can do that. But I'm worried that our relationship will be damaged... Investigation is difficult... difficult.....[127]

---

123 *2008 DO 2300* (2008) 12 June 2008 (Korean Supreme Court); *2007 DO 6012* (2007) 11 October 2007 (Korean Supreme Court).

124 Annie I. Bang. 'Politicians Linked to JU Lobbying Scandal' *Korea Herald* (30 November 2006).

125 Su Young Hong. 'Investigating Prosecutor's Threat to Obtain Confession' *Dong-Ah Il-bo* (6 February 2007); Chul Won Kang. 'Investigating Prosecutor in JU Case Force a Suspect to Lie' *Han-Kook Il-Bo* (6 February 2007).

126 Min Su Kang. 'Prosecutor Demanding Perjury' *Korean Broadcasting System* (6 February 2007); Chang Suk Kim. 'Is It a Misconduct of Only One Prosecutor?' (2007) 648 Hankyoreh 21.

127 Such interrogation tactics occasionally cause a mental problem of suspects. In 2004, a female suspect experienced mental disorder because of the coercive interrogation by the prosecutor in a very similar

The prosecutor used these methods in order to obtain the conviction of a high-profile public servant because such a conviction, as Jong-Gu Kim noted, could give the prosecutor a good reputation.[128] As an acknowledgement for the false confession and testimony, he promised to reduce a sentence and not to charge other offences.

In the final case, four juveniles (three 15-year-olds and one 18-year-old), who had been charged on the suspicion of murder and confessed by coercion, found not guilty at the Supreme Court.[129] This is very important in the Korean criminal justice, which can be compared to Confait case in the UK.[130] The murder case had not been investigated by the police. From the beginning, the prosecution service conducted an investigation with its own investigative units. The prosecutor had arrested the juveniles, interviewed them and placed them in custody for 20 days before the formal charge.[131] All of them were convicted of murder at the first trial.[132] I interviewed one of the defence counsel who stated that the decision was based on interview documents including statements which were the result of direct manipulation:

> [*DL2-IS2*] At the first trial, all four juveniles were convicted of murder. The judges never minded visual recordings and didn't even watch them even though they were presented as supporting evidence by the prosecutor.[133] The trial had been based only on the interview

---

situation to this example. The medical record employed as significant evidence to prove innocence of defendants described the suspect's condition as following: '[*Suspect*] I couldn't sleep because the prosecutor's face kept coming across my mind. [*Doctor's Medical Record*] After she was coerced to make a false confession ... she lost her consciousness twice. Since then, she has shown some symptoms of mental disorder. For example, she does scarcely recognise her family, relatives and friends. [*Doctor's Medical Record*] She stated that "the interrogation by the prosecutor is unfair, and I want to prove my innocence by killing myself".' *See 2004 DO 711* (2004) 13 May 2004 (Korean Supreme Court); *2004 NO 1409* (2004) 14 January 2004 (Seoul High Court); the fear that the suspects experience during the prosecutorial interrogation can be observed in an interview recently published. In a well-known case in Korea, a female suspect, Jung Ah Shin, illustrated the prosecutorial power in terms of interrogation thus: 'Prosecutorial interrogation was too scary for me. My pants got wet during the second interview session.' *See* Hun Kang. 'Interview with Jung Ah Shin' *Chosun Il-Bo* (15 January 2011).

[128] Jong-Gu Kim stated that prosecutors can achieve a good reputation when they investigate and convict high-profile public servants. *See* Jong Gu Kim, *The Reform of the Korean Criminal Justice System* (2nd edn BuB-Mun-Sa, Seoul 2004), 531.

[129] This case is called 'Suwon Homeless Girl Murder Case.' *see 2009 DO 1151* (2010) 22 July 2010 (Korean Supreme Court); *2008 NO 1914* (2009) 22 January 2009 (Seoul High Court). The defendants were found not guilty at the High Court (appellate jurisdiction). But the prosecutors appealed against the decision. The case moved to the Supreme Court.

[130] Henry Fisher, *Report of an Inquiry into the circumstances leading to the trial of three persons on charges arising out of the death of Maxwell Confait and the fire at 27 Doggett Road, London SE6 (HCP 90)* (HMSO, London 1977)

[131] Kyung Tae Kim. 'Juveniles Charged with Murder of Suwon Homeless Girl' *Yun-Hap News* (30 January 2008)

[132] For the details on the judgement, *see* n 84 above and accompanying text.

[133] For further discussion about electronic recordings and a relevant provision of the KCPA, *see* n 134

> documents written by the prosecutor. All defendants confessed to the crime and a stream of plot was well matched with the confessions. In fact, at first, I thought they murdered the girl because the interview documents were too perfect. ... But, almost all statements were manipulated by the prosecutor. For example, the prosecutor asked one of the suspects as follows: "Do you remember steps, buildings or a small garden in the school where the crime occurred?" The suspect answered to the question "Probably, a small garden". But in the interview documents, the question and answer were recorded as follows: "When and where did you strike the girl? I don't remember exactly, but there was a small garden." In addition, when it comes to the method of striking, the prosecutor asked the suspect "he [one of the suspects] said that he hit the girl like this. Is this right?" But such a question was recorded in the documents as an answer: "I hit the girl like this".

Defence counsel told me that even he had been certain about the conviction when he simply reviewed the interview records because every statement in the documents was very clearly organised to prove the defendants' guilt. However, it emerged that in addition to manipulation of statements, a number of threats and inducements were used in order to elicit confessions from these vulnerable suspects:

> [*DL2-IS2*] In my case, the prosecutor had used various threats and inducements in order to get confessions. For example, the prosecutor told one of the juveniles, who didn't confess to the crime, as follows: "Do you know the Nam-Young case? Gang members killed people by knives. I investigated the case. In this case, one of gang-members got a 10 years' imprisonment sentence, which was the heaviest among the defendants. But he got released on probation. Don't you know the probation?" Then, he showed the statutes to the boy and explained very kindly: "Instead of murder, you will be charged with a lesser offence. Then, you will be able to be released on probation. So, you don't need to worry" In the end, he got the confession from the boy. Particularly, the prosecutor made the boy relaxed by indicating video camera: "Do you think I' m lying to you? Look at the video camera. Our conversations have been all video-recorded." ... I'm really worried about the suspects being interrogated. These awful incidents took place under video camera. But, most suspects are interrogated without audio or video recordings. Now, I can imagine what is happening in the interrogation room.

Without legal advice or parental support, the juveniles made false confessions in order to escape from the harsh interrogation:

---

below.

> [*DL2-IS2*] Confession is a pretty scary thing. Notwithstanding a number of conflicting evidence, four juveniles were convicted of murder only by the confessions at the first trial. .... I asked them why they confessed to murder. They said there was no alternative. There was no person to help them. Apart from the confession, they couldn't find another method to get out ...

Fortunately, defence counsel were able to discover the conflicting statements and the manipulation of interview documents by viewing the partially recorded video tapes, which had been voluntarily presented to the court by the prosecutor to supplement the confessions of the defendants.[134] In the end, they proved the unreliability of the confessions by indicating exculpatory evidence and inappropriate interrogation tactics. As this defence counsel emphasised, 'if there had not been the electronic recording, the juveniles would had been convicted even at the Supreme Court because there was no method to prove the unreliability of the prosecutorial interview documents'.

These cases show the lack of adequate mechanisms to screen the interviewing methods being used by the prosecutors. Consequently, nobody knows what occurred behind the closed door until the abuses of interviewing methods are often revealed unintentionally. Suspects have been tortured, threatened, and induced to make self-incriminating statements. On other occasions, their statements have been manipulated into admissions by the prosecutors.

A number of prosecutors have argued that 'such an abuse is the extraordinary one, which was conducted by an overzealous prosecutor. Accordingly, those cases should not be generalized.'[135] However, such abuses, as Professor Shin argued, 'are not incidents, which happened by accident, but inevitable consequences being originated from the structural fallacy by article 312 of the KCPA.'[136]

5. Recommendations for Safeguards

---

[134] At present, the electronic recording is not mandatory in Korea. Rather, as seen in this case, prosecutors can record the interview and provide the court with the recordings as supplementary evidence to their interview documents. *See* n 4 above and accompanying text; Kuk Cho. 'The 2007 Revision of the Korean Criminal Procedure Code' (2008) 8 Journal of Korean Law 1, 8.

[135] Jung Youn Jeon, Sun Hyuk Lee and Na Mu Go. 'Coercing a Suspect to Lie. The Fault of One Prosecutor?' *Hankyoreh* (7 February 2007).

[136] Dong-Woon Shin. 'The Reform of the Korean Legal System and the Revision of the Law of Evidence' (2006) 47(1) Seoul Law Journal 107-132, 117.

Article 312 of the KCPA may protect against police abuse but has not played a significant role in safeguarding the defendants from the prosecutor's coercive interviews. The prosecution service has turned into an investigation agency employing inappropriate interviewing tactics. In particular, the abuses of interview methods have been exacerbated by a number of factors such as the lengthy detention period, the secrecy of the interrogation, and a lack of mechanisms for disclosure of exculpatory evidence. Unanticipated distortions have taken place in the Korean criminal justice system. In order to resolve those problems, a number of methods must be carefully considered which can increase the transparency of the interrogation practices, reduce the impact of coercive interrogative tactics, and protect vulnerable defendants.[137]

5.1. Guaranteeing the Right to Counsel

To prevent inappropriate interrogation methods, opening up the interrogation process is one of the significant steps. This measure, as seen earlier in the examples of the English, French, and German systems, can be achieved by guaranteeing the right to counsel during the interrogation.

In Korea, defence counsel are allowed in theory to participate in the investigative interview with suspects.[138] However, the defence counsel rarely takes part in the interrogation. As noted in Table 6.1, only 0.02 per cent of the criminal cases, suspects have legal advice during the prosecutor's interview. In the face of the fact that prosecutors occasionally use inappropriate and coercive methods to elicit confessions, and furthermore, the interview results virtually determines the verdicts as well as sentences, this statistical information shows conclusively that the interrogation process cannot be monitored by the defence counsel. There are three aspects to this issue.

Firstly, the scarcity of defence counsel and the high cost of legal advice cause that the assistance from lawyers is not affordable to most suspects.[139]

---

[137] Bernard Weisberg. 'Police Interrogation of Arrested Persons: A Skeptical View' (1961) 52(1) The Journal of Criminal Law, Criminology, and Police Science 21, 44.

[138] The Korean Ministry of Justice (tr), *Criminal Procedure Act [Hyungsasosongbeop] partially amended on 21 December 2007 No. 8730* (1954) art 243-2 (Defense Counsel's Participation) (l) 'A public prosecutor or a judicial police officer shall, upon receiving an application from a suspect, his defense counsel, legal representative, spouse, lineal relative, or sibling, allow the defense counsel to have an interview with the suspect, or shall allow the defense counsel to participate in the interrogation of the suspect, unless there is any justifiable reason otherwise.'

[139] In Korea, one lawyer is in charge of 6,903 citizens. This figure is much more than in other major criminal justice systems: 278 in the UK, 263 in the USA, 901 in France, and 459 in Germany. *See* National Assembly Research Service, *Republic of Korea in 2008: A Statistical Comparison* (Korean National Assembly, Seoul 2008) In this study, the number of people and attorney was calculated based on the statistics in 2006.

Table 6.1 Number of cases of defence counsel's participation in the prosecutor's interrogation

Year	2003	2004	2005	2006	2007
Criminal Cases*	1,914,979	2,057,194	1,845,316	1,809,624	1,948,306
Participation of Defence Counsel	112	158	303	367	541
Percentage	0.01%	0.01%	0.02%	0.03%	0.04%

Note. * This figure refers to the number of cases being concluded by the prosecution service. *Source*: Young Tae Kwon. 'Unwarranted Right to Defence Counsel' *The Law Times* (January 2009)

Nevertheless, free legal advice, which is given to the suspects, is very limited.[140] As a result, most suspects are interrogated by the police and prosecutors without any legal advice from the lawyers.[141]

Secondly, article 243-2 of the KCPA permits the prosecutors to extensively restrict the lawyer's participation in the interrogation. The conditions under which the counsel's participation is limited are not specifically articulated. The prosecutors are entitled to prohibit the participation of defence counsel in questioning only if there are 'justifiable reasons'.[142] Thus, the suspect's right to counsel is restricted by the extensive discretion of the police and prosecutors.[143] Furthermore, during the interview, the defence counsel cannot give the advice to the suspects without interrogator's approval.[144] Subsequently, as one defence counsel described it, the lawyers in general just sit down behind the suspects and listen to the interview as if they are 'pictures on the wall'.[145]

Finally, the defence counsel themselves are reluctant to take part in the interview. They may not feel the necessity to take part in the police interview as the statements in

[140] KCPA arts 33, 214-2, 282.
[141] Professor Cho described free legal advice as 'a good-looking decoration' *see* Kuk Cho. 'The Prevention of Inappropriate Interrogation Methods' (Seoul 14th October 2010) quoted in Young Tae Kwon. 'The Conference for the Prevention of Inappropriate Interrogation Methods' *The Law Times* (18th October 2010).
[142] *See* 138 above.
[143] One defence counsel illustrated that 'the investigative agencies may extensively use the condition in order to limit the participation of defence counsel.' *See* ibid 'Unwarranted Right to Defence Counsel' (20th January 2009).
[144] KCPA art 243-2 para (3) 'The defense counsel who participates in the interrogation may make a statement on his opinion after interrogation: Provided, that the counsel may raise an objection regarding any unfair interrogation manner even in the middle of the interrogation, and may also make a statement, subject to an approval of the public prosecutor or the judicial police officer.'
[145] Young Tae Kwon. 'Unwarranted Right to Defence Counsel' *The Law Times* (20th January 2009) (Similarly, another counsel stated that 'it is very difficult to intervene because in most cases the prosecutors do not allow the defence counsel to provide legal advice during the interrogation.')

the police station can be easily rejected in court.[146] Moreover, the lawyer tends to place more emphasis on preparing documents for the courts than on participating in interview. As Professor Ho Joong Lee has said, 'the defence counsel may regard requesting leniency in sentencing as the most significant activity for themselves. They simply focus on the results. Therefore, the participation in the interrogation seems to be considered as inefficient and unproductive.'[147] Consequently, the participation in the interrogation is often regarded as a waste of resources even though it is one of the essential measures to protect the suspect.

Taken together, under the current system, the right to counsel does not act as a proper safeguard. Therefore, a number of reforms should be considered for the suspects to be protected by their constitutional right to counsel at the pre-trial stage. First of all, the provisions, which are currently favourable to the investigation authorities, should be revised to increase the participation of the defence counsel. For instance, the lawyer needs to give the suspects legal advice during the interrogation irrespective of approval from the interviewers. In addition, such participation should not be limited and specific conditions must be provided in the statutes in order to prevent the lawyer's participation being arbitrarily restricted. Finally, the suspects should be entitled free legal advice before and during their interviews with the police and prosecutors. The pre-trial investigation process is as significant as the trial because the results of investigation generally have such an impact on the trial.[148] This is particularly so in the Korean system where the outcomes of trials are mostly determined based on prosecutorial documents written at the pre-trial stage, that the right to counsel may be more important in the interview process than in courts.

5.2. Electronic Recording Interviews with Suspects

One commonly used method is electronic recordings of interview. This will protect the suspects both from giving false confessions and from being sentenced on the basis of poorly informed judgements. First of all, audio and visual recording leads the interviewers to be aware that their interviewing methods will be closely scrutinised. Therefore, they will avoid inappropriate tactics, which may result in censure or

---

[146] Ho Joong Lee. 'Criminal Procedure and Related Human Rights' (2006) 19 Hanyang Law Journal 45, 54.

[147] ibid; One counsel who is working in Seoul stated that 'For the participation in the interrogation, which generally takes eight hours, we have to miss many things. In terms of finance, such an activity is not helpful.' *See* Young Tae Kwon. 'Unwarranted Right to Defence Counsel' *The Law Times* (20th January 2009).

[148] Ho Joong Lee op. cit. 48.

exclusion of evidence.[149]

In addition, this enables the courts to make more informed judgement by indicating what occurred during the interrogation. Slobogin argued that 'when an interrogation is not taped, in contrast, objective analysis of voluntariness can never occur. In short, failure to tape an interrogation is failure to preserve evidence which is crucial to determining the outcome of trial'.[150] This is supported by Roberts and Zuckerman:

> Before the days of tape-recording, in circumstances where most or all of the information about the interrogation came from presumptively biased sources, the courts were bound to have great difficulty in ascertaining what really transpired in the interview-room in order to assess the reliability of a custodial confession.[151]

The Suwon homeless girl murder case in Korea, discussed above, is a good example indicating that video recordings of all or part of the interviews can play a significant role in helping the trial judges to observe whether or not the confessions were false.[152]

Furthermore, this audio-video recording does not jeopardise any legitimate law enforcement interest. As Barness and Webster observed, electronic recording of interview helps law enforcement agencies:

> [A] routine system of the recording of police interrogations can provide the means of strengthening police interrogation evidence while helping to ensure that the rights of suspects are safeguarded.[153]

Consequently, electronic recording can be a safeguard providing protection against the admission of false confessions. At the same time, this safeguard can give the significant benefits to the law enforcement by reinforcing the results of interviews.[154]

In particular, this safeguard may also resolve distortions in the Korean criminal justice system. The electronic recordings of an interview conducted by the police can be more reliable than the interview document written by the prosecutor. These methods can increase the transparency of the interview process, which leads, as Weisberg argued, to

---

[149] Welsh S. White. 'False Confessions and the Constitution: Safeguards against Untrustworthy Confessions' (1997) 32 Harvard Civil Rights-Civil Liberties Law Review 105, 154.
[150] Christopher Slobogin. 'Toward Taping' (2003) 1(1) Ohio State Journal of Criminal Law 309, 318.
[151] Paul Roberts and Adrian A. S. Zuckerman, *Criminal Evidence* (Oxford University Press, 2004), 400.
[152] *See* the texts accompanying nn 129-134 above.
[153] James H. Barnes and Noah Webster, *Police Interrogation: Tape Recording* (Royal Commission on Criminal Procedure Research Study No. 8, HMSO, London 1980) para 6.21.
[154] ibid para 6.21; Welsh S. White. 'False Confessions and the Constitution: Safeguards against Untrustworthy Confessions' (1997) 32 Harvard Civil Rights-Civil Liberties Law Review 105, 155.

public distrust:

> [T]he most unique feature of [investigative] questioning is its characteristic secrecy. It is secrecy which creates the risk of abuses, which by keeping the record incomplete makes the rules about coercion vague and difficult to apply, which inhibits the development of clear rules to govern ... interrogation and which contributes to public distrust of the [law enforcements].[155]

The police interviews can also be monitored by third parties such as supervision officers, lawyers, prosecutors, or external commissions. This supervising mechanism, as McConville and Morrell stated, will ensure 'that suspects are fairly treated and that evidence of alleged confession is based on something more than the bare word of the interrogator's.'[156] Consequently, the police can conduct an investigation independently and the prosecution service can monitor that investigation.

However, electronic recording itself, as a number of commentators pointed out, is not a perfect safeguard.[157] Although what is tape-recorded may be accurate, as Sanders and Young illustrated, 'it may none the less be unreliable when suspects are induced to confess, are subjected to oppressive pressure or have words put into their mouths. Not only these things sometimes happen on tape and with a lawyer present, but they also happen before or between interviews.'[158] Hence, the system of criminal justice, as we shall see below, needs more procedural safeguards to protect the suspects.

---

[155] Bernard Weisberg. 'Police Interrogation of Arrested Persons: A Skeptical View' (1961) 52(1) The Journal of Criminal Law, Criminology, and Police Science 21, 44.

[156] Mike McConville and Philip Morrell. 'Recording the Interrogation: Have the Police Got It Taped?' (1983) Criminal Law Review 158, 162.

[157] ibid (McConville and Morrell argued that police-citizen encounters must be taped in their entirety. Otherwise, interrogations will continue to take place in secret albeit interviews are taped.); Stephen Moston and Geoffrey M. Stephenson, *The Questioning and Interviewing of Suspects Outside the Police Station* (Royal Commission on Criminal Procedure Research Study No. 22, HMSO, London 1993), 47 (According to Moston and Stephenson, 'Encounters outside the police station are important for understanding why suspects make admissions inside the police station. Interviews inside the police station, either recorded on audio or video tape, contain only one part of the relevant exchanges between the suspect and police officers.'); Gisli H. Gudjonsson, *The Psychology of Interrogations and Confessions: A Handbook* (John Wiley & Sons Ltd, 2003), 22 (Gudjonsson stated that 'The failure to record all interrogation sessions makes it difficult, if not possible, to retrospectively evaluate the entire process (e.g. what was said and done by the interrogator to break down resistance and obtain a confession.'); Steve Uglow, *Evidence: Text and Materials* (2nd edn Sweet & Maxwell, London 2006) 802, 172-186; Andrew Sanders and Richard Young, *Criminal Justice* (3rd edn Oxford University Press, Oxford 2007), 240-243.

[158] ibid.

5.3. Limiting the Length of Interrogation

In the Korean criminal process, the prosecutors can generally detain a suspect up to 480 hours, during which they can interview the suspect without particular limitations.[159] Only the interviews conducted after midnight have been prohibited by the rules of Ministry of Justice.[160] The lengthy interview has been considered as one of the important tactics to extract confessions:

> [*J3-IS*] The prosecutors try to lead suspects to make self-incriminating admissions by using detention, threats and inducements. Because of the detention and repetitious interviews, the suspects get depressed and discouraged. The hopeless suspects tend to confess to crimes according to the prosecutor's intention. The prosecutors interview the suspects for 10 or 20 sessions in order to get confessions from custodial suspects, and then, record only a very small part of whole interviews in their documents.

Lengthy and repetitive questioning increases psychological control over the suspect, and as the process raises the anxiety level of suspects, can lead to false confessions.[161]

As a number of empirical studies indicated, the length of interview is closely associated with the likelihood of producing false confessions even when the interviewees have normal intelligence.[162] For the suspect who is subject to a lengthy

---

[159] In particular, this detention can be extended up to 960 hours for the investigations of crimes against the security of the state. *See* n 104 above.

[160] However, notwithstanding this limitation, the prosecutors can keep conducting interviews after midnight with the permission of a designated prosecutor when those are necessary for the investigation. *See* The Rule for the Protection of Human Rights During the Investigation 2006 Instruction of the Ministry of Justice 556 art 40.

[161] Richard A. Leo, *Police Interrogation and American Justice* (Harvard Univ Pr, 2008), 113.

[162] Welsh S. White. 'False Confessions and the Constitution: Safeguards against Untrustworthy Confessions' (1997) 32 Harvard Civil Rights-Civil Liberties Law Review 105 129-131, 143-145; Gisli H. Gudjonsson, *The Psychology of Interrogations and Confessions: A Handbook* (John Wiley & Sons Ltd, 2003), 151 (Based on his empirical studies, Gudjonsson found that 'There was also a significant relationship between the length of the interrogation and the number of tactics used, on the one hand, and the number of confessions obtained, on the other. Therefore, the more time and effort the detective puts into the interrogation process, the greater the likelihood that a confession will be elicited.'); Steven A. Drizin and Richard A. Leo. 'The Problem of False Confessions in the Post-DNA World' (2004) 82 N C Law Rev 891, 948 (Drizin and Leo illustrated that 'More than 80% of the false confessors were interrogated for more than six hours, and 50% of the false confessors were interrogated for more than twelve hours. ... These figures are especially striking when they are compared to studies of routine police interrogations in America, which suggest that more than 90% of normal interrogations last less than two hours. These figures supports the observations of many researchers that interrogation-induced false confessions tend to be correlated with lengthy interrogations in which the innocent suspect's resistance is worn down, coercive techniques are used, and the suspect is made to feel hopeless, regardless of his innocence.')

interview, the process may be perceived as something akin to torture.[163] The Buddhist temple murder case in the USA is well known not only because of its notorious execution-style murder, in which nine people were shot after being forced to lie on the floor of a Buddhist temple, but also because of relentless interrogation. One suspect whose name is Bruce compared the investigative interview to 'when [he] went in for surgery':[164]

> Bruce's interrogation began at 2:30 A.M. on September 12, three hours after his arrest. ... The interrogators took a break at 4:30 A.M. At 5:00 A.M., they took Bruce to a property room, showing him photographs of the victims ... Over the next seven hours, Bruce was continually questioned by two officers. According to the officers sometime after 12:10 P.M., Bruce stopped protesting his innocence and merely stated that he did not "remember what happened. ... At 3:15 P.M., after almost thirteen hours of intermittent interrogation, Bruce began incriminating himself. Over the next two hours, he gave a detailed [false] confession to the killings.[165]

Similarly, in the 'Cardiff Three' case of the UK, three suspects were sentenced to life imprisonment because of false confessions in 1990. Of the suspects, Miller who had a mental age of eleven confessed to the muder after lengthy and oppressive police questioning. He denied involvement in a murder well over 300 times. But he was finally persuaded to make false admissions.[166]

Under such circumstances, suspects make admissions because the increased length of interrogation deepens their sense of resignation and despair.[167] This lengthy and pressured interrogation, as Gudjonsson noted, significantly leads to an increased risk of false confessions.[168]

To combat this, in England and Wales, a number of provisions have been established in the PACE and Code of Practice C:

> Interviewing may take place over the 36-hour period (or up to four days, for indictable offences ...) of compulsory detention. PACE Code of Practice C provides for this

---

[163] White op. cit. 143.
[164] Roger Parloff. 'False Confessions' (1993) Am Law, 60 quoted from White op. cit.
[165] ibid 129-130. However, before the trial, investigators arrested two other suspects by tracing the weapons used in killings. Subsequent investigation indicated that Bruce and other three suspects were not involved in this murder case.
[166] *R v Miller, Paris and Abdullahi*, Court of Appeal, official transcript, 16 December 1992.
[167] Leo op. cit. 135-137.
[168] Gudjonsson op. cit. 173.

> interrogation to take place under reasonable conditions, specifying adequate breaks for rest and refreshment (paras 12.2 and 12.8), adequate heating, lighting and ventilation in the interview room (paras 12.4) and allowing the presence of a legal advisor (if requested). Code C also requires the custody officer to assess whether the detainee is fit to be interviewed ... (para 12.3).[169]

For the protection of the suspect, the Korean criminal justice system should set up procedural safeguards, which will limit the length of time during which suspects can be detained and interrogated without being formally charged and can provide suspects with sufficient rest between interviews.[170]

5.4. Prohibiting Inducements

In most jurisdictions, inappropriate interrogation methods are mainly regulated by the courts, which can exclude involuntary or coerced confessions.[171] In general, much attention has been paid to physical tactics, e.g. torture, deprivation of food or sleep, lengthy interview leading to exhaustion or fatigue, and threats of physical violence.[172] However, promises of leniency, whether they are explicit or implicit, should be also monitored by the courts because they are, as Ofshe and Leo stated, another primary cause of false confessions in the modern era.[173]

Such inducements, as Alschuler has suggested, can lead the suspect to regard a confession as in his best interests.[174] If the offer is tempting – e.g. a promise that the suspect will not face a charge of current offences if he names a high profile public servant to whom he gave a bribe, the suspect, as we shall see below, might believe that it would be in his interests for him to falsely confess to crime that he did not commit.[175] In addition, vulnerable suspects often give false confessions, as was seen in Suwon homeless girl murder case, with lesser charges when they believe the investigators will frame them in the end despite their rejection of the accusations.[176] In particular, when

---

[169] Andrew Sanders and Richard Young, *Criminal Justice* (3rd edn Oxford University Press, Oxford 2007), 247. For more detailed information on these provisions, *see* Police and Criminal Evidence Act 1984 (c. 60) ss 41-43 and Police and Criminal Evidence Act 1984 Code of Practice C 2008 paras 12.2 – 12. 8.

[170] Gudjonsson op. cit. 25; Sanders and Young op. cit. 247.

[171] ibid 249; White op. cit. 145-153.

[172] Richard A. Leo, *Police Interrogation and American Justice* (Harvard Univ Pr, 2008), 309.

[173] Richard J. Ofshe and Richard A. Leo. 'The Decision to Confess Falsely: Rational Choice and Irrational Action' (1997) 74(4) Denver Univ Law Rev 979, 1051-1096.

[174] Albert W. Alschuler. 'Prosecutor's Role in Plea Bargaining' (1968) 36 U.Chi.L.Rev. 50, 61-62.

[175] *See* n 182 below.

[176] White op. cit. 151.

the suspect has been held a long time in custody, promises from the prosecutors may be 'too great to ignore and too difficult to assess.'[177]

Thus, in England and Wales, the offering of inducements has been implicitly prohibited by the PACE Code of Practice C:

> [N]o interviewer shall indicate, except to answer a direct question, what action will be taken by the police if the person being questioned answers questions, makes a statement or refuses to do either. If the person asks directly what action will be taken if they answer questions, make a statement or refuse to do either, the interviewer may inform them what action the police propose to take provided that action is itself proper and warranted.[178]

The KCPA does not have such a specific provision. Instead, article 309 of KCPA provides that the confessions being induced by fraud or other similar methods during the interview shall not be admitted as evidence.[179] Based on this provision, in particular 'other similar methods', the courts have ocassionally excluded confessions obtained as a result of the prosecutor's promises. These inducements to confess include the diminished punishment,[180] charging with a lesser offence,[181] and non-prosecution of some offences.[182]

Under these circumstances, the prosecution service has proposed that the Korean criminal process should adopt a new system to give benefits to the suspects who voluntarily confess during the investigative interview, i.e. a Korean version of the 'plea bargaining'.[183] This proposal has been considered as an important issue in the reform of the Korean criminal process.[184] The prosecutors have argued that this scheme is necessary in order to investigate corruption, gang crimes, and complicated financial offences.[185]

---

[177] 397 *Brady v. United States of America* (1970) 384 U.S. 742 (The U.S. Supreme Court), 754.
[178] Police and Criminal Evidence Act 1984 Code of Practice C 2008 para 11.5.
[179] The Korean Ministry of Justice (tr), *Criminal Procedure Act [Hyungsasosongbeop] partially amended on 21 December 2007 No. 8730* (1954) s 309 'Confession of a defendant extracted by torture, violence, threat or after prolonged arrest or detention, or *which is suspected to have been made involuntarily by means of fraud or other methods, shall not be admitted as evidence of guilt.*'
[180] *87 DO 317* (1987) 801 Panre Gongbo 846 (Korean Supreme Court); ibid *85 DO 2182* (1986) 769 282.
[181] ibid *83 DO 2782* (1984) 731 1053.
[182] ibid *2000 DO 5701* (2002) 159 1720.
[183] Haeng Sern Kim. 'A Brief Review on the Prosecution's Attempt to Adopt Foreign Judicial Systems and New Types of Crimes' (2010) 43 Democratic Legal Studies [Minju Beophak] 317, 345; The National Assembly Committee on Legislation and Judiciary, *A Theoretical Study of the Reform of the Prosecution Service* (KNA, Seoul 2010), 148-149;No Seop Park. 'The Adoption of Plea Bargaining in Korea' (2008) 20(1) Journal of Korean Criminal Law [Hyungsabeop Yeonku] 115, 115-116.
[184] ibid 115-116; Haeng Sern Kim op. cit. 345.
[185] The National Assembly Committee on Legislation and Judiciary, *A Theoretical Study of the Reform of*

However, such a proposal will further increase the prosecutorial power in the interrogation room by permitting the prosecutors to offer suspect inducements without limit, and consequently, increase the inequality between the prosecutors and the suspects. It is likely to bring about a rise in both the false confessions and wrongful convictions. In addition, if the plea bargaining is introduced in Korea, sentences as well as verdicts will be determined mostly by the prosecutors. The trial may be reduced to a meaningless process simply to confirm prosecutorial decisions. Particularly, as those decisions are made in the prosecutor's closed room, the right to an open trial cannot be properly protected.[186]

It is essential that the prosecutor's promises of leniency to induce confessions be carefully reviewed by the court. At present, the trials are mainly based on the prosecutor's interview documents. The suspects are generally detained for a lengthy period for interrogation. The whole interrogation is carried out in the prosecutor's closed room without proper electronic recordings. Furthermore, the defence counsel do not participate in the interrogation and such participation is also often restricted by the prosecutors.[187] Under these circumstances, if the prosecutors are legally permitted to provide the promises of leniency, the justice could not be guaranteed in the Korean criminal process.

5.5. Protecting Vulnerable Interviewees

Some types of individuals - i.e. the mentally handicapped, learning difficulties, and juveniles – need special protection because of their vulnerabilities to the pressures of interviews.[188] Empirical evidence has indicated that those people have unusual propensity to take on board suggestions from interrogators.[189] In other words,

---

the Prosecution Service (KNA, Seoul 2010), 148; Haeng Sern Kim op. cit. 345.

[186] ibid 349-351.

[187] Hang Sern Kim stated that 'during the interrogation, most suspects do not have the assistance of defence lawyers in Korea. In particular, there are many limitations to their participation in questioning process.' *See* ibid 350; Ho Joong Lee. 'Criminal Procedure and Related Human Rights' (2006) 19 Hanyang Law Journal 45, 49-54.

[188] Gisli H. Gudjonsson, *The Psychology of Interrogations and Confessions: A Handbook* (John Wiley & Sons Ltd, 2003), 259-265 (In particular, according to Gudjonsson, 'The majority (64%) of the false confessors claimed to have made the false confession when under the age of 21, with the peak (51%) being in the age group 16–20. This suggests that factors associated with youth make people particularly vulnerable to making false confessions.', 177); Steve Uglow, *Evidence: Text and Materials* (2nd edn Sweet & Maxwell, London 2006) 802 182-183; Andrew Sanders and Richard Young, *Criminal Justice* (3rd edn Oxford University Press, Oxford 2007) 172-175; Richard A. Leo, *Police Interrogation and American Justice* (Harvard Univ Pr, 2008), 312.

[189] White op. cit. 142; Gudjonsson, op. cit.; Steven A. Drizin and Richard A. Leo. 'The Problem of False Confessions in the Post-DNA World' (2004) 82 N C Law Rev 891.

vulnerable populations tend to give involuntary or unreliable statements readily due to the influence of coercion or inducement.[190] Thus, for the purpose of minimising such a risk, the criminal process needs to set up special safeguards, as seen in the PACE Code of Practice C:

> Although juveniles or people who are mentally disordered or otherwise mentally vulnerable are often capable of providing reliable evidence, they may, without knowing or wishing to do so, be particularly prone in certain circumstances to provide information that may be unreliable, misleading or self-incriminating. ***Special care*** should always be taken when questioning such a person, and the ***appropriate adult*** should be involved if there is any doubt about a person's age, mental state or capacity. Because of the risk of unreliable evidence it is also important to obtain corroboration of any facts admitted whenever possible.[191]

With vulnerable persons, one of the most important safeguards is the presence of appropriate adults. Appropriate adults generally play a role in advising the person being questioned and in observing whether or not the interview is being conducted properly and fairly.[192]

In Korea, the guardians and parents can be present at the interview by the request of the interviewees by considering the age, gender, nationality, or any other aspect of the suspect.[193] However, the prosecutors do not have the obligation to inform them of such a right. In addition, the prosecutor can exclude appropriate adults on the basis of the efficiency of investigation.[194] Consequently, vulnerable suspects are often interviewed in the absence of their parents.[195] Indeed, under these circumstances, coercive tactics

---

[190] ibid 963-974.

[191] Police and Criminal Evidence Act 1984 Code of Practice C 2008 para 11C (Emphasis added by the author)

[192] ibid para 11.17.

[193] The Korean Ministry of Justice (tr), *Criminal Procedure Act [Hyungsasosongbeop] partially amended on 21 December 2007 No. 8730* (1954) art 244-5 'A public prosecutor or a judicial police officer may, if a suspect under interrogation falls under any of the following subparagraphs, allow a person who has a reliable relationship with the suspect to sit in company with the suspect, ex officio or upon receiving a petition from the suspect or his legal representative ...'

[194] ibid art 244-5; The Rule for the Protection of Human Rights During the Investigation 2006 Instruction of the Ministry of Justice 556 art 37.

[195] As seen above, four suspects were all juveniles in Suwon homeless girl murder case. However, all of them were interrogated by the prosecutor in absence of appropriate adults including defence counsel. *See* n 129 above; In Taek Lim. 'False Confessions from Vulnerable Juveniles' (2010) (833) Hankyoreh 21 (In this Kwang-Myung case, two juveniles - one of them is mentally handicapped – had been interviewed without the participation of appropriate adults and confessed to thefts that they did not commit.)

and inducements have led the suspects to give false confessions.[196] One defence counsel who had experienced such a case emphasised the importance of appropriate adults during the investigative interview:

> [*DL2-IS2*] Do you think it's possible for the juveniles to give false confessions in the presence of their parents? They wouldn't do so, if there're their parents beside them during the interview. They know their parents will protect them from the police and prosecutors. But, in my case, they confessed to murder they didn't commit. All of them were juveniles. Furthermore, they were all poor children. Most of them didn't have parents whom they could rely on. They told me that there was no one who helped them during the frightening interrogation.

In order to protect the vulnerable in the interrogation room, a provision for guaranteeing the mandatory presence of appropriate adults should be established, as in PACE Code C:

> A juvenile or person who is mentally disordered or otherwise mentally vulnerable must not be interviewed regarding their involvement or suspected involvement in a criminal offence or offences, or asked to provide or sign a written statement under caution or record of interview, in the absence of the appropriate adult.[197]

The appropriate adult can give advice to the vulnerable person and monitor the interviewing process. In general, parents, guardians, social workers, or psychiatrists can act as appropriate adults.[198]

However, mere presence is not sufficient to protect the vulnerable suspect.[199]

---

[196] *See* nn 129 and 195 above.

[197] Police and Criminal Evidence Act 1984 Code of Practice C 2008 para 11.15 (For urgent interviews, a number of exceptions are articulated in the Code C – i.e. paragraphs 11.1, 11.18 to 20)

[198] PACE Code C of Practice specifically articulated the scope of appropriate adults: 'The appropriate adult' means, in the case of a: (a) juvenile: (i) the parent, guardian or, if the juvenile is in local authority or voluntary organisation care, or is otherwise being looked after under the Children Act 1989, a person representing that authority or organisation; (ii) a social worker of a local authority; (iii) failing these, some other responsible adult aged 18 or over who is not a police officer or employed by the police. (b) person who is mentally disordered or mentally vulnerable: ... (iv) a relative, guardian or other person responsible for their care or custody; (v) someone experienced in dealing with mentally disordered or mentally vulnerable people but who is not a police officer or employed by the police; (vi) failing these, some other responsible adult aged 18 or over who is not a police officer or employed by the police.' *See* ibid para 1.7.

[199] Hodgson and Pearce & Gudjonsson stated that the mere presence of an appropriate adult may play a role only in adding a degree of legitimacy and credibility to the interview process at court. *See* Gisli H. Gudjonsson, *The Psychology of Interrogations and Confessions: A Handbook* (John Wiley & Sons Ltd,

Appropriate adults need to clearly understand their roles.[200] They must know what kind of advice they need to provide and how they can evaluate the fairness of interview.[201] In order to do so, specific guidelines and training courses for appropriate adults should be set up.[202] In addition, they need to be allowed to privately consult with the detainee at any time.[203] This may help the vulnerable to realise their legal rights, to understand questions from investigators, and to give consistent answers.[204] Subsequently, appropriate adults can ensure that the investigative interview is conducted properly and fairly.

6. Conclusion

The interview is one of the most important investigative stages as it contributes to both reorganise the investigator's statements of the accused offence and construct a case on the basis of the accounts from the suspects, witnesses, and victims. In particular, for the purpose of constructing a case, obtaining a confession is regarded as a significant factor. The stress on obtaining a confession can lead interviewers to resort to various interrogative methods ranging from torture to trickery. However, while such tactics can produce reliable confessions, they lead to untrustworthy self-incriminating statements leading to wrongful convictions.

False confessions resulting from the pressure of the interrogation have become one of the main concerns in the criminal justice systems because miscarriages of justice play a role in reducing the public trust in the criminal process. Thus, each jurisdiction has set up procedural safeguards to protect the suspects against false confessions. The drafters of the KCPA also realised this problem. However, their method was different from other jurisdictions, permitting the prosecutor's interview records to be accepted as presumptive evidence with the aim of controlling coercive questioning tactics by the police.

2003), 262; Jacqueline Hodgson. 'Vulnerable Suspects and the Appropriate Adult' (1997) Crim. L. R. 785, 795.

[200] In terms of passive role of appropriate adults, Sanders and Young illustrated that 'Many appropriate adults misunderstand what is happening, fail to realise how an apparently innocent series of questions and answers can be incriminating, and are just as intimidated as the suspects.' *See* Andrew Sanders and Richard Young, *Criminal Justice* (3rd edn Oxford University Press, Oxford 2007), 174.

[201] Gudjonsson op. cit. 262.

[202] For the role confusion of untrained social workers acting as an appropriate adult, *see* Jacqueline Hodgson. 'Vulnerable Suspects and the Appropriate Adult' (1997) Crim. L. R. 785, 791.

[203] PACE Code of Practice C 2008 para 3.18.

[204] Gudjonsson op. cit.

However, this attempt failed as it led to coercive methods being used in the prosecutor's interview. Prosecutors' written interview records cannot help to regulate this as they provide the court with quite limited and skewed information. The courts tend to accept prosecutorial interview records without particular questioning. At the same time, this lack of transparency has prevented practices in the interrogation room from being appropriately monitored by the third parties. In addition, such attempt has caused a number of structural deformities: role ambiguity between the prosecution service and the police, a lack of sense of ownership of the police in investigation, and an inefficient double interviewing structure.

The Korean criminal justice system should amend the evidentiary impact of the prosecutorial interview records. Instead, it should establish a number of appropriate safeguards to protect the suspects against false confessions. Firstly, the right to counsel should be guaranteed at the pre-trial stage. The defence counsel can play a major role in safeguarding the suspects by monitoring the interrogation process and providing appropriate legal advice. Secondly, electronic recordings would bring about significant benefits to the Korean system. Interviews being recorded by the police can be closely scrutinised by the prosecutors as well as the courts, and selectively admitted into evidence. The courts can make an informed judgement and the prosecution service may play a role in filtering the police investigation. However, as the increased role of defence counsel and the electronic recording are not perfect methods to protect the suspects, the system should be set up additional safeguards such as the limitation to the length of interrogation, prohibition of inducements, and the protection of the vulnerable suspects.

Due to unanticipated distortions in the criminal process, the current Korean system of criminal justice has encountered difficulties in making progress in terms of protecting human rights and while at the same time maintaining efficiency. The right to a fair trial is just an expression in law, not in practice. In order to move forward to a more developed stage which guarantees the right to a fair trial, the Korean law must address these issues.

Chapter 7 The Prosecutorial Investigation and Its Impacts

1. Introduction

The focus in the Korean criminal justice system on the interview by the prosecutors does not only limit the defendant's right to a fair trial, but it also, as discussed in Chapter 3, transforms the prosecution service into an investigation agency. As a result, the investigation and prosecution are conducted by one actor in Korea. Prosecutors, who are in charge of the prosecution, investigate the crime. This chapter explores the impact of the prosecutorial investigation.

The functional overlap, as discussed in Chapter 1, tends to emphasise crime control values in Korea. The prosecutor's role increases efficiency as it builds a factory conveyer belt without significant obstacles. However, considering the due process model, such prosecutorial involvement can cause three problems.[1] Firstly, the prosecutors' direct involvement in investigation may weaken their quasi-judicial role because they focus their attention on the achievement of a conviction from the beginning of investigation. Secondly, prosecutorial investigation may abrogate the filtering role of the prosecution service. A significant safeguard disappears in the criminal process. Finally, information and evidence are exclusively controlled by the prosecutors. Consequently, this increases the inequality of arms between the state and individuals. These problems are exacerbated where there is no proper monitoring mechanism.

2. Prosecutor's Objectivity in Investigations

Direct investigation hinders prosecutors in their quest for objectivity. Prosecutors, as seen in Chapter 3, have two contrary roles: a minister of justice and an advocate. In

[1] Herbert L. Packer, *The Limits of the Criminal Sanction* (Stanford University Press, Stanford, Calif. 1968) 385, 163-173.

most countries, research suggests that they put the emphasis on their adversarial role.[2] Felkenes described this as 'conviction psychology' which indicates 'the set of attitudes held by the prosecutor tending to buttress his emphasis on conviction'.[3]

The prosecutors generally assume the guilt of the defendants from the beginning of the prosecution process because they believe only the guilty person is charged.[4] They feel an obligation, as a guardian of the public interest, to prove the guilt of the defendants as well as send criminals to prison. According to Felkenes' study, most prosecutors consider convicting the charged person as more important than releasing an innocent person. For instance, one deputy district prosecutor who joined his study stated that 'my major concern is to see that the guilty are convicted and receive a proper punishment.'[5]

This can also be seen in the Korean prosecution service. Every year, the prosecutor general presents the aims of the Public Prosecutors' Office. The research on those aims for the last six years shows that the Korean prosecution service has a strong tendency to seek conviction. For example, Sung-Nam Shin, the prosecutor general in 2002, stated:

> The public prosecutors have to investigate the corruption cases thoroughly and punish the guilty persons. In particular, immoral entrepreneurs must be investigated completely and punished in order to help our country to be more competitive in the world market. Furthermore, their illegal money must be confiscated.[6]

This approach can also be seen subsequent years (2003-2009), where the main interest of the Korean prosecution service was conviction and punishment.[7] This is no different from other countries. However, unlike other jurisdictions, the Korean prosecution service stresses thorough investigation by prosecutors. This may make the impact of

---

[2] George T. Felkenes. 'Prosecutor: A Look at Reality' (1975) 7 Sw.UL Rev. 98, 112; Walter W. Jr Steele. 'Unethical Prosecutors and Inadequate Discipline' (1984) 38 SMU Law Review 965, 982; Abbe Smith. 'Can You Be a Good Person and a Good Prosecutor' (2000) 14 Georgetown Journal of Legal Ethics 355, 380-384; Heather Schoenfeld. 'Violated Trust: Conceptualizing Prosecutorial Misconduct' (2005) 21(3) J Contemp Crim Justice 250, 255; Stanley Z. Fisher. 'In Search of the Virtuous Prosecutor: A Conceptual Framework' (1988) 15 Am J Crim Law 197, 198.

[3] The 'conviction psychology' is often called as 'a tendency to behave overzealously'. *See* ibid 198; Felkenes op. cit. 110.

[4] ibid 112; Schoenfeld op. cit. 257-258 (Schoenfeld stated that 'prosecutors could neutralize misconduct because they believe they are prosecuting guilty defendants.'); Susan Bandes. 'Loyalty to One's Convictions: The Prosecutor and Tunnel Vision' (2006) 49(2) Howard Law J 475, 491.

[5] Felkenes op. cit.

[6] Korean Supreme Prosecutors' Office, *The Annual Report of the Public Prosecutors' Office in 2002 [Keomchalyeongam]* (KSPO, Seoul 2003), 1345.

[7] Korean Supreme Prosecutors' Office, *The Annual Report of the Public Prosecution Service* (KSPO, Seoul 2004-2010) Appendix ch 2-4; Jong Gu Kim, *The Reform of the Korean Criminal Justice System* (2nd edn BuB-Mun-Sa, Seoul 2004), 530.

conviction mentality more significant.

2.1. The Conviction Mentality in Korea

The conviction mentality can be influenced by both external and internal elements. There are a number of studies investigating the causes. Firstly, because of the 'score-keeping mentality', the prosecutors generally place emphasis on procuring convictions.[8] This tendency is encountered by the influence of external elements such as institutional, professional, and political factors.[9] In particular, as Fisher noted, institutional pressure plays a significant role in leading the prosecutors to focus on conviction rate. This pressure stems from the nature of agencies, the adversarial system, and professional responsibility.[10]

Secondly, the public prosecutor, as a minister of justice, has a responsibility that they have to seek justice and that guilty persons cannot avoid punishment. This leads them to concentrate on obtaining a conviction.[11] Smith argued that 'Too often prosecutors believe that they and only they know what justice is.' The prosecutors regard doing justice as punishing guilty persons instead of protecting innocent defendants.[12]

Finally, cognitive process can have an impact on the prosecutor's decisions.[13] As Bandes suggested, people have a tendency to follow their beliefs. Likewise, prosecutors readily accept the evidence which is compatible with their beliefs.[14] This section

---

[8] ibid 109-110; C. Ferguson-Gilbert. 'It Is Not Whether You Win or Lose, It Is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors' (2001) 38 California Western Law Review 283, 289-292.

[9] Stanley Z. Fisher. 'In Search of the Virtuous Prosecutor: A Conceptual Framework' (1988) 15 Am J Crim Law 197, 197; Kenneth Bresler. 'I Never Lost a Trial: When Prosecutors Keep Score of Criminal Convictions' (1995) 9 Georgetown Journal of Legal Ethics 537, 537; Bennett L. Gershman. 'Prosecutor's Duty to Truth' (2000) 14 ibid 309, 309; Daniel S. Medwed. 'The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence' (2004) 84 Boston University Law Review 125, 125.

[10] Fisher op. cit. 204-215.

[11] *See* Randolph N. Jonakait. 'The Ethical Prosecutor's Misconduct' (1987) 23(6) Crim Law Bull 18 quoted from Heather Schoenfeld. 'Violated Trust: Conceptualizing Prosecutorial Misconduct' (2005) 21(3) J Contemp Crim Justice 250, 252.

[12] Abbe Smith. 'Can You Be a Good Person and a Good Prosecutor' (2000) 14 Georgetown Journal of Legal Ethics 355, 378.

[13] Susan Bandes. 'Loyalty to One's Convictions: The Prosecutor and Tunnel Vision' (2006) 49(2) Howard Law J 475;Dianne L. Martin. 'Lessons about Justice from the Laboratory of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence' (2001) 70 UMKC Law Review 847;Keith A. Findley and Michael S. Scott. 'The Multiple Dimensions of Tunnel Vision in Criminal Cases' (2006) 2 Wis Law Rev 291;Karl Ask and Pär Anders Granhag. 'Motivational Bias in Criminal Investigators' Judgments of Witness Reliability' (2007) 37(3) J Appl Soc Psychol 561;James McCloskey. 'Convicting the Innocent' (1989) 8 Crim.Just.Ethics 2;Craig A. Anderson, Mark R. Lepper and Lee Ross. 'Perseverance of Social Theories: The Role of Explanation in the Persistence of Discredited Information' (1980) 39(6) J Pers Soc Psychol 1037.

[14] Bandes op. cit. 492.

explores the conviction mentality in Korea by considering two aspects: conviction as a measurement of success and the nature of the adversarial role.

2.1.1. Conviction as a Measurement of Success

A conviction seems to be an effective way to measure the success of prosecutors.[15] As Fisher suggested, the elements influencing such a measurement can be categorised into two groups: external and internal indices.[16] The media, victims, and the police are the external factors.[17] Indeed, the prosecutors improve their reputation when they strictly pursue criminals than when they release the accused by finding exonerating evidence.[18]

On the other hand, there is an internal culture which regards convictions as an indicator of job performance.[19] Medwed identified that 'prosecutors with the highest conviction rates (and, thus, reputations as the best performers) stand the greatest chance for advancement internally.'[20] Even though seeking justice is an important aim of the prosecutors, it may not be a measure of their professional competence. In order to gain a good reputation, they need 'heavy' convictions and sentences.[21]

Due to such internal and external pressures, the Korean prosecutors show a strong tendency towards obtaining a conviction:

> [*PP3-IS*] Indeed, conviction is very important to the prosecutors. For example, in cases the charged persons are found not guilty in court, the prosecutors who take charge of the cases are absolutely criticised by the managers. Then, they can't take up important cases again because the managers don't trust them anymore.

On the contrary, an acquittal is in general regarded as a mistake. The Korean Supreme

---

[15] Albert W. Alschuler. 'Prosecutor's Role in Plea Bargaining' (1968) 36 U.Chi.L.Rev. 50, 106; Stanley Z. Fisher. 'In Search of the Virtuous Prosecutor: A Conceptual Framework' (1988) 15 Am J Crim Law 197, 205; Daniel S. Medwed. 'The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence' (2004) 84 Boston University Law Review 125, 134; George T. Felkenes. 'Prosecutor: A Look at Reality' (1975) 7 Sw.UL Rev. 98, 114-115; Judith A. Goldberg and David M. Siegel. 'The Ethical Obligations of Prosecutors in Cases Involving Postconviction Claims of Innocence' (2001) 38 California Western Law Review 389, 409.

[16] Fisher op. cit. 205.

[17] Jong Gu Kim, a former minister of justice and a chief of the prosecutors, stated that 'the media and the victims largely influence the prosecutors to begin investigation of particular cases and to punish the suspects.' *See* Jong Gu Kim, *The Reform of the Korean Criminal Justice System* (2nd edn BuB-Mun-Sa, Seoul 2004), 535.

[18] ibid 535.

[19] Felkenes op. cit. 114; Fisher op. cit. 206; Medwed op. cit. 134-135.

[20] ibid 134-135; Felkenes op. cit. 112; Martin H. Belsky. 'On Becoming and Being a Prosecutor' (1983) 78 Northwestern University Law Review 1485, 1492.

[21] Fisher op. cit. 206.

Prosecutors' Office published a special news article in relation to the conviction rate in 2008. This article introduced the Dae-Gu Seo-Bu Prosecutors' Office as one of the best offices because the office achieved one-hundred per cent of conviction rate in 2007.[22] Sang H. Lee, a prosecutor in this office, said that 'There was no acquittal for the last year. This achievement indicates that there was no mistake at all in the prosecutor's decisions.'[23] This statement shows different perspectives between the conviction and acquittal. The conviction is considered as a successful prosecutorial performance, whereas the acquittal is treated as a failure.[24] Conviction rates, as Alschuler suggested, 'seem to most prosecutors a tangible measure of their success.'[25]

2.1.2. The Nature of the Adversarial Role

The adversarial role itself creates a vigorous pressure which forces prosecutors to focus on conviction and punishment.[26] Such a pressure, as Fisher stated, 'can lead the prosecutor to behave over zealously, using improper means to gain a conviction or ignoring evidence of innocence or mitigation.'[27]

For instance, in 2003, a public prosecutor of In-Chon Public Prosecutors' Office summoned a witness to his office who had testified to a defendant's innocence in court. He interrogated this witness and obtained a statement which is different from his testimony in court. The prosecutor submitted this account as evidence to prove guilt.[28] In this case, the prosecutor tried to undermine the evidence which had been advantageous to the defendant. In other words, he ignored his quasi-judicial role, and instead, used his adversarial role in order to obtain a conviction.

---

[22] Dae-Gu Seo-Bu Prosecutors' Office prosecuted 24,966 criminal cases in 2007 and all of them were convicted. The news article did not include the number of the cases. Therefore, the author found the statistics with reference to the Annual Report of the Public Prosecution Service *[Gum-Chal Yun-Gam] See* Korean Supreme Prosecutors' Office, *The Annual Report of the Public Prosecutors' Office in 2007 [Keomchalyeongam]* (KSPO, Seoul 2008), 712.

[23] JS Kim and others. 'The New Record of the Dae-Gu Seo-Bu Prosecutors' Office' *News-Pros* (1 February 2008).

[24] George T. Felkenes. 'Prosecutor: A Look at Reality' (1975) 7 Sw.UL Rev. 98, 114-115; Daniel S. Medwed. 'The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence' (2004) 84 Boston University Law Review 125, 134-136; C. Ferguson-Gilbert. 'It Is Not Whether You Win or Lose, It Is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors' (2001) 38 California Western Law Review 283, 289.

[25] Albert W. Alschuler. 'Prosecutor's Role in Plea Bargaining' (1968) 36 U.Chi.L.Rev. 50, 106.

[26] Stanley Z. Fisher. 'In Search of the Virtuous Prosecutor: A Conceptual Framework' (1988) 15 Am J Crim Law 197, 208; Susan Bandes. 'Loyalty to One's Convictions: The Prosecutor and Tunnel Vision' (2006) 49(2) Howard Law J 475, 488-490.

[27] Fisher op. cit. 208.

[28] *2003 DO 7482* (2004) 26 March 2004 (Korean Supreme Court) (The Supreme Court ruled that 'the testimony in court takes priority over the statements which are written by the prosecutors in their office.')

Felkenes and Fisher illustrated this characteristic differently. Felkenes focused on the conflict of different roles – judicial and advocate, whereas Fisher found the cause in the nature of the adversary system.[29] According to the Felkenes's argument, the prosecutor's roles as a minister of justice and an advocate conflict with each other continuously:[30]

> On the one hand he must be the aggressive state's advocate demanding strict compliance with state law, while on the other hand he is the quasi-judicial officer of the court seeking justice even for those he would prosecute. Wrestling with this perspective of himself creates ambivalence on the part of the prosecutor. He is torn between his image as a powerful, callous attorney and a crusader for justice.[31]

This conflict often causes chaos, and subsequently, leads prosecutors to lose their objectivity.[32] They choose their adversarial role rather than the quasi-judicial because the conviction rate is considered as an important measurement to evaluate their job performance.[33] Unlike Felkenes's study, Fisher argues that the adversary system itself makes prosecutors focus on their adversarial role.[34] To support this argument, he examined three aspects of the adversary system.

First, the public prosecutors have a role to play in attacking the defendant's credibility in the adversary system. Therefore, they do not have many opportunities to understand defendants as well as their personal and social circumstances. The prosecutors are inevitably closer to the persons who pressure them to punish the defendant, for instance, the victims, police officers, and civilian witnesses as opposed to defendants and their witnesses.

Second, prosecutors feel pressure to win as an advocate of the victim and a representative of 'the entire law enforcement subculture.'[35] Fisher described this tendency as follows:

---

[29] George T. Felkenes. 'Prosecutor: A Look at Reality' (1975) 7 Sw.UL Rev. 98; Stanley Z. Fisher. 'In Search of the Virtuous Prosecutor: A Conceptual Framework' (1988) 15 Am J Crim Law 197.

[30] Bandes described this conflict as 'a prosecutor's conflicting loyalties...between the duty to do justice and the duty to act as a zealous advocate.' *See* Susan Bandes. 'Loyalty to One's Convictions: The Prosecutor and Tunnel Vision' (2006) 49(2) Howard Law J 475, 485.

[31] Felkenes op. cit. 118.

[32] ibid 119; Bandes op. cit. 483-485.

[33] Felkenes op. cit. 119.

[34] Fisher op. cit. 208; Bandes op. cit. 488-492.

[35] ibid 209 (Fisher stated that this subculture includes 'prosecution (from peers and superiors to clerks and secretaries), police, probation, court officers, newspaper reporters, and even sympathetic judges.')

> A prosecutor leaving the courtroom after winning a guilty verdict or stiff sentence in an important case will likely receive warm congratulations from members of this network. One who dismisses charges against a factually guilty defendant because of insufficient evidence or some other imperative of justice will encounter, at best, condolences for her loss. Such losses, like wins, are more than personal to the prosecutor; they are experienced as losses to society.[36]

Such a view is obviously similar to the idea which regards the conviction rate as a measurement of success.[37] Where the prosecutors achieve a conviction, they receive plaudits both externally and internally. In contrast, an acquittal is regarded as a failure. However, there is a difference between those two perspectives. The former focuses on the adversarial role of the prosecutor, whereas the latter puts emphasis on the conviction itself.

Finally, the enthusiasm of the defence counsel can also lead to losing their objectivity.[38] Defence counsel use all 'truth-defeating' tactics to protect defendants.[39] For instance, they examine a witness in order to damage the reliability and do not disclose the evidence which is adverse to the defendant.[40] Under these circumstances, it is very difficult to expect prosecutors to behave as an impartial fighter. The 'In-Chon' case, as seen above, is a good example of this argument. In that case, nobody may know whether or not the original testimony of the witness in court is true. However, it is obvious that the prosecutor lost his objectivity as a minister of justice and used an inappropriate method in order to procure a conviction.

In short, the prosecutors have difficulty in striking a balance between two roles: quasi-judicial and adversarial. However, they readily choose the adversarial role because the conviction is an important indicator of their job performance. Moreover, the nature of the adversarial role leads the prosecutors to oppose the

---

[36] ibid 210.

[37] Albert W. Alschuler. 'Prosecutor's Role in Plea Bargaining' (1968) 36 U.Chi.L.Rev. 50, 106; Stanley Z. Fisher. 'In Search of the Virtuous Prosecutor: A Conceptual Framework' (1988) 15 Am J Crim Law 197, 205; Daniel S. Medwed. 'The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence' (2004) 84 Boston University Law Review 125, 134; George T. Felkenes. 'Prosecutor: A Look at Reality' (1975) 7 Sw.UL Rev. 98, 114-115; Judith A. Goldberg and David M. Siegel. 'The Ethical Obligations of Prosecutors in Cases Involving Postconviction Claims of Innocence' (2001) 38 California Western Law Review 389, 409.

[38] Fisher op. cit. 210-211.

[39] ibid; Murray L. Schwartz. 'Zeal of the Civil Advocate' (1983) Law & Social Inquiry 543, 549-550.

[40] ibid 549-550; David Luban. 'Calming the Hearse Horse: A Philosophical Research Program for Legal Ethics' (1981) 40 Maryland Law Review 451, 458 (Luban states that the evidence which is detrimental to the defendant can be the client's secrets which the defence counsel should keep.)

defendants rather than to protect their rights.

2.2. The Impact of the Investigative Prosecutors on 'Conviction Mentality'

Prosecutors tend more toward a 'conviction mentality' when they conduct investigations on their own initiatives. Jong-Gu Kim argued that 'Korean public prosecutors generally receive the best reputation when they discover high profile corruption cases, investigate them, and achieve a conviction.'[41] This indicates an important fact that the 'conviction mentality', unlike other jurisdictions, can affect prosecutors from the beginning of the investigation rather than at the later stage of the prosecution. The prosecutors seek to construct a case from the start even when they have insufficient information. According to the description of investigation by Delmas-Marty, when the prosecutors 'gather proof of the crime and identify the perpetrator', they come to have a passion to achieve a conviction.[42]

Whereas the police construct a case for the prosecution, the Korean prosecutors investigate a case with the goal of conviction.[43] The prosecutors try to gather evidence which is useful to prove the defendant's guilt from the beginning. In particular, they use several methods in order to gain confessions and information from the suspects and witnesses. These tactics include inducements, threat and even torture.

Case examples, as noted in detail in Chapter 6, show such abuse very well. One suspect was tortured to death in the prosecutor's interview room. In another case, the prosecutor threatened a suspect to lie before judges. For the prosecutor who has conviction mentality, the vulnerabilities of the suspects were not a significant factor to consider. Rather, he tried to use them in order to obtain a confession. Thus, in 2008, four juveniles were forced to make false confessions by the prosecutor without the participation of the appropriate adults. Defence counsel in this case stated that the prosecutor lost his objectivity because of his passion to achieve a conviction which could give him fame:

---

[41] Jong Gu Kim, *The Reform of the Korean Criminal Justice System* (2nd edn BuB-Mun-Sa, Seoul 2004), 531.

[42] Mark A. Summers (tr), Mireille Delmas-Marty, *The Criminal Process and Human Rights: Toward a European Consciousness* (Martinus Nijhoff Publishers, 1995), 10.

[43] McConville suggested that 'case construction by the police is generally (although not invariably) geared towards producing strong cases – that is, convictions.' However, the conviction as an aim will be more appropriate to the public prosecutor than the police. *See* Mike McConville, Andrew Sanders and Roger Leng, *The Case for the Prosecution : Police Suspects and the Construction of Criminality* (Routledge, London 1991) 227, 148-172.

> [*DL2-IS2*] In the Suwon homeless girl murder case, the prosecutor provided the reporters from the newspapers and TV with the results of the investigation. He appeared even on TV programmes. The suspects were all innocent juveniles. They were threatened and induced to falsely confess to murder without appropriate assistance from the defence counsel and even their parents. Nevertheless, he publicized that he got the real criminals whom the police had missed. He became a hero by the media: 'An almost forgotten murder case was solved by the capable prosecutor.' ... But, the suspects became an infamous criminal after this wrongful investigation and prosecution by the prosecutors. I don't know the personalities of this prosecutor. But, I am certain he didn't look at the case with objectivity because of his ambition of fame.

Prosecutors in general focus on obtaining a conviction. Because of this, where they also investigate, they look towards a conviction from even before they have sufficient evidence to charge. That is to say, the decision to prosecute is already made when they begin to conduct an investigation. Furthermore, they often use unethical or even illegal methods in order to complete their goals. In this situation, it is not possible to hope the prosecutors to perform a quasi-judicial role with objectivity:

> [*DL3-IS*] I've never seen the prosecutors serving as a quasi-judicial officer, who protects the benefits of defendants. I have to say that all prosecutors work only to prove the defendant's guilt. We shouldn't expect the Korean prosecutors to consider the interest of defendants.

> [*PO3-IS*] Investigation agencies including the prosecution service in Korea tend to infringe the defendant's rights. How can the Korean prosecutors protect suspects? The prosecutors themselves work as an interrogator. It's very ridiculous to expect the prosecutors to protect defendants in their interrogation room and in court.

> [*J1-IM*] The quasi-judicial role of the Korean prosecutors is the expression only in the book. They don't consider the defendant's benefits at all because they are investigators rather than prosecutors. Only the defence counsel can work for defendants.

3. A Defect in Filter Mechanism

Prosecutorial investigation also causes a defect in the filter mechanism in the criminal

process. One of the significant functions of the public prosecution service, as Professor Uglow stated, is to review the investigations independently as a 'second filter'.[44] However, the prosecutor's direct involvement in the investigation can result in a faulty situation in which no independent filter exists to screen investigations. In particular, given the impact of tunnel vision, the separation of the function of investigation and prosecution must be a significant element to protect defendants.

Unlike the conviction mentality, 'tunnel vision' is based on unintentional cognitive bias. The conviction mentality leads prosecutors to focus on conviction intentionally, whereas the prosecutors can make a wrongful decision without such intention as a result of their tunnel vision.

3.1. Tunnel Vision in the Criminal Process

Tunnel vision technically refers to physical vision which focuses on the central part of the objective while excluding peripheral fields.[45] This can be used as a metaphor to describe a natural human tendency to focus on a single desired objective excluding all else. In the criminal justice system, tunnel vision has been generally used to refer to investigator's tendency only to focus their attention on the evidence which is necessary to prove the guilt.[46] Martin defined tunnel vision as 'a compendium of common heuristics and logical fallacies' and suggested that 'Investigators focus on a suspect,

---

[44] Steve Uglow, *Criminal Justice* (2nd edn Sweet & Maxwell, London 2002), 195-196(Professor Uglow stated that 'The prosecutor's first action is to review the police case, not simply to decide whether to take court action but also to confirm the nature and level of the charge against the accused and whether the mode of trial is appropriate.')

[45] The term 'tunnel vision' is not only used in the legal field, but also in different research works. For instance, in the medical field, tunnel vision is used to refer to the patients with retinitis pigmentosa (RP). These patients suffer from narrowing of visual fields (tunnel vision). For the patients, special glasses have been developed in order to expand the vision. *See* Arthur B. McKie and others. 'Mutations in the pre-mRNA splicing factor gene PRPC8 in autosomal dominant retinitis pigmentosa (RP13)' (2001) 10(15) Hum Mol Genet 1555.

In the website visibility research, tunnel vision is used to describe the phenomenon which occurs when 'Web site users get too familiar with the content and layout of frequently visited Web sites.' This phenomenon is 'one of the main visibility concerns facing information delivery and knowledge exchange through Web sites'. *See* Rami N. Hasan and M. H. Samadzadeh. 'A Study of Tunnel Vision and Rotation as Aspects of Web Site Visibility' (International Conference on Information Technology: Coding and Computing ITCC, 2005) <http://ieeexplore.ieee.org/xpls/abs_all.jsp?arnumber=1425194>

In addition, Cao and Nijholt transplanted this phenomenon into the crisis management field. They suggested that 'Under stress due to information overload and a lack of time, crisis managers tend to rely on standard operating procedures and their previous experiences without re-examination ... Correct but ambiguous or contradicting information is easily discarded. We call the above phenomena 'tunnel vision''. *See* Yujia Cao and Anton Nijholt. 'Modality Planning for Preventing Tunnel Vision in Crisis Management' (Proc. of the AISB Symp. on Multimodal Output Generation (MOG) 2008).

[46] Richard A. Leo and Deborah Davis. 'From False Confession to Wrongful Conviction: Seven Psychological Processes' (2009) Journal of Psychiatry and Law 22.

select and filter the evidence that will "build a case" for conviction, while ignoring or suppressing evidence that points away from guilt.'[47] In other words, all information which is consistent with their belief is regarded as relevant and probative. However, the evidence which is inconsistent with their conclusion is overlooked and discredited.[48]

All human beings are vulnerable to tunnel vision. All professionals in the criminal justice system will have difficulty in avoiding unintentional mistakes because of this:

> [*PO3-IS1*] Investigators can have a bias even with a very worthless statement or petty evidence. Let me introduce a case that I experienced. When I investigated a robbery a few years ago, I got one suspect. His appearance was very similar to the description of the victim. Furthermore, five million Won (about GBP 2,500) was paid in his bank account at the very next day of the crime. The amount of money was the same as the victim's. So, all of my team members came to believe that he is the real criminal. We coercively interrogated him for a long time. But, he was innocent. Fortunately, he could prove the source of the money. It was our mistake. But, if there had been no one who could prove the source of his money, the result would have been different. It's very awful. Any investigator can make this kind of mistake.

Tunnel vision can inevitably lead investigators, prosecutors, defence lawyers, and judges to focus on a particular conclusion. As Raeder suggested, 'Once a hypothesis is selected, evidence that does not fit may be ignored.'[49]

In terms of wrongful convictions, tunnel vision is a well-known phenomenon.[50] According to Findley and Scott, 'tunnel vision' has a role to play in most wrongful convictions and these facts can be noted in the official inquires.[51] The Philips Commission on Criminal Procedure in England and Wales stated that 'A police officer who carries out an investigation, inevitably and properly, forms a view as to the guilt of the suspect. Having done so, without any kind of improper motive, he may be inclined to shut his mind to other evidence telling against the guilt of the suspect or to overestimate the strength of the evidence he has assembled.'[52]

---

[47] Dianne L. Martin. 'Lessons about Justice from the Laboratory of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence' (2001) 70 UMKC Law Review 847, 848.
[48] Keith A. Findley and Michael S. Scott. 'The Multiple Dimensions of Tunnel Vision in Criminal Cases' (2006) 2 Wis Law Rev 291, 292.
[49] Myrna Raeder. 'What Does Innocence Have to Do with it? A Commentary on Wrongful Convictions and Rationality' (2003) Mich St L Rev 1315, 1327.
[50] ibid; Findley and Scott op. cit. 293
[51] ibid.
[52] *See* Sir Cyril Phillips, 'The Royal Commission on Criminal Procedure: Report' HMSO (Cmnd 8092, London) para 6.24.

In the USA and Canada, there are also official reports which referred to tunnel vision and its effect. For example, in the USA, after examining thirteen wrongful convictions which were sentenced to death, Illinois Governor's Commission on Capital Punishment concluded that tunnel vision pervasively influences the decision process in the criminal justice system:[53]

> The Commission has unanimously recommended that law enforcement agencies take steps to avoid "tunnel vision," where the belief that a particular suspect has committed a crime often obviates an objective evaluation of whether there might be others who are actually guilty.[54]

The Canadian official inquiry dealing with the wrongful conviction of Thomas Sophonow in Manitoba also highlighted the impact of 'tunnel vision'.[55] Mr Sophonow was convicted of murdering 16 year-old Barbara Stoppel in 1982. After three-year imprisonment, the Manitoba Court of Appeals quashed the conviction. However, despite this judgment, his co-workers and neighbours still suspected him. He struggled to seek exoneration for 15 years. At last, in 2000, the Winnipeg Police Service officially announced that another suspect had been identified through the two-year re-investigation and Mr Sophonow was not responsible for the murder. Attorney General of Manitoba made an apology to him, and stated that 'he had endured three trials and two appeals, and spent 45 months in jail for an offence he did not commit.'

The Inquiry investigating this case also regarded tunnel vision as one of the elements which can lead the professionals in the criminal justice system to make wrongful decisions.[56] In particular, the report noted that the Winnipeg police investigators ignored a potential suspect due to this:

> Tunnel Vision is insidious. It can affect an officer or, indeed, anyone involved in the administration of justice with sometimes tragic results. It results in the officer becoming so focussed upon an individual or incident that no other person or incident registers in the officer's thoughts. Thus, tunnel vision can result in the elimination of other suspects who

---

[53] Illinois. Governor's Commission on Capital Punishment, *Report of the Governor's Commission on Capital Punishment* (State of Illinois, Springfield, Ill. 2002), 20.
[54] ibid.
[55] The Commission of Inquiry Regarding Thomas Sophonow, 'Thomas Sophonow Inquiry Report' The Government of Manitoba < http://www.gov.mb.ca/justice/publications/sophonow/recommendations/english.html#tunnel> Accessed on 23 March 2011.
[56] ibid.

> should be investigated. Equally, events which could lead to other suspects are eliminated from the officer's thinking. Anyone, police officer, counsel or judge can become infected by this virus.[57]

In short, tunnel vision refers to a tendency to focus on certain suspects and evidence which is helpful to prove the guilt. In particular, it can affect every person involved in the criminal justice system because, as we shall see later, it stems from the cognitive process of human beings.[58] For similar reason, the phenomenon of tunnel vision can be observed in most jurisdictions.

3.2. Elements Leading to Tunnel Vision

There is considerable research on 'tunnel vision' in criminal justice system. Legal researchers draw their attention to the 'information processing and behavioural biases leading a person to selectively attend to, seek out, produce, and interpret evidence', whereas cognitive scholars tend to limit the definition of the tunnel vision to the 'focus of attention.'[59] For instance, Safer and others defined 'tunnel vision' as 'a highly restricted narrowing of attention to certain aspects of a situation.'[60] They suggest that a traumatic situation makes persons focus only on part of the whole picture. On the contrary, in a neutral situation, they extend their attention to the broad scene.[61] Of the legal researchers, Burke explores several aspects of the cognitive bias leading the legal professionals to have tunnel vision: confirmation bias, selective information processing, and belief perseverance.[62]

First, confirmation bias is the tendency to both seek and interpret evidence in order

---

[57] ibid; Illinois. Governor's Commission on Capital Punishment, *Report of the Governor's Commission on Capital Punishment* (State of Illinois, Springfield, Ill. 2002), 21.

[58] Burke states that the prosecutors are 'irrational because they are human, and all human decision makers share a common set of information-processing tendencies that depart from perfect rationality.' *See* Alafair S. Burke. 'Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science' (2006) 47(5) William and Mary Law Review 1587, 1590-1591; Richard A. Leo and Deborah Davis. 'From False Confession to Wrongful Conviction: Seven Psychological Processes' (2009) Journal of Psychiatry and Law 2.

[59] ibid 22.

[60] Martin A. Safer and others. 'Tunnel Memory for Traumatic Events' (1998) 12(2) Applied Cognitive Psychology, 99.

[61] ibid.

[62] Burke op. cit. 1593 (Burke classified the features into four categories: confirmation bias, selective information processing, belief perseverance, and the avoidance of cognitive dissonance. However, in this paper, 'the avoidance of cognitive dissonance' is excluded because it may cause unnecessarily additional explanation.)

to confirm existing beliefs, expectations, or theories.[63] Wason and Johnson-Laird note that this bias arises from the people's natural tendency to prefer information confirming their hypothesis as opposed to disconfirming information.[64] Nickerson states that a case is unwittingly built in a biased way in the criminal process. He defines this tendency as 'confirmation bias' which refers to 'unwitting selectivity in the acquisition and use of evidence.'[65] In particular, he emphasises the unintentional involvement in case-building. Accordingly, the legal professionals perceive, accept, or interpret the evidence in a biased way without intention or even not knowing what they are doing.[66]

Leo and Davis suggest that confirmation bias pervasively influences 'tunnel vision'.[67] Investigators have a tendency to accept evidence which supports their 'existing beliefs, perceptions, and expectations and to avoid or reject evidence that does not.'[68] Once the investigators fix upon a suspect, they seek to obtain a confession through interrogation.[69] If a suspect confesses to the crime, this confession would be an important source of 'continuing' confirmation bias even though it is a false confession.[70] Furthermore, such a confession occasionally leads even the defence counsel to exclude the possibility of innocence.

In the criminal justice system, innocent persons are occasionally charged and convicted wrongfully due to this confirmation bias.[71] For instance, Martin refers to the Donald Marshall Jr. case as follows:[72]

---

[63] ibid 1593-1594; Keith A. Findley and Michael S. Scott. 'The Multiple Dimensions of Tunnel Vision in Criminal Cases' (2006) 2 Wis Law Rev 291, 309; Raymond S. Nickerson. 'Confirmation Bias: A Ubiquitous Phenomenon in Many Guises' (1998) 2 Review of General Psychology 175, 175.

[64] Peter C. Wason and Philip N. Johnson-Laird, *Psychology of Reasoning: Structure and Content* (Harvard Univ Pr, 1972), 210-211.

[65] Evans stated that 'Confirmation bias is perhaps the best known and most widely accepted notion of inferential error to come out of the literature on human reasoning.' *See* Raymond S. Nickerson. 'Confirmation Bias: A Ubiquitous Phenomenon in Many Guises' (1998) 2 Review of General Psychology 175, 175.

[66] ibid 176.

[67] Richard A. Leo and Deborah Davis. 'From False Confession to Wrongful Conviction: Seven Psychological Processes' (2009) Journal of Psychiatry and Law 2, 22-27.

[68] ibid 22-23. Unlike criminal investigators, the prosecutors have a different source for 'tunnel vision' such as the institutional and political culture of their office and conviction psychology. *See* ibid 26; Daniel S. Medwed. 'The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence' (2004) 84 Boston University Law Review 125; Stanley Z. Fisher. 'In Search of the Virtuous Prosecutor: A Conceptual Framework' (1988) 15 Am J Crim Law 197.

[69] Richard A. Leo and Richard J. Ofshe. 'The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation' (1998) Journal of Criminal Law and Criminology 429, 429-496.

[70] Leo and Davis op. cit. 25-26.

[71] ibid 23 (Leo and Davis stated that investigators sometimes have 'erroneous assumptions', e.g. 'a person who is sexually attracted to a victim will often kill her if rejected.')

[72] T. Alexander Hickman, 'Royal Commission on the Donald Marshall, Jr., Prosecution: Report' Lieutenant Governor in Council (Nova Scotia).

> Police wanted to believe that Marshall was the killer and did not want to believe that a middle-aged white man had in fact killed Seale [victim] and attacked Marshall. The police did not bother to investigate the crime scene or search for independent witness. Instead, they pressured Marshall's teenaged acquaintances with threats of criminal charges and imprisonment into becoming informers against him.[73]

In this case, the police pinpointed Marshall as the culprit because of these wrong assumptions. Furthermore, confirmation bias led them to find evidence, which supported their beliefs, and in the end, succeeded in proving the guilt of the innocent person.

Second, people in general have a tendency to stick to their prior beliefs, and this can prevent them from evaluating the strength of evidence.[74] Burke defines this cognitive process as 'selective information processing' and argues that people focus on the evidence supporting their prior beliefs even when they have to assess contradictory evidence.[75]

Similarly, Findley and Scott suggest three sources of tunnel vision: tunnel vision as a function of cognitive biases; institutional pressures reinforcing tunnel vision; and prescribed tunnel vision.[76] In particular, the cause of tunnel vision is noted in two aspects – the natural tendency of a human being and reinforcing sources. This is to say, tunnel vision is created by the 'cognitive distortions', which help a person to perceive and interpret evidence in a wrong way, and this is reinforced by the institutional pressures from victims, the community and the media.[77]

Individuals readily accept the information which is compatible with their prior beliefs, whereas when they are confronted with dissonant information, they try to find weaknesses which can refute this information in order to defend their beliefs.[78] In

---

[73] Dianne L. Martin. 'Lessons about Justice from the Laboratory of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence' (2001) 70 UMKC Law Review 847, 860.

[74] Alafair S. Burke. 'Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science' (2006) 47(5) William and Mary Law Review 1587, 1596.

[75] ibid 1597; Lord, Ross, and Lepper suggest that people 'are apt to accept 'confirming' evidence at fact value while subjecting 'disconfirming' evidence to critical evaluation, and as a result to draw undue support for their initial positions from mixed or random empirical findings.' For more details, *see* Charles G. Lord, Lee Ross and Mark R. Lepper. 'Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence' (1979) 37(11) J Pers Soc Psychol 2098, 2098-2109.

[76] Keith A. Findley and Michael S. Scott. 'The Multiple Dimensions of Tunnel Vision in Criminal Cases' (2006) 2 Wis Law Rev 291, 307-345.

[77] ibid 323.

[78] Kari Edwards and Edward E. Smith. 'A Disconfirmation Bias in the Evaluation of Arguments' (1996) 71(1) ibid 5, 5-24; Peter H. Ditto and David F. Lopez. 'Motivated Skepticism: Use of Differential Decision Criteria for Preferred and Nonpreferred Conclusions' (1992) 63ibid568, 568 ('Information

particular, the natural human tendency, as Edwards and Smith suggested, is to retrieve memories which are useful to disprove an incompatible argument. They argue that persons search their memories when they encounter disconfirming evidence, but this searching naturally concentrates on refutable materials.[79] The 'selective information processing' is based on a bias which regards any incompatible evidence as insignificant. In this sense, there is a difference between the confirmation bias and selective information processing. The former is the tendency to seek or interpret evidence to confirm the hypothesis, whereas the latter is a bias which tends to refute disconfirming evidence to defend prior beliefs.

Finally, 'belief perseverance' is the tendency to stick to the prior beliefs even when those beliefs are overturned by the disconfirming evidence.[80] Psychological researchers have analysed this natural tendency. For instance, Anderson and others conducted several experiments by using a debriefing paradigm.[81] In these experiments, they initially provided experimental subjects with two fabricated case studies. Besides, they asked those subjects to compose an explanation of them. Then, the subjects were debriefed regarding the fictitious nature of those case studies. However, notwithstanding that the cases were simulated, the subjects adhered to the theories which they had concluded based on wrong information. Even after the evidence supporting their argument was completely wrong, the subjects showed the tendency to cling to their conclusions.[82]

In the criminal process, the police and prosecutors often show such tendency. They are in general reluctant to admit the correctness of an acquittal.[83] Rather, they continue to adhere to their beliefs in guilt even after the defendants are found 'not guilty'. In Korea, the Chul-Gyu Lee case shows this phenomenon very well in which a chief of the Ansan Police Station was arrested and charged with bribery, but was found not guilty in

---

consistent with a preferred conclusion is examined less critically than information inconsistent with a preferred conclusion.')

[79] Kari Edwards and Edward E. Smith. 'A Disconfirmation Bias in the Evaluation of Arguments' (1996) 71(1) J Pers Soc Psychol 5, 18.

[80] Alafair S. Burke. 'Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science' (2006) 47(5) William and Mary Law Review 1587, 1599.

[81] Craig A. Anderson, Mark R. Lepper and Lee Ross. 'Perseverance of Social Theories: The Role of Explanation in the Persistence of Discredited Information' (1980) 39(6) J Pers Soc Psychol 1037, 1037-1049.

[82] Anderson et al. state that 'initial beliefs may persevere in the face of a subsequent invalidation of the evidence on which they are based, even when this initial evidence is itself as weak.' *See* ibid 1045.

[83] Daniel S. Medwed. 'The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence' (2004) 84 Boston University Law Review 125, 138; McCloskey has a similar perspective on this 'belief perseverance': 'It is human nature to resist any information that indicates that we have made a grievous mistake.' *See* James McCloskey. 'Convicting the Innocent' (1989) 8 Crim.Just.Ethics 56, 56.

the Supreme Court.[84] The statement of the prosecutor, who was in charge of investigating this case, indicates that he still clings to his belief in guilt:

> I couldn't search the defendant's house. It's my fault not to find sufficient evidence. However, it's 100 per cent correct that Shim [Provider of bribes] gave the defendant bribes. Until now, I'm very certain about his conviction. I believe that the judgment of acquittal of the Supreme Court was totally wrong.[85]

The Korean Supreme Court found Chul-Gyu Lee not guilty.[86] Nevertheless, the prosecutor still adheres to his prior beliefs while criticising the verdict of the Supreme Court.[87]

In short, cognitive bias is based on several distinctive features leading a person to have tunnel vision. Firstly, persons seek information which is helpful to support their hypothesis. Secondly, if they are confronted with the information which is incompatible with their beliefs, they focus their attention on discrediting this information. By contrast, they are prone to accept the confirming information supporting their beliefs. Finally, this bias continues to exist even after the hypothesis is completely discredited by the disconfirming information.

'Tunnel vision' is mainly caused by the cognitive bias and can be reinforced by external elements. Tunnel vision is a natural human tendency which leads a person to decide in a biased way. It can be intensified by social contexts including institutional pressures, the media, and victims. As Bandes suggested, a social context and institutional norms can contribute to develop 'tunnel vision'.[88] Valuable social ends or 'unthinkable evil' can have a role to play in reinforcing 'tunnel vision' in a social context. Individuals in the criminal justice system seek to follow the institutional norms and to adopt organisational goals, cultures, beliefs, and perspectives on problems.[89] In this circumstance, they can lose their individual judgement, and subsequently, come to have 'tunnel vision'.

---

[84] *2004 DO 711* (2004) 13 May 2004 (Korean Supreme Court); *2004 NO 1409* (2004) 14 January 2004 (Seoul High Court); Jun Ki Kim. 'The former Chief of Ansan Police Station Found Not Guilty' *Kyung-Hyang* (10 May 2005).
[85] Ho Jin Jo and Woo Sung Kwon. 'Chief of the Police Station Found Not Guilty' *Oh My News* (6 July 2005).
[86] *2004 DO 711* (2004) 13 May 2004 (Korean Supreme Court).
[87] Alafair S. Burke. 'Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science' (2006) 47(5) William and Mary Law Review 1587, 1599-1601.
[88] Susan Bandes. 'Loyalty to One's Convictions: The Prosecutor and Tunnel Vision' (2006) 49(2) Howard Law J 475, 481-483.
[89] ibid 482-483.

3.3. A Safeguard against Tunnel Vision

Cognitive bias has a major role to play in forming 'tunnel vision' in the criminal process. Because this bias is a natural human tendency, it is very difficult for the legal professionals themselves to control. Accordingly, the criminal process needs effective filters to screen errors resulting from cognitive bias.

The police and prosecutors, as Nickerson pointed out, 'can and do engage in case-building unwittingly, without intending to treat evidence in a biased way or even being aware of doing so.'[90] In this regard, 'tunnel visions' is different from the 'conviction mentality'. Conviction mentality is usually formed through the motivated goal, e.g. achieving a conviction,[91] whereas tunnel vision unintentionally influences the decision making process.[92] In other words, the prosecutors with conviction mentality seek evidence in order to prove the defendant's guilt. They have an intention to convict the defendant. By contrast, they do not recognise cognitive biases which they can have while seeking and interpreting evidence. Due to this reason, the criminal process needs filters which provide legal actors with objective benchmarks.

However, the prosecutor's investigation, as we have seen, eliminates one of the significant filters in the criminal process, which should exist between investigation and prosecution:

> [*DL2-IS1*] The prosecutor also makes a mistake while investigating a crime. But, the problem is that there is no system to control and review the prosecutorial investigation. At present, the police investigations are reviewed by the prosecutors. Indeed, it can help to reduce mistakes taking place during the investigation. But, no one can review the investigation conducted by the prosecutors before the trial. This is a big problem in the Korean criminal process.

The judgment of Yang-Ho Byun Case[93] showed the problems caused by both tunnel

---

[90] Raymond S. Nickerson. 'Confirmation Bias: A Ubiquitous Phenomenon in Many Guises' (1998) 2 Review of General Psychology 175, 175-176.

[91] Leo and Davis define motivational bias in relation to 'goal pursuit' as another cause which leads to wrongful convictions. In particular, they point out that 'The primary goal of investigators and prosecutor should be accuracy – identifying and convicting the guilty while making sure to avoid prosecution of innocents.' *See* Richard A. Leo and Deborah Davis. 'From False Confession to Wrongful Conviction: Seven Psychological Processes' (2009) Journal of Psychiatry and Law 2, 27.

[92] Nickerson suggests the importance of separation between intentional and unintentional selection of information even though it is difficult to classify in practice: 'The line between deliberate selectivity in the use of evidence and unwitting molding of facts to fit hypothesis or beliefs is a difficult one to draw in practice, but the distinction is meaningful consequently.' *See* Nickerson op. cit.

[93] *2008 DO 8137* (2009) 1/2 Panre Gongbo 183 (Korean Supreme Court).

vision and the loss of filter mechanism. Yang-Ho Byun, a former high-profile public servant in the Ministry of Finance, was arrested by the Central Investigation Department (CID) of the Supreme Prosecutors' Office accused of receiving bribes in 2006. The prosecutors investigated the case and charged him. The trial continued for nearly three years until the Korean Supreme Court found him not guilty in 2009.[94]

The Korean Supreme Court made a point that 'the prosecutors focused their attention only on the confession of another defendant. As a result, they did not consider other evidence which could discredit the confession.'[95] There was also a possibility that the defendant made a false confession by inducements.[96] Nevertheless, the prosecutors did not look carefully at such contradictory evidence. If there had been an objective filter to review the results of prosecutorial investigation, the defendant may well have been freed much earlier than this.

In short, because of 'tunnel vision', the police and prosecutors in general unintentionally focus their attention on the evidence which is compatible with their beliefs by ignoring other evidence. Thus, the criminal proceedings need an independent monitoring system to review the results of the investigation. However, the prosecutorial investigation eliminates the separation of the functions between the investigation and prosecution. This functional overlap results in the loss of a significant filter to review the investigation.

4. Disclosure of Evidence

As we have seen, the investigation conducted by prosecutors can lead to the deepening of any conviction mentality and of any tunnel vision. This will have its impact on a defendant's right to a fair trial. But their monopoly over the investigation also means a complete control over information. The lack of disclosure for courts and defendants

---

[94] ibid; Jung Ryu and Si Hyun Kim. 'Korean Supreme Court raises doubts on the reliability of a lobbyist's confession' *Chosun Il-Bo* (16 January 2009); Ji Sung Jeon. 'Yang Ho Byun Found not Guilty' *Dong-Ah Il-bo* (16 January 2009); Chosun Il-bo Editorial. 'Central Investigation Department needs a courage to discontinue the weak cases' *Chosun Il-Bo* (13 February 2009).

[95] *2008 DO 8137* (2009) 1/2 Panre Gongbo 183 (Korean Supreme Court).

[96] ibid; Martin also notes the general unreliability of the informers: 'Although strictly speaking the informer may be simply the individual who reports a crime, the more usual sense of the term connotes a person who provides information or testimony for benefit. These informers may provide information to police as a routine practice, or the informer is an associate or accomplice who gains a benefit by providing information or offering to testify against the key suspect.' *See* Dianne L. Martin. 'Lessons about Justice from the Laboratory of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence' (2001) 70 UMKC Law Review 847, 856-857.

may increase the inequality of arms between the state and defendants.[97] An important example is the concealment of exculpatory evidence by prosecutors.[98] The disclosure of all relevant evidence should be a significant safeguard for defendants.

4.1. Equality of Arms and Disclosure of Evidence

The principle of equality of arms is one of the important elements for a fair trial. With respect to the import of 'equality of arms', the Strasbourg Court stated that 'each party must be afforded a reasonable opportunity to present his case— including his evidence— under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.'[99] This judgment stems from the civil proceedings. Yet, as Dijk and others suggest, the principle of equality of arms is more important in the criminal cases than in the civil cases because the criminal proceedings fundamentally start from 'the inequality of the parties.'[100]

One of the important elements to guarantee the equality of arms is the right to access information. This right implies that the defendants should have 'the same access to the records and other documents pertaining to the case.'[101] However, defence lawyers have difficulty in acquiring this information.[102]

For a fair trial, as Murphy and Whitty have stated, access to information is an essential element: 'a fair trial is impossible if a defendant is unaware of the charges against him or her, is unable to prepare a defence, or is prevented from presenting their case fully in court.'[103] In this sense, disclosure of evidence by the prosecutors must be one of the key issues to guarantee the equality of arms.[104]

---

[97] The Korean Supreme Court declares that the public prosecutor should have a duty to disclose all evidence which is for or against the defendant as a representative of the public interest. *See 2001 DA 23447* (2002) 152 Panre Gongbo 753 (Korean Supreme Court).

[98] Ashworth and Redmayne state that the principle of equality of arms 'has recently crystallized as the right of a defendant to have disclosure of 'all material evidence for or against the accused'.' *See* Ashworth and Redmayne op. cit. 33.

[99] *Dombo Beheer B.V. v The Netherlands* (1994) 18 EHRR 213 (European Court of Human Rights) para 33 (In this case, the Strasbourg Court emphasises that this principle can apply to both civil and criminal proceedings: 'Although Contracting States have greater latitude over the concept of a 'fair hearing' in civil proceedings than they do in criminal proceedings, the requirement of 'equality of arms' in the sense of a 'fair balance' between the parties applies in both types of proceedings.')

[100] P. Van Dijk and others (eds), *Theory and Practice of the European Convention on Human Rights* (4th edn Intersentia, Oxford 2006) 1190, 580.

[101] ibid.

[102] *Kamasinski v Austria* (1991) 13 EHRR 36 (European Court of Human Rights) para 88.

[103] Therese Murphy and Noel Whitty. 'What is a Fair Trial? Rape Prosecutions, Disclosure and the Human Rights Act' (2000) 8(2) Feminist Legal Studies 143, 148.

[104] Ashworth and Redmayne op. cit. 33; *Edwards v United Kingdom* (1993) 15 EHRR 417 (European Court of Human Rights) para 36 (For a fair trial, the criminal procedure demands the prosecutor 'to

There is an imbalance existing between the state and an accused individual.[105] The door-to-door search for a witness by the police is an example.[106] The defence counsel, even if they have a similar investigative team, would not obtain the same results as the police because witnesses have a tendency to want to cooperate with the prosecution rather than the defence.[107] In addition, for the accused, it is difficult to have access to crime scene because the crime scene and relevant evidence are occupied by the investigators.

As a consequence, the suspects have no choice but to depend on the police as well as prosecutors 'to find, collect, develop, and disclose the evidence.'[108] However, such evidence is unlikely to be sufficient to prove their innocence. As Findley illustrated, the police as well as prosecutors do not want to cooperate with the accused or to send not exculpatory evidence:

> Police are an arm of the prosecution; they typically work closely with prosecutors, who, while theoretically charged with responsibility to "do justice," in practice often develop a conviction psychology in which catching and convicting the suspect is the highest value.[109]

For a similar reason, the police are reluctant to help the accused to have access to the evidence, which can undermine likelihood of conviction.[110] Zacharias notes that such

---

disclose to the defence all material evidence for or against the accused.'); David J. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (Butterworths, London, Dublin, Edinburgh 1995), 213; Sybil D. Sharpe. 'The Human Rights Act 1998: Part 3: Article 6 and the Disclosure of Evidence in Criminal Trials' (1999) Crim L R 273-286, 273-274.

[105] Keith A. Findley. 'Innocents at Risk: Adversary Imbalance, Forensic Science, and the Search for the Truth' (2008) 38 Seton Hall Law Rev 893, 898.

[106] Fred C. Zacharias. 'Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice' (1991) 44 Vand.L.Rev. 45, 78 n 143.

[107] ibid (Zacharias stated the reasons as follows: 'the witness's identification with the prosecution, dislike for a person the government has targeted as a defendant, fear of all criminals, and prosecutorial or police suggestions that the witness should not cooperate.')

[108] Findley op. cit.

[109] ibid.

[110] Steve Uglow, *Criminal Justice* (2nd edn Sweet & Maxwell, London 2002), 268-269 (Professor Uglow placed the emphasis on 'the need for the accused to have access to information necessary for the proper preparation of the defence' with reference to Taylor case - 'a senior policeman withheld information from the CPS that a witness identifying the defendants had made an earlier statement that one of the girls he had seen might have been black (neither defendant was) and that he had claimed a reward. The officer withheld the information fearing that it would be disclosed to the defence.'); *2000 HUNMA 474* (2003) 15(1) Panrejib 282 (Korean Constitutional Court) *see* n 113 above; *Kyles v Whitley (93-7927)* (1995) 514 US 419 (U.S. Supreme Court) (In this case, the non-disclosure of exculpatory evidence by the police plays a main role in reversing defendant's capital murder conviction. The non-disclosed items are as follows: 'initial eyewitness statements taken by police (arguably closer to fitting Beanie); police records establishing Beanie's initial call to the police; his inconsistent statements to the police, and his suggestion that the police search defendant's rubbish; evidence linking Beanie to other crimes committed at the same grocery store and to an unrelated murder; and a computer printout of the license numbers of the cars

unfair evidence is produced by the informational monopoly:

> The fear that the government will develop an informational monopoly is one reason why code drafters impose an occasional duty on prosecutors to step out of the competitive role.[111]

In this regard, the disclosure of evidence by prosecutors is very important. The disclosure has a main role to play in breaking the informational monopoly by the state. Such an obligation of prosecutors is necessary to strike a balance between the state and defendants.

4.2. Disclosure of Evidence in Korea

In Korea, there was a significant debate with respect to the disclosure of evidence. In 2000, In-Chon Seo-Bu Police Station (SBPS) refused a request from a defence counsel for access to the interview documents of the suspect. The defence lawyer instituted a suit against the Chief of the SBPS. He argued that 'such refusal by the police could infringe the defendant's right to assistance of counsel by limiting the access of the counsel to the information which is necessary to both understand the case and defend the accused.'[112] The Korean Constitutional Court held that 'the restriction on the defence counsel's access to the records as to the interview with the suspects violated the right to assistance of counsel, which is protected on the basis of article 12(4) of the Korean Constitution, by preventing the defence counsel's activities.'[113]

The KCPA introduced the statutory scheme for disclosure of evidence through the amendment in 2007.[114] According to article 266-3 and 266-4 of the KCPA, the prosecutor has a duty to disclose evidence on the basis of the request of the defendants.[115] However, this provision limits the disclosure of evidence to the trial stage. Accordingly, the defendants cannot demand the disclosure of evidence before the

---

police found in the parking lot on the night of the murder.') *See* Fisher op. cit. 1379 n 3.

[111] Zacharias op. cit. 77.

[112] *2000 HUNMA 474* (2003) 15(1) Panrejib 286 (Korean Constitutional Court).

[113] ibid, 289-291 (In this case, one of the judges stated that 'at the beginning of the investigation, disclosure of much information may disturb fact-finding procedure by helping the suspect to destroy important evidence'. *See* ibid 292.

[114] There are two provisions for the disclosure of evidence in the CPA 1954 in Korea, which were established on 1 June 2007: article 266-3 and 266-4.

[115] The Korean Ministry of Justice (tr), *Criminal Procedure Act [Hyungsasosongbeop] partially amended on 21 December 2007 No. 8730* (1954) art 266-3(1).

trial.[116] Disclosure at the investigation stage coupled with legal advice is an important element because it can preserve the right to a fair trial by giving the defendant significant information.[117] In this regard, the current scheme is not enough to protect the defendants.

In particular, the disclosure of evidence is very limited in practice because of the prosecutorial investigation which increases the inequality of arms between the prosecutors and defendants. There are two aspects to this: the control over information and the neglect of the duty to disclose.

First, the prosecutors' investigation enables them to control over almost all information in relation to the defendants from the beginning of investigation. Such information includes all evidence which proves guilt or innocence. Prosecutors achieve an 'informational monopoly', which is significant and harmful as it can damage fairness.[118] Gershman identified the problems arising from this informational monopoly:

> The most formidable threat to rationality and fairness in the adversarial system comes not from restrictions on the exclusionary rule, or the erosion of due process constraints on prosecutorial excesses, but from the prosecutor's institutional role in controlling access to information relevant to a defendant's guilt, and the prosecutor's ability to withhold evidence that might prove a defendant's innocence.[119]

As Zacharias stated, this is the reason why in some countries, the legislators require the prosecutor to step 'out of the competitive role' in the criminal process.[120] However, the Korean prosecutors use their control of information to increase their competitive edge

---

[116] ibid (1) A defendant or his defence counsel may file an application with the public prosecutor to ask the prosecutor to allow him to inspect or copy, or deliver in writing, a list of the documents or articles relating to the case indicted and the following documents that are likely to have influence over admission of indicted facts or sentencing: Provided, that if the defendant employed his defence counsel, only the inspection shall be applied to the defendant... (2) If it is deemed that there is a reasonable ground to disallow inspection, copying, or delivery in writing of documents, such as the national security, needs to protect witnesses, likelihood of destruction of evidence, and specific grounds under which it is anticipated that it is likely to hinder the investigation into related cases, the public prosecutor may refuse to allow the inspection or copy, or deliver in writing, such documents or place a limitation thereon.; At the forum for the introduction of the scheme to enforce the prosecutors to disclose evidence, Professor Min and Park argue that this regime should be extended to the investigation stage. *See* Presidential Committee on the Judicial Reform, 'Committee Report: the Reform for the Advanced Judicial System' PCJR (Seoul), 197-198.

[117] Steve Uglow op. cit. 268; Nicola Padfield, *Text and Materials on the Criminal Justice Process* (4th edn Oxford University Press, Oxford; New York 2008) 536, 167 (Padfield stated that 'Clearly, any failure to disclose relevant evidence undermines the right to a fair trial, and it can be argued that if relevant evidence has to be excluded in the public interest, then the prosecution should not be sustained.')

[118] Zacharias op. cit. 77; Gershman op. cit. 449.

[119] ibid.

[120] *See* above n 111 and accompanying text.

which is already formidable. Prosecutorial investigation can make worse the current circumstances because it allows the prosecutors to control access to the information.[121]

Second, the prosecutors, as seen earlier, may lose their objectivity because of a 'conviction mentality'. In particular, this may lead to the concealment of the exculpatory evidence although the prosecutors have a general duty to disclose information for the defendants. In 2002, the Korean Supreme Court ruled that the state should compensate for a damage caused by the prosecutor's concealment of exonerating evidence.[122] In that case, a suspect was arrested by the police in 1996 accused of rape and robbery. He was interviewed by the prosecutor of the Seoul Nambu Prosecutors' Office and charged. During the course of first instance proceedings, the police found exculpatory evidence and forwarded it to the prosecutor's office. However, the prosecutor did not disclose this evidence, and as a result, the original court found him guilty. Such concealment of the exculpatory evidence was noted in the appellate jurisdiction, and the conviction was quashed.[123]

As one judge said in the interview, it is very rare for the prosecutors to provide the court with exculpatory evidence:

> [*J4-IC*] We don't expect prosecutors to present exculpatory evidence for the defendants. I've never seen such prosecutors. That is impossible. You can easily realise that the prosecutors being directly involved in the investigation can't have objectivity during the trial.

The prosecutors have access to all information because they conduct an investigation by themselves. However, there is a risk that the information is used only to achieve a conviction due to the loss of prosecutorial objectivity and a lack of an effective mechanism for the disclosure of exculpatory evidence. In this regard, the Korean criminal justice system needs an effective regime to guarantee the disclosure of evidence.

---

[121] Gershman noted that 'The power to control evidence is the power to conceal it. This can result in the conviction and punishment of innocent persons.' In particular, he introduced four cases taking place in the USA: Randall Dale Adams ('The court found that the prosecutor 'knowingly used perjured testimony and knowingly suppressed evidence.'); James Richardson ('the prosecutor had suppressed evidence that would have shown Richardson's innocence.'); James 'Shabaka' Brown ('the prosecutor misrepresented to the jury that ballistics evidence proved the defendant's guilt, when in fact the prosecutor knew that the ballistics report showed that the bullet that killed the deceased could not have been fired from the defendant's weapon.'); Eric Jackson ('the prosecutor concealed evidence that would have shown that the fire was not arson-related, but was caused by an electrical malfunction.') *See* ibid 451-453.

[122] *2001 DA 23447* (2002) 152 Panre Gongbo 753 (Korean Supreme Court).

[123] ibid. In this case, the exculpatory evidence was the result of the DNA test. The other person's DNA which was different from the defendant's was found in the victim's underwear.

5. Monitoring Systems for the Prosecution Service

The various legal powers and sufficient resources have led the prosecutors to be directly and extensively involved in the investigation in Korea. However, the prosecutors readily lose their objectivity because of a 'conviction mentality' and 'tunnel vision'. They can brace the adversarial role rather than the quasi-judicial responsibility which is of importance to protect the defendant's rights to a fair trial. The Korean prosecutors focus their attention on achieving conviction and seek to find evidence which is compatible with their beliefs in conviction.

In this context, the presumption of innocence provided for by the right to a fair trial is just a symbolic expression. Rather, the 'presumption of guilt' prevails in the process. Such a situation is perhaps desirable for dealing with large number of cases in an efficient way on the basis of crime control values. However, as Packer suggested, the efficiency can be achieved only by the supposition that 'the screening processes operated by police and prosecutors are reliable indicators of probable guilt.'[124] Yet, such an assumption should not be easily arrived at because 'conviction mentality' and 'tunnel vision' can prevent the police and prosecutors from making evidence based decisions. Packer described the criminal process relying on the presumption of guilt as follows:

> Once a man has been arrested and investigated without being found to be properly innocent, or, to put it differently, once a determination has been made that there is enough evidence of guilt to permit holding him for further action, then all subsequent activity directed toward him is based on the view that he is probably guilty. The precise point at which this occurs will as soon as the suspect is arrested, or even before, if the evidence of probable guilt that has come to the attention of the authorities is sufficiently strong. But in any case the presumption of guilt will begin to operate well before the "suspect" becomes a "defendant."[125]

Furthermore, the prosecutors have much easier access to information and evidence than the defendants. More importantly, they can control the disclosure of such information from the beginning of the investigation. Consequently, the principle of equality of arms cannot be properly guaranteed in Korea. The defendants do not have sufficient resources to defend themselves.

---

[124] Herbert L. Packer, *The Limits of the Criminal Sanction* (Stanford University Press, Stanford, Calif. 1968) 385, 160.
[125] ibid.

5. Monitoring Systems for the Prosecution Service

The various legal powers and sufficient resources have led the prosecutors to be directly and extensively involved in the investigation in Korea. However, the prosecutors readily lose their objectivity because of a 'conviction mentality' and 'tunnel vision'. They can brace the adversarial role rather than the quasi-judicial responsibility which is of importance to protect the defendant's rights to a fair trial. The Korean prosecutors focus their attention on achieving conviction and seek to find evidence which is compatible with their beliefs in conviction.

In this context, the presumption of innocence provided for by the right to a fair trial is just a symbolic expression. Rather, the 'presumption of guilt' prevails in the process. Such a situation is perhaps desirable for dealing with large number of cases in an efficient way on the basis of crime control values. However, as Packer suggested, the efficiency can be achieved only by the supposition that 'the screening processes operated by police and prosecutors are reliable indicators of probable guilt.'[124] Yet, such an assumption should not be easily arrived at because 'conviction mentality' and 'tunnel vision' can prevent the police and prosecutors from making evidence based decisions. Packer described the criminal process relying on the presumption of guilt as follows:

> Once a man has been arrested and investigated without being found to be properly innocent, or, to put it differently, once a determination has been made that there is enough evidence of guilt to permit holding him for further action, then all subsequent activity directed toward him is based on the view that he is probably guilty. The precise point at which this occurs will as soon as the suspect is arrested, or even before, if the evidence of probable guilt that has come to the attention of the authorities is sufficiently strong. But in any case the presumption of guilt will begin to operate well before the "suspect" becomes a "defendant."[125]

Furthermore, the prosecutors have much easier access to information and evidence than the defendants. More importantly, they can control the disclosure of such information from the beginning of the investigation. Consequently, the principle of equality of arms cannot be properly guaranteed in Korea. The defendants do not have sufficient resources to defend themselves.

---

[124] Herbert L. Packer, *The Limits of the Criminal Sanction* (Stanford University Press, Stanford, Calif. 1968) 385, 160.
[125] ibid.

Under these circumstances, the Korean criminal justice system does not have an effective method to ensure the objectivity of the prosecutors. Acquittals have an adverse impact on the prosecutor's reputation. This can lead the prosecutors to focus too heavily on the need to achieve convictions.[126] Nevertheless, no appropriate mechanism has been set up to monitor prosecutorial misconduct which is in general caused by this overzealousness.

Firstly, the court should take charge of restricting prosecutorial zealousness, but the role is limited to the cases in which the convicted defendants claim that due process was infringed. Moreover, the courts may be lenient on the prosecutorial misconduct because they focus on the 'fundamental fairness' of the trial rather than the detailed propriety of conducts.[127] Likewise, they do not want to overturn convictions even if there is some misconduct by the prosecutor because the reversal may have an effect on the finality and waste trial resources.[128]

In addition, as seen in Chapter 6, judges cannot make informed decisions because of the trial based on prosecutor's written records. The documents provide the courts with incomplete information so that judges cannot effectively determine whether the prosecutors used coercive methods or elicited an involuntary confession. The very high convictions rates exceeding ninety-nine per cent in Korea is a good example to show such circumstances.

Table 7.1 The conviction rates in Korea (2005-2009)

Year	Conviction Rate	Charged	Acquitted Defendants	
			N	%
2009	99.2	1,196,776	9,704	0.8
2008	99.5	1,316,987	7,168	0.5
2007	99.5	1,217,284	5,765	0.5
2006	99.6	1,094,113	4,350	0.4
2005	99.7	1,145,597	3,087	0.3

Source: Korean Supreme Court, Judicial Yearbook from 2005 to 2009.[129]

[126] Chosun Il-bo Editorial. 'Central Investigation Department needs a courage to discontinue the weak cases' *Chosun Il-Bo* (13 February 2009)
[127] Stanley Z. Fisher. 'In Search of the Virtuous Prosecutor: A Conceptual Framework' (1988) 15 Am J Crim Law 197, 212.
[128] Heather Schoenfeld. 'Violated Trust: Conceptualizing Prosecutorial Misconduct' (2005) 21(3) J Contemp Crim Justice 250, 260; Gershman stated that 'courts have tolerated other truth-disserving conduct by prosecutors in order to protect adversarial integrity and prosecutorial discretion.' *See* Bennett L. Gershman. 'Prosecutor's Duty to Truth' (2000) 14 Georgetown Journal of Legal Ethics 309, 318.
[129] Korean Supreme Court, *Judicial Yearbook [Sabeopyungam]* (KSC, Seoul), from 2005 to 2009; To see

Secondly, the investigations by the prosecutors are reviewed only internally by the superiors through the '*Kyuljae*' system of consultation and approval.[130] However, according to the statements of one judge whom I interviewed, this mechanism does not seem to work properly:

> [*J2-IM*] The superiors in the prosecutor's offices don't carefully look at the decisions made by the prosecutors. They just correct a number of sentences and misspells. For most cases, they don't play a role in monitoring the prosecutor's practices.

Another judge argues that this is a significant method in Korea as there is no other scheme to screen the results of the prosecutorial investigation:

> [*J2-RS*] At present, the consultation and approval by the superiors is the only method to review the prosecutor's decisions. Even though the impact is very trivial, this method can contribute to control the decisions made by individual prosecutors. Without this, a big problem may take place.

Unlike police investigations which are monitored independently by the prosecutors, the prosecutorial investigations move on to the court without an appropriate review.[131] In particular, the decisions not to charge are taken by the prosecution service without further review:[132]

> [*J4-IC*] The charged cases can be screened by us [judges] in court even though it often takes long time. But, there is no way to monitor the case being determined not to charge by the prosecutors. I have no idea which guidelines they use for such a decision.

Only the prosecutors can review their actions and inspect their misconducts. The Inspection Department of the Ministry of Justice can have a role to play in checking the prosecution service and unlawful activities by the prosecutors.[133] However, it cannot carry out an independent monitoring role because, as seen in detail in Chapter 4, the

---

the number of suspects charged by the prosecution service, *see* ch 3 n 33.

[130] The Ministry of Justice (tr), *Public Prosecutor's Office Act [Keomchalcheongbeop] partially amended on 21 December 2007 No. 8717* (1949) art 7(1).

[131] Ordinance 665 of the Ministry of Justice for the duties of the Judicial Police Officer 2009 partially amended on 29 May 2009 art 54.

[132] For further discussion about the decisions not to prosecute, *see* below.

[133] Bo Hak Seo. 'Political Independence and Checks on the Public Prosecutor's Powers' (2004) Next 9, 14.

prosecutors run the Ministry of Justice including the inspection department.[134] The prosecutors seek to be actively involved in the affairs of the Ministry of Justice rather than to be independent from them. Most actions of the Ministry of Justice are directed and decided by the prosecutors since the key posts of the ministry including the inspection department are occupied by prosecutors. Unlike other jurisdictions, there is no independent authority to inspect both the wrongdoings by the prosecutors and the operations of prosecution service.[135] Professor Seo argued that 'In Korean society, the prosecutors virtually have diplomatic immunity.'[136]

As a consequence, the errors above of discussed and indeed individual corruption of the prosecutor can distort the outcome of the investigation and prosecution. In 2004, prosecutor Do-Hun Kim was sentenced to prison convicted of bribery. According to the judgment, he accepted KRW 20,000,000 (approximately equal to GBP 10,000) from a suspect in return for not charging her.[137] In addition to this case, Prosecutor Yung Kwang Kim was also convicted of bribery and sentenced to prison.[138] In this case, the prosecutor had discontinued the investigation after taking KRW 10,000,000 (approximately equal to GBP 5,000) from the suspect.[139] The judge said:

> The prosecutors play a key role in the criminal proceedings with considerable powers for the investigation and prosecution. Thus, they must have a high sense of integrity. However, Prosecutor Kim took bribes from his suspect. This bribery cannot be forgiven under any circumstance.[140]

---

[134] Tae-Hun Ha. 'Political Prosecutor [*Jungchi Kumchal*]' (2008) (9) Participatory Society [*Chamyusahoi*]; Sang Hee Han. 'The Change of the Prosecution Service' (2008) (9) Participatory Society [*Chamyusahoi*]; In Seop Han, 'Legal Control on High Profile Corruption: the Public Prosecutor's Role and Limitation' in *A Vision for the New Millennium: The Establishment of Transparent Society* (The Korean Association for Public Administration, Seoul 1999) 99, 109 n 12 (Professor Han stated that 'many prosecutors wants to work in the Ministry of Justice or the Supreme Prosecutors' Office because working in those places can give them a benefit in terms of the personnel assignments and promotion.').

[135] Bo Hak Seo op. cit. 13-14; Yong Se Kim. 'The Problems of the Current Investigation System' (2000) 19(1) Daejon Social Sciences Journal 77, 90; Jun Young Mun. 'The Checks on the Prosecutorial Powers by the Citizens' (2005) 29 Democratic Legal Studies [Minju Beophak] 173, 185-186 (With respect to the exclusive charging power of the prosecutor, Professor Mun suggested that 'As a matter of fact, there is no mechanism to control the charging decision of the prosecutor in the Korean criminal justice system. The prosecutor can even withdraw the prosecution without a limitation.')

[136] Bo Hak Seo op. cit. 14.

[137] Myung Hun Ji. 'The former prosecutor, Do-Hun Kim, was sentenced to prison' *Dongailbo* (4 June 2004); Sung Hun Lee and Chang Jae Yu. 'Diary to Record Pressures' ibid(22 August 2003); Yun Duck Jung. 'The Former Prosecutor, Do-Hun Kim, Found Guilty in the Appeal Court' ibid(4 June 2004).

[138] *2006 NO 2576* (2007) 19 January 2007 (Seoul High Court).

[139] Hy Jin Jung. 'Former Prosecutor Sentenced to Prison' *Dongailbo* (28 October 2006); Kyung Ki Lee. 'Corruption Case in the Legal Field' *Naeilshinmun* (27 June 2008); Sung Hyun Kim. 'Prosecutor Young Kwan Kim Sentenced to Suspension of Execution' *Newsis* (19 January 2007)

[140] Hy Jin Jung op. cit.

There are not many corruption cases involving prosecutors. Those two cases became public as a by-product of other significant scandals. The former was discovered while investigating a case of defamation of character, which involved a high profile public servant working in the Presidential Office. The latter was published during the investigation into a large scale corruption in the legal circle.

Such a small number of corruption cases can be explained by two aspects. First, as seen above in the judgment, the prosecutors may have a higher sense of integrity than any other public servants. Second, the prosecutors monopolise most powers in the criminal proceedings. There is no authority to take an inquiry into the prosecutor's activities except for the prosecution service itself. Subsequently, the prosecutors may be reluctant to uncover their colleagues' misconduct. To solve such a problem, the Mu-Hyun Noh administration tried to establish an independent investigation authority which could conduct an investigation into the prosecutors. However, this trial failed because of the strong objection of the prosecution service.[141] These cases show that the prosecutors' power can be manipulated because of individual corruption. Nevertheless, there is no effective system to screen the decisions taken by the prosecutors.

Finally, there is no external system to check the prosecutor's discretion and there is no independent regime to review the decisions by the prosecutors.[142] Concerning the power to charge [*Kisodokjumjui*], the only independent method to review is, as Professor Lee stated, the victim's right to appeal against decisions taken by the prosecutor not to file an indictment [*Jaejungshinchungkwon*].[143] This right became nominal in 1973 under the military government.[144] However, the development of democracy led this almost extinct right to be reactivated in 2007. By the reform of the criminal procedure, the range of appeals was expanded to all crimes provided in the

---

[141] *See* Ha Young Kim. 'Ten Agendas for Reforming the Prosecution Service' *Pressian* (20 October 2005); Sang Won Sun. 'Concerns about the Strengthening of Prosecutor's Power' ibid(26 September 2008).

[142] Bo Hak Seo. 'Political Independence and Checks on the Public Prosecutor's Powers' (2004) Next 9, 11; Ho Joong Lee. 'Reformation and Democratic Control of the Public Prosecution Service' (2008) 9(2) Seo-Kang Law Journal 43, 43-44; Dong-Woon Shin. 'The Reform of the Korean Public Prosecution' (1988) 29(2) Seoul Law Journal 39, 46-47 (Professor Shin argued that 'the Korean prosecutors have a very strong power, which cannot be observed in other countries. Besides, there is no proper monitoring regime by the people. Therefore, the Korean criminal justice system needs a mechanism to control the abuses of prosecutorial powers and to enforce the prosecutor's objectivity.').

[143] Ho Joong Lee. 'Reformation and Democratic Control of the Public Prosecution Service' (2008) 9(2) Seo-Kang Law Journal 43, 65 (Professor Lee stated that 'the Prosecutors' Office Act also has a provision that the victims can request an internal review as to the prosecutorial decisions not to charge. However, this measure is ineffective because the review is carried out in the prosecution service.')

[144] ibid; Sang Jin Park. 'Suggestions for Reforming the Prosecution of Organization and Prosecution of Power' (2002) 15 Kun Kuk Journal of Social Science 75, 87.

Criminal Act.[145] This is the only measure to review the prosecutorial decisions, but it is not enough to control prosecutorial powers because of three limitations.

First, the courts in charge of reviewing cases are in general reluctant to disagree with the decisions by the prosecutors.[146] Furthermore, even though the judges decide to charge the suspects, the trial work is still conducted by the prosecutors, and they do not want to challenge the original decisions[147]:

> [*J4-IC*] The right to appeal against the prosecutorial decisions not to charge is useless. Even though we [judges] decide that the indictment should be filed because the prosecutor's decision is wrong, the prosecutors, who are in charge of the trial work, do not anything. They argue the innocence of defendants in court. They don't want to listen to the judicial decisions.

Second, only the victims have the right to appeal. Accordingly, in many cases in which there are no direct victims, the decisions taken by the prosecutors cannot be reviewed. Finally, the abuse of prosecutorial discretion is a significant issue, e.g. charging the evidentiary weak cases. However, such decisions cannot be reviewed by any independent authority because the right to appeal was limited to the decisions not to charge.[148]

The Special Prosecutor (SP) is another mechanism used to check prosecutorial discretion. This is not to review, but a significant add-on. The SP is a temporary investigative position, which is established by the National Assembly on a case-by-case basis.[149] Its main role is to investigate and prosecute high profile corruption cases.[150] Albeit the SP is called a prosecutor, they are in theory independent of the prosecution service because this system stems from the distrust in the prosecutorial investigation.[151]

---

[145] The Korean Ministry of Justice (tr), *Criminal Procedure Act [Hyungsasosongbeop] partially amended on 21 December 2007 No. 8730* (1954) art 260.

[146] Kuk Cho. 'The Appeal Against Decisions of the Prosecutor as an Exception Being Emphasised' (2000) 8 Hyungsapanre-Yungu 550, 550-566 (Professor Cho stated that 'the courts do not their duty to check the exclusive powers of the prosecutor.') cited from Jun Young Mun. 'The Checks on the Prosecutorial Powers by the Citizens' (2005) 29 Democratic Legal Studies [Minju Beophak] 173, 188 n 22.

[147] KCPA art 260 (6).

[148] Ho Joong Lee op. cit. 67.

[149] The Korean criminal procedure adopted the US style special prosecutor system for investigation and prosecution. *See* Kuk Cho. 'The Unfinished "Criminal Procedure Revolution" of Post-Democratization South Korea' (2002) 30(3) Denver J Int Law Policy 377.

[150] Dong-Woon Shin. 'The Reform of the Korean Public Prosecution' (1988) 29(2) Seoul Law Journal 39, 118.

[151] Yong Se Kim. 'The Problems of the Current Investigation System' (2000) 19(1) Daejon Social Sciences Journal 77, 79; Kuk Cho. 'The Ongoing Reconstruction of the Korean Criminal Justice System' (2006) 5(1) Santa Clara Journal of International Law 100, 118.

The Special Prosecutor Act was first introduced in 1999 and was established in order to conduct an investigation of a particular crime allegedly committed by the Prosecutor General and a number of subordinates.[152]

Due to the organisational characteristics of the SP, successful results are difficult to achieve. A SP is appointed by the President from several candidates recommended by both the Korean Bar Association and the Supreme Court. However, in general, a former public prosecutor is appointed. Moreover, public prosecutors as well as investigators from the prosecution service are employed to support the SP's investigation. In these circumstances, it has been very rare for the SP to draw a different conclusion from the original prosecutorial decisions. Professor Kim argued that 'the special prosecutor cannot work properly because it does not entirely exclude the prosecutorial influence upon the investigation'.[153] However, the reason behind the use of a SP is that Korean citizens do not trust prosecutorial investigations.[154] The prosecution service has been often considered to conduct investigation of particular crimes unfairly due to political influences, and thereby has lost the public confidence in its operations.

According to the survey conducted by *Jungangilbo* and East Asia Institute, the reliability of the Prosecutors' Office is lower than the Police Agency and Supreme Court.[155] In another survey on the public trust in the prosecution service, 'seventy-one per cent of the respondents stated that the operations by the public prosecution service are unjust.' This survey was designed by Yun-Kun Woo, who was a member of the National Assembly.[156] Similarly, in the recent survey on the integrity of the government agencies, the integrity of the prosecution service was reported as the lowest level among 38 central agencies.[157] The lack of monitoring mechanism results in lack of confidence in the prosecution service, and consequently, causes distrust in the criminal justice

---

[152] The Act for Appointment of the Special Prosecutors for Investigation of Strike Inducement Case and the Lobby to Prosecutor General's Wife Case 1999 6031; Min Bae Kim. 'The Establishment of the Special Prosecutor Act' *Chosun Il-Bo* (20 September 1999)

[153] Yong-Se Kim op. cit.; Similarly, Professor Cho noted that 'the SP is a temporary organisation for investigation of a particular offence. Because of such an organisational feature, the SP cannot carry out sufficient investigation.' *See* KuK Cho op. cit.(2002) 386. However, Shin stated that 'albeit the SP's investigation is not sufficient to discover the truth, the system itself is helpful to check prosecutorial unfairness.' *See* Youn Su Shin. 'The necessity of the Special Prosecutor System' *Korean Lawtimes* (25 January 2000).

[154] Yong-Se Kim op. cit.; Kuk Cho op. cit.(2006) 118.

[155] *See* Chang Woon Shin. 'Public Opinion Survey about the Power Organizations' *Jungangilbo* (14 June 2008) and ibid 'The Public Opinion Survey about the Influence and Credibility of 25 Powerful Organizations' (3 July 2007).

[156] *See* Tae Jong Kim. 'Unjust Prosecution Service' *Yun-Hap News* (19 October 2008).

[157] *See* Min Ki Chae. 'The Result of the Survey on the Integrity of Government Agencies' *Chosunilbo* (9 December 2010).

system.[158]

6. Conclusion

To ensure the defendant's right to a fair trial, the Korean Constitution [*Heonbeop*] provides for fundamental rights such as presumption of innocence, privilege against self-incrimination, equality of arms, and right to counsel.[159] However, in order to preserve those rights, each legal actor in the criminal process, as Packer suggested, should play a role as a mechanism to monitor the procedure.[160] The operations taken by the police and prosecution service must be monitored by lawyers, courts and an independent authority in order to prevent their powers from being abused, and subsequently, from threatening the defendant's constitutional rights.

However, prosecutor's direct involvement in the investigation is inappropriate to perform such a role in three aspects. Firstly, prosecutorial investigation may weaken the prosecutor's quasi-judicial role, which is created to guarantee the basic rights and interests of the defendants. From the beginning of the investigation, the prosecutors focus their attention on the achievement of a conviction. This tendency leads to the abuse of investigative and prosecutorial arms, e.g. tortures, threats and inducements. Secondly, prosecutorial investigation may abrogate the filtering role of the prosecution service. As a result, a significant safeguard disappears in the criminal process, which independently reviews the results of the investigation including the protection of the defendant's rights. Finally, the monopoly of information and evidence by the prosecutors increase the inequality of arms between the state and individuals. The vulnerable status of the defendants is aggravated in this context.

In the face of those problems, the Korean criminal justice system does not have a proper monitoring mechanism to review the prosecutors' decisions and to inspect their actions. Consequently, the defendant's right to a fair trial cannot be properly guaranteed.

---

[158] In a survey on the criminal trial, 83.7 per cent of respondents stated that the criminal trials were unjust. *See* Presidential Committee on the Judicial Reform, 'Committee Report (III): From 1st to 13th Conference' PCJR (Seoul May 2004), 259.

[159] *See* ch 1.

[160] Herbert L. Packer, *The Limits of the Criminal Sanction* (Stanford University Press, Stanford, Calif. 1968) 385, 163.

Chapter 8 An Empirical Study of the Impact on Police of the Police and Prosecutors Relationship

1. Introduction

This study has demonstrated that the statutory framework, government policy and day-to-day operational practices of the prosecution service have led the prosecutors to occupy a dominant role with the Korean criminal justice system. The thesis argued that this has had serious consequences, particularly for notions of due process and the defendant's right to a fair trial.

This chapter now explores the extent to which the role and practices of the Korean prosecutor impacts on the operations of the police themselves, in particular on their function of investigating crime. This is based on a survey of 1,144 police officers which produced data relating to police officers' perceptions of their role: how clearly they understood that role, any conflicts within it and whether they were overloaded.[1] The study seeks to measure the stress levels of officers and, by distinguishing those who investigate crime from other officers, to assess the extent to which the prosecutorial system in Korea has an impact on those levels.

The chapter, first of all, define what is meant by job stress and its likely impact on an occupational group. It considers the features of stress and the factors contributing to stress. It also explains why this study differs from previous research. Then, the methodology of the study is clarified. Finally, the findings are presented and the results are discussed.

2. Job Stress

Job stress is an important element which can decrease productivity in organisations by giving rise to health-related and organisational problems such as employee dissatisfaction, alienation, absenteeism, and turnover.[2] Parker and DeCotiis defined job

[1] The fieldwork was conducted in various parts of Korea from 20th July to 19th October 2010.
[2] Donald F. Parker and Thomas A. DeCotiis. 'Organizational Determinants of Job Stress' (1983) 32(2)

stress as 'the feeling of a person who is required to deviate from normal or self-desired functioning in the work place as the result of opportunities, constraints, or demands relating to potentially important work-related outcomes.'[3] In other words, job stress is a dysfunctional emotional response to unpleasant stimuli such as uncomfortable, undesirable, and threatening workplace conditions.[4]

2.1. Elements Leading to Job Stress on Police

Police work is a stressful and demanding occupation because potentially it leads police officers to face violent and threatening situations.[5] Many studies have been conducted to address the correlation between the nature of the police work and increased levels of physiological and psychological stress.[6]

Hart and others categorised the police stressors into three groups: personal, occupational and organisational.[7] Personal stressors include established characteristics of personality that have an effect on the relationship between the stress and health.[8]

Organ Behav Hum Perform 160, 161; Jamal stated that 'Notwithstanding conceptual variation, job stress usually results in disruption of the individual's psychological and physiological homeostatis [sic], forcing deviation from normal functioning in interactions with job and work environments.' *See* Muhammed Jamal. 'Relationship of Job Stress and Type-A Behavior to Employees' Job Satisfaction, Organizational Commitment, Psychosomatic Health Problems, and Turnover Motivation' (1990) 43(8) Human Relations 727, 728.

[3] Parker and DeCotiis op. cit. 165.

[4] Daniel Cameron Montgomery, Jeffrey G. Blodgett and James H. Barnes. 'A Model of Financial Securities Salespersons' Job Stress' (1996) 10(3) Journal of Services Marketing 21, 24.

[5] Paula Brough. 'A Comparative Investigation of the Predictors of Work-related Psychological Well-being within Police, Fire and Ambulance Workers' (2005) 34(2) New Zealand Journal of Psychology 127, 130-131; Ronald J. Burke and Aslaug Mikkelsen. 'Burnout among Norwegian Police Officers: Potential Antecedents and Consequences.' (2006) 13(1) International Journal of Stress Management 64, 64; Kevin G. Love and others. 'Symptoms of Undercover Police Officers: A Comparison of Officers Currently, Formerly, and Without Undercover Experience' (2008) 15(2) ibid 136, 136-137 (Love et al. state that 'police officers and others associated with 'high-risk' professions (e.g., firefighters, air traffic controllers, and emergency medical technicians) are prone to increased levels of physiological and psychological strain and indeed trauma because of the nature of their work.')

[6] Ingrid V. E. Carlier, A. E. Voerman and Berhold P. R. Gersons. 'The Influence of Occupational Debriefing on Post-traumatic Stress Symptomatology in Traumatized Police Officers' (2000) 73(1) Br J Med Psychol 87 (Carlier et al. analyse the correlation between traumatic events e.g. confrontation with aggressive mob, finding a corpse, and murdered child and stress.); Pamela A. Collins and A. C. Gibbs. 'Stress in Police Officers: A Study of the Origins, Prevalence and Severity of Stress-related Symptoms within a County Police Force' (2003) 53(4) Occupational Medicine 256 (Collins and Gibbs assessed the strain of the police officers, which was associated with a series of potential home and work related stressors. They mainly dealt with two groups of stressors such as organisational and operational stressors)

[7] Peter M. Hart, Alexander J. Wearing and Bruce Headey. 'Police Stress and Well-being: Integrating Personality, Coping and Daily Work Experiences' (1995) 68(2) J Occup Organ Psychol 133.

[8] ibid 137 (Hart et el. used six indicators in order to analyse the personal stressors of the police. For instance, for measurement of satisfaction with life, Dieren et al.'s SWLS were employed.) For more details on SWLS, *see* Ed Diener and others. 'The Satisfaction With Life Scale' (1985) 49(1) J Pers Assess 71.

Secondly, occupational stressors refer to various work experiences confronted by police officers on a daily basis.[9] Dealing with victims, arresting perpetrators, and doing shift work are examples of occupational stressors. Finally, organisational stressors include different systematic interactions within the criminal procedure such as quality of communication, the amount of paper work, support or lack of support from superiors or fellows and career progression.[10]

Among those three groups of stressors, organisational stressors have more impact on police stress than other factors.[11] The unfriendly leadership style of supervisors or conflicting job demands have been regarded as significant causes of job stress by creating an undesirable organisational climate.[12] In addition, imbalances between an individual's ability and the skills demanded, lack of training, and insufficient resources can also increase job stress.[13] McCreary and Thompson's study on the measures of stressors in policing,[14] Burke and Richardson's study on psychological stress in organisations,[15] and Kop and others' study on the burnout of Dutch police officers[16] all show the significance of the organisational factors.[17] In particular, Collins and Gibbs

---

[9] ibid 138; Collins and Gibbs define these factors as 'operational stressor' and include variables as follows: Dealing with someone who is drunk; Verbal aggression from the public; Having to use force to restrain; Physical aggression from the public; Answering call for officer assistance; Dealing with a drug addict; High-speed driving; Attending a domestic dispute; Searching for a missing person; Giving evidence in court; Adult victim of violence or abuse; Attending a serious road traffic accident; Being at risk of hepatitis or AIDS; Administering first aid; Interview suspect of serious crime; Crowd control or riot duty; Attending a sudden death; Child victim of violence or abuse; and Informing a relative of a death. *See* Collins and Gibbs op. cit. 260.

[10] ibid; Burke and Mikkelsen op. cit. 65; Hart et al. op. cit. 138-145.

[11] ibid 150.

[12] Parker and DeCotiis op. cit. ; Jamal op. cit. 728; According to Kop et al.'s analysis, '[police] officers mostly mentioned organizational aspects as stressors. In particular they cited poor management, in terms of incapable or uninterested supervisors, bad mutual relationships, and a lack of internal communication.' *See* Nicolien Kop, Martin Euwema and Wilmar Schaufeli. 'Burnout, Job Stress and Violent Behaviour among Dutch Police Officers' (1999) 13(4) Work & Stress 326, 330.

[13] Susan Michie and Sian Williams. 'Reducing Work Related Psychological Ill Health and Sickness Absence: A Systematic Literature Review' (2003) 60(1) Occup Environ Med 3, 4; Jan A. Landeweerd and Nicolle P. G. Boumans. 'The Effect of Work Dimensions and Need for Autonomy on Nurses' Work Satisfaction and Health' (1994) 67(3) J Occup Organ Psychol 207, 215; Cordes and Dougherty stated that 'Individuals experiencing qualitative overload feel they lack the basic skills or talents necessary to complete task effectively.' *See* Cynthia L. Cordes and Thomas W. Dougherty. 'A Review and an Integration of Research on Job Burnout' (1993) 18(4) Academy of management review 621, 631.

[14] Donald R. McCreary and Megan M. Thompson. 'Development of Two Reliable and Valid Measures of Stressors in Policing: The Operational and Organizational Police Stress Questionnaires' (2006) 13(4) International Journal of Stress Management 494.

[15] Ronald J. Burke and A. M. Richardson, 'Psychological Burnout in Organizations: Research and Intervention' in R. T. Golembiewski (ed), *Handbook of organizational behavior* (2nd edn Marcel Dekker, New York 2001) 327.

[16] Kop et al. op. cit.

[17] Burke and Mikkelson stated that 'worksetting and organizational conditions have been found to be more significant predictors of burnout than personal demographic and personality factors.' *See* Burke and Mikkelsen op. cit. 65-66.

explored 'the pattern of stressors most strongly associated with symptoms of mental ill-health and confirms that the principal issues remain centred upon work structure and climate.'[18]

2.2. Role Stressors: Significant Organisational Factors

In an organisation, every individual performs various roles. These roles are significant factors that may increase job stress. Cooper and others refer to such organisational roles as 'the behaviours and demands that are associated with the job an individual performs.'[19] Beehr and others defined the role stress as 'anything about an organizational role that produces adverse consequences for the individual.'[20]

For instance, lack of clarity about a role or competing job demands can act as stressors as they make role obligations 'vague, irritating, difficult, conflicting or impossible to meet.'[21] However, the role stressors themselves, as Sager and Wilson suggested, are not job stress, but instead are influential factors which may result in job stress.[22] In particular, role conflict, role ambiguity, and role overload have been frequently referred to as the main role stressors.

Role Conflict

Role conflict occurs when a person faces incompatible demands and expectations, which are not readily achieved at the same time.[23] For instance, in Korea, police

---

[18] In this study, Collins and Gibbs employed 19 scales to measure the organisational stressor: Demands of work impinging on home; Lack of consultation/communication; Not enough support from senior officers; Working long hour; Pressure to get results; Urgent requests preventing completion of planned work; Not enough control over work; Deadlines/time pressures; Too much work; Paperwork; Subject to complaints investigation; Working shifts; Working unpredictable hours; Not enough support from fellow officers; Recalled when off duty; Slow career progression; Not enough scope for initiative; Uncertainty about house move; Not enough work. *See* Collins and Gibbs op. cit. 260-261.

[19] Cary L. Cooper, Philip Dewe and Michael P. O'Driscoll, *Organizational Stress: A Review and Critique of Theory, Research, and Applications* (Sage Publications, Inc, 2001), 37.

[20] Terry A. Beehr, Jeffrey T. Walsh and Thomas D. Taber. 'Relationship of Stress to Individually and Organizationally Valued States: Higher Order needs as a Moderator' (1977) 19(11) Journal of Occupational and Environmental Medicine 771, 41; Robert L. Kahn and Robert P. Quinn, 'Role stress: A framework for analysis' in Alan A. McLean (ed), *Occupational Mental Health* (Rand McNally, New York 1970) 50.

[21] Margaret Hardy and W. Hardy, 'Role Stress and Role Strain' in ibid Margaret E. Hardy and Mary E. Conway (eds), *Role Theory: Perspectives for Health Professionals* (2nd edn Appleton & Lange, Norwalk 1988) 159, 76 (Hardy and Hardy defined the role stress as a 'social structural condition in which role obligations are vague, irritating, difficult, conflict, or impossible to meet.'); Cooper et al. op. cit. 38.

[22] Jeffrey Sager and Phillip H. Wilson. 'Clarification of the Meaning of Job Stress in the Context of Sales Force Research' (1995) 15 Journal of Personal Selling and Sales Management 51, 54.

[23] Jim I. M. Jawahar, Thomas H. Stone and Jennifer L. Kisamore. 'Role Conflict and Burnout: The Direct

investigators can have conflicting demands placed upon them on one hand by their superiors and on the other by prosecutors.[24] This context can lead to role conflict of the police.

In addition, the prosecutors in general do not maintain open lines of communication with police investigators. Where there are potential conflicts, the police investigators try to avoid the situation rather than to ask for clarification and voice their concerns.[25] As a result, one-sided directions can also accelerate the role conflict of police investigators.[26] Those circumstances stem from the dominant position of the prosecutors and may have a role to play in increasing the job stress.

Role conflict is believed to increase tension, job dissatisfaction, and withdrawal behaviours. In particular, as Schaubroeck and others suggested, 'Lack of agreement between received roles can be expected to produce an uncomfortable overall attitude toward the job because it diminishes one's perceived effectiveness in the work unit.'[27] People who experience role conflict have a tendency to avoid the work situation by being absent or leaving the organisation.

Role Ambiguity

Role ambiguity is defined as 'the lack of clarity and predictability of the outcomes of one's behaviour.'[28] It is regarded as one of the significant organisational factors, which may lead to job stress for police officers.[29] Role ambiguity happens when a person has insufficient information to carry out job duties, when uncertainty exists concerning job

---

and Moderating Effects of Political Skill and Perceived Organizational Support on Burnout Dimensions' (2007) 14(2) International Journal of Stress Management 142, 149; Daniel Cameron Montgomery, Jeffrey G. Blodgett and James H. Barnes. 'A Model of Financial Securities Salespersons' Job Stress' (1996) 10(3) Journal of Services Marketing 21, 24; Cooper et al. state that those incompatible demands can be given to a person 'either within a single role or between multiple roles occupied by the individuals.' *See* Cooper et al. op. cit. 38.

[24] Hwan-Beom Lee, Soo-Chang Lee and Deog-Bo Shim. 'The Effects of Police Investigator's Role Conflict on Job Stress in Korean Police Investigation Structure' (2007) 45(1) Korea Journal of Public Administration [*Hangjeong Nonchong*] 255, 259.

[25] Mi-Young Hong, *The Relationship between the Police and Prosecutors: A Survey* (Korean National Assembly, Seoul 2005), 8.

[26] ibid.

[27] Cooper et al. op. cit. 38-39; John Schaubroeck, John L. Cotton and Kenneth R. Jennings. 'Antecedents and Consequences of Role Stress: A Covariance Structure Analysis' (1989) 10(1) J Organ Behav 35, 36.

[28] Robert J. House and John R. Rizzo. 'Role Conflict and Ambiguity as Critical Variables in a Model of Organizational Behavior' (1972) 7(3) Organ Behav Hum Perform 467, 474.

[29] Cooper et al. op. cit. 38; Schaubroeck et al. op. cit. 35-37; O'Driscoll and Beehr stated that 'Role ambiguity, in particular, was linked with job dissatisfaction, which was in turn associated with psychological strain and intentions to quit.' *See* Michael P. O'Driscoll and Terry A. Beehr. 'Supervisor Behaviors, Role Stressors and Uncertainty as Predictors of Personal Outcomes for Subordinates' (1994) 15 (2) ibid 141, 153.

requirements, or when means and ends are vague.[30]

For instance, the prosecutorial domination, as seen in detail in Chapter 3, can be an important factor which diminishes the autonomy of the police. Professor Seo argued that 'in Korea, the police officer has been regarded as one of the difficult occupations because they have lots of responsibilities without proper powers to conduct their duties. As a consequence, such a situation plays a significant role in destroying the morale of the police.'[31] This circumstance brings about a loss of ownership of case on part of the police. In particular, a lack of autonomy of police investigators may increase role ambiguity.

In terms of job stress, autonomy can be defined as 'the degree to which the job provides substantial freedom, independence, and discretion to the individual in scheduling the work and in determining the procedures to be used in carrying it out.'[32] Particularly, autonomy has been found to be a significant factor which has considerable impact on job stress.[33] As Cooper and others suggested, autonomy is the ability to determine one's work methods, work schedules, and even issues such as breaks and vacations, all of which has an ameliorating impact on job stress.[34]

When considering previous studies, such a low degree of autonomy may lead to a high level of 'role ambiguity' and, as we shall see later, 'role overload' of police investigators because they are bound by restrictive directions from the prosecutors which can inhibit their ability to respond to job demands.

In addition, police investigators do not have enough feedback from the prosecutors

---

[30] Daniel Cameron Montgomery, Jeffrey G. Blodgett and James H. Barnes. 'A Model of Financial Securities Salespersons' Job Stress' (1996) 10(3) Journal of Services Marketing 21, 25.

[31] Bo Hak Seo, 'The Reasonable Allocation of Investigative Powers between the Police and Prosecutors' in Supreme Prosecutors' Office and National Police Agency (eds), *Public Hearing for Allocating Investigative Powers in Korea* (SPO; NPA, Seoul 2005) 197, 209-211; Hak-Bae Kim op. cit. 18; Kuk Cho op. cit. 117-120; Dong-Hee Lee. 'A Comparative Study on the Structure of Crime Investigation Authorities in Korea and the Reform Strategy' (2004) 7 Korean Police Journal 146, 176-177.

[32] R. Kenneth Teas. 'An Empirical Test of Models of Salespersons, Job Expectancy and Instrumentality Perceptions' (1981) 18(2) J Market Res 209, 212.

[33] Monica Martinussen, Astrid M. Richardsen and Ronald J. Burke. 'Job Demands, Job Resources, and Burnout among Police Officers' (2007) 35(3) Journal of Criminal Justice 239 (In this study, job resources were measured by the degree of autonomy that the police experienced in their work and social support from supervisors and co-workers. In terms of the relationship between job resources, job demands, and burnout, the results suggested that both job demands and job resources were associated with all three burnout dimensions.); Zhao et al. suggest that autonomy is an important source of job satisfaction of police officers. In every regression, autonomy emerged as a significant variable related to all three types of satisfaction: satisfaction with work, supervisor, and co-workers. *See* Jihong Zhao, Quint Thurman and Ni He. 'Sources of Job Satisfaction among Police Officers: A Test of Demographic and Work Environment Models' (1999) 16(1) Justice Q 153, 167-168; Jan A. Landeweerd and Nicolle P. G. Boumans. 'The Effect of Work Dimensions and Need for Autonomy on Nurses' Work Satisfaction and Health' (1994) 67(3) J Occup Organ Psychol 207, 207.

[34] Cooper et al. op. cit. 105.

even though they always conduct investigations under the direction from the prosecutors. This circumstance, as Coman and Evans suggested, may cause role ambiguity of the police investigators as it can increase uncertainty.[35]

Finally, the Korean prosecution service conducts investigations with its own investigative units.[36] Such a direct investigation by prosecutors may lead the police officers to regard the prosecution service as another investigation agency rather than a supervisory institution.[37] In other words, the police investigators do not seem to treat the supervision by prosecutors as a method to protect the rights of defence or to review police investigations.[38] Instead, the police may deem that the prosecutors use the police investigation as a subsidiary organ to support their investigation.[39]

This can bring about the role ambiguity of police investigators as well as role conflict.[40] The police officers are perhaps uncertain of the value of prosecutorial supervisions. Moreover, for the similar reason, they seem to be confused whether they have to follow the instructions from the prosecutors or not even though they have a statutory duty.[41]

Role Overload

Role overload takes place when a person is faced with multiple obligations, demands or

---

[35] Coman and Evans stated that 'Stress related to poor relationships with superiors also derives from inadequate communication of information to officers. This may lead to lack of clarity in the officer's role prescriptions (role ambiguity), so that individual officers may be uncertain about the actual work duties they may be expected to perform at any given time.' *See* Greg Coman and Barry Evans. 'Stressors facing Australian police in the 1990s' (1991) 14 Police Stud.: Int'l Rev.Police Dev. 153, 157.

[36] *See* ch 3 and 8.

[37] Jong Gu Kim, *The Reform of the Korean Criminal Justice System* (2nd edn BuB-Mun-Sa, Seoul 2004), 529-536.

[38] Jong-Gu Kim stated that 'due to excessive investigations by the prosecutors, the Korean prosecution service has been considered not as a leading protector of human rights, but as an objective to be monitored for the protection of principled rights of defence.' *See* ibid 533.

[39] Hak-Bae Kim op. cit. 6; Professor Lee argued that 'the police officers are the subsidiary supporters for prosecutorial investigations in the Korean criminal procedure.' *See* Jae-Sang Lee, *Korean Criminal Procedure* (2nd edn Park Young Sa, Seoul 2008), 100.

[40] 'Clarity' has been considered as a significant element to create role ambiguity of the police. *See* Jennifer M. Brown and Elizabeth A. Campbell, *Stress and Policing: Sources and Strategies* (John Wiley & Sons, Chichester; New York; Brisbane; Toronto; Singapore 1994), 28-29 (Brown and Campbell suggested an example in regards to the role ambiguity resulting from a lack of clarity: 'there is a lack of clarity about the role and purpose of the police exemplified by two extreme pictures of the British police officer – the bobby on the beat exercising individual discretion and as a member of a riot squad functioning as a paramilitary officer. In Britain, the same officers may be required to perform both roles. There is no explicit evidence to demonstrate that flipping form community policing to riot control is a source of stress in itself. There is, however, an indication that exposure to public order duties is stressful.')

[41] *2007 GOHAP 4* (2007) 51 Kakgong 13 September 2007 2453 (Daejon District Court) (In this case, Young-Il Kim, a police investigator working at the Chung-Nam Police Agency, rejected the prosecutor's direction by arguing that such a direction can infringe the defendant's rights.)

duties, which are considered too much work to fulfil in the time available.[42] Such role overload has been discussed by two aspects: quantitative and qualitative overload.[43] Firstly, individuals who are unlikely to finish the work in the allotted time experience quantitative role overload. Secondly, qualitative role overload refers to the individual's perception that a task cannot be effectively completed because he does not have enough skills which are necessary to their work.[44] Empirical investigations have mainly concentrated on the impact of the quantitative overload on an individual's stress.[45]

Role overload has been found to be a significant factor leading to job stress.[46] According to Schaubroeck and others' study, role overload has a direct influence upon job tension.[47] In particular, this study showed a clear difference between role overload, role conflict, and role ambiguity.[48] Thompson and others confirmed the linkage between the support from supervisors as well as co-workers, role overload for policewomen and their job stress.[49] However, a certain level of role overload is necessary for optimal mental health of the individuals.[50] That is, too few as well as too many working hours generally cause serious stress for individuals.[51]

Role overload may be a significant role stressor of Korean police investigators. Lee and others suggest that the complicated investigation process in Korea results in role overload for police investigators. The police investigation in Korea is inefficient due to

---

[42] Montgomery et al. op. cit. 25; Cooper et al. op. cit. 39 (Cooper et al. stated that 'Not only can role overload lead to excessive demands on an individual's time, but it also create uncertainty about his or her ability to perform these roles adequately.')

[43] Cordes and Dougherty op. cit. 631; In particular, Gomme and Hall assessed the role overload of prosecutors based on the nature and extent of qualitative and quantitative aspects. *See* Ian M. Gomme and Mary P. Hall. 'Prosecutors at Work: Role Overload and Strain' (1995) 23(2) Journal of Criminal Justice 191.

[44] Cordes and Dougherty op. cit. 631.

[45] ibid.

[46] ibid 628; Cooper et al. op. cit. 39.

[47] John Schaubroeck, John L. Cotton and Kenneth R. Jennings. 'Antecedents and Consequences of Role Stress: A Covariance Structure Analysis' (1989) 10(1) J Organ Behav 35, 53

[48] ibid.

[49] In this study, Thompson et al. argued that 'Supervisor support reduced work stressors of role overload and role ambiguity, and consequently emotional exhaustion. Thus supervisor support is associated with perceptions of the family environment, via its impact on role stressors and emotional exhaustion.' *See* Briony M. Thompson, Andrea Kirk and David Ferry Brown. 'Work Based Support, Emotional Exhaustion, and Spillover of Work Stress to the Family Environment: A Study of Policewomen' (2005) 21(3) Stress Health 199, 204.

[50] Shelley Coverman. 'Role Overload, Role Conflict, and Stress: Addressing Consequences of Multiple Role Demands' (1989) Social Forces 965, 979.

[51] Grace K. Baruch and Rosalind C. Barnett. 'Role Quality, Multiple Role Involvement, and Psychological Well-being in Midlife Women.' (1986) 51(3) J Pers Soc Psychol 578, 583-584 (Baruch and Barnett suggest that 'to the degree that a particular role yields a net gain of benefits over costs, involvement in that role will have a positive impact on well-being, even if such involvement also increases the number of roles a woman occupies.')

the prosecutor's pre-eminent position.[52] The investigation process is ruled by the prosecutors.[53] In order to deal with criminal cases, the police investigators as well as other investigative authorities must send the cases to the prosecutor's office regardless of the seriousness of offences.[54] Although many criminal cases are very trivial, all investigative authorities must file the cases and dispose of them through complicated procedures. [55] Thus, the Korean investigation procedure requires unnecessary paperwork and bureaucratic red tape.[56]

Bureaucratic red tape and excessive paperwork have been frequently discussed as an important source of occupational stress.[57] Burke and Mikkelson identified bureaucratic red tape as a significant factor in police stress: 'Policing is also an occupation that provides few successes, little positive feedback, difficult and upsetting interpersonal contact with members of the general public, considerable red tape and bureaucracy, unmet expectations, the need to manage one's emotions, and authoritarian or paramilitary supervision.'[58] In short, excessive paperwork and unnecessary work may cause role overload of police investigators in Korea.[59]

---

[52] Hwan-Beom Lee et al. op. cit. 259; Hak-Bae Kim, 'The Reasonable Reallocation of the Investigative Powers between the Police and Prosecutors: The Perspective of the Police' in Supreme Prosecutors' Office and National Police Agency (eds), *Public Hearing for Allocating Investigative Powers in Korea* (SPO; NPA, Seoul 2005) 2, 17.

[53] The Korean Ministry of Justice (tr), *Criminal Procedure Act [Hyungsasosongbeop] partially amended on 21 December 2007 No. 8730* (1954) art 195.

[54] ibid art 196.

[55] There is only one exception to this principle. The chief of the police station can prosecute some minor offences, which are punishable by fines of not more than KRW 200,000 (approximately equal to GBP 100) or detention for less than thirty days. However, the number of cases dealt with by the police occupies generally 2 per cent of all offences. That is, 98 per cent of cases are investigated under the prosecutorial direction. *See* ch 5.

[56] Dong-Hee Lee. 'A Comparative Study on the Structure of Crime Investigation Authorities in Korea and the Reform Strategy' (2004) 7 Korean Police Journal 146, 165-176.

[57] Jon Vagg. 'Context and Linkage: Reflections on Comparative Research and 'Internationalism' in Criminology' (1993) 33(4) Br J Criminol 541, 300; Jerome E. Storch and Robert Panzarella. 'Police Stress: State-Trait Anxiety in relation to Occupational and Personal Stressors' (1996) 24(2) Journal of Criminal Justice 99, 103; Collins and Gibbs op. cit. 262 (Collins and Gibbs suggest that time pressures, poor support from senior ranks and too much paperwork are important factors to cause stress of the police officers); Alyssa Taylor and Craig Bennell. 'Operational and Organizational Police Stress in an Ontario Police Department: A Descriptive Study' (2006) 4(4) The Canadian Journal of Police & Security Services 223, 227 (In this study, bureaucratic red tape was illustrated as one of the main organisational factors causing the police stress)

[58] Ronald J. Burke and Aslaug Mikkelsen. 'Burnout among Norwegian Police Officers: Potential Antecedents and Consequences.' (2006) 13(1) International Journal of Stress Management 64, 65.

[59] Jennifer M. Brown and Elizabeth A. Campbell, *Stress and Policing: Sources and Strategies* (John Wiley & Sons, Chichester; New York; Brisbane; Toronto; Singapore 1994), 29-30 (Brown and Campbell suggest that poor management such as excessive attention to detail and poor consultation contribute to police officer stress.); Peter Finn and Julie Esselman Tomz, *Developing a Law Enforcement Stress Program for Officers and their Families* (National Institute of Justice: Issues and Practices, DIANE Publishing, 1997), 8 (Finn and Tomz state that poor supervision can have impact on the stress of the police: 'the actions and attitudes of police supervisors can either increase or help alleviate the stress of the

2.3. Previous Research and the Scope of the Study

So far most studies have drawn attention to factors within the police force itself that contribute to stress. External aspects resulting from the relationship between the police and prosecutors have been hardly examined. There are two studies which were conducted to examine any correlation between the prosecutorial role and the stress of police officers. Firstly, there was a survey of 500 police officers working in the investigation divisions in Seoul, Korea.[60] In this survey, eighty-six per cent of respondents answered that they had experienced difficulties while conducting investigations.[61] For instance, suspects, victims, and witnesses often refused to give a statement to the police, arguing that they want to make a statement before the prosecutors because the police investigators do not have sufficient powers to investigate or end the case.

In the second study, Lee and others argued that prosecutor's pre-eminent position had an adverse impact on the police investigation by increasing the stress on police officers. This was based on a survey of 248 police investigators working at the Kyung-Buk Police Agency in Korea.[62] The researchers identified three features: complicated procedures, unilateral instructions by prosecutors and a lack of police powers.[63] Correlations between those factors and role stressors were examined. They employed Montgomery and others' theoretical framework which provided a number of scales to measure the relationship between the organisational and personal characteristics, role stressors, and job stress.[64]

However, it is unclear from these studies whether police investigators have a different level of stress from other police officers since Lee and others depended on one sample population – police investigators. Furthermore, they did not consider the investigative function of the prosecution service and personal characteristics of the police investigators.[65] This current study considers those aspects as well. First of all, it examines the stress of all police officers by employing stratified random sampling which makes clear different perspectives between police investigators and normal police

---

job.'); Nancy Otis and Luc G. Pelletier. 'A Motivational Model of Daily Hassles, Physical Symptoms, and Future Work Intentions among Police Officers' (2005) 35(10) J Appl Soc Psychol 2193, 2193.

[60] Mi-Young Hong, *The Relationship between the Police and Prosecutors: A Survey* (Korean National Assembly, Seoul 2005)

[61] ibid 16.

[62] Hwan-Beom Lee et al. op. cit.

[63] ibid 259.

[64] ibid 257-265; Montgomery et al. op. cit.

[65] Hwan-Beom Lee et al. op. cit. 265-266.

officers.[66] Secondly, the effects of the investigative function of prosecutors and the work experience of the police investigators are considered as independent variables. More importantly, the findings are expanded based on interviews with legal professionals.

As a result, this study explores one personal and four organisational features: [67]

- Communication between the police and prosecutors
- Autonomy of police investigators
- The efficiency of investigation process
- Officer's perspective on the prosecution service
- Work experience (Personal factor)

These factors are identified as contributors to the role stressors of police investigators. As this study focuses on organisational influences, many other personal characteristics except for work experience have been excluded in order to reduce the variables.[68] There may be other significant personal features such as the relationship with spouses, number of children or income, which can have an impact on the role stressors. However, such intrusive personal questions can decrease the response rate. As a result, only a small number of demographics are chosen in order to enhance the response rate.

3. Analytical Framework and Hypotheses

In this study, three role stressors are systematically considered based on Lee and others' analysis as well as Montgomery and others' model of job stress in order to examine the stress on police investigators. Firstly, one individual characteristics and four

---

[66] Alan Bryman, *Social Research Methods* (3rd edn Oxford University Press, Oxford; New York 2008) 748pp 173-4, 699.

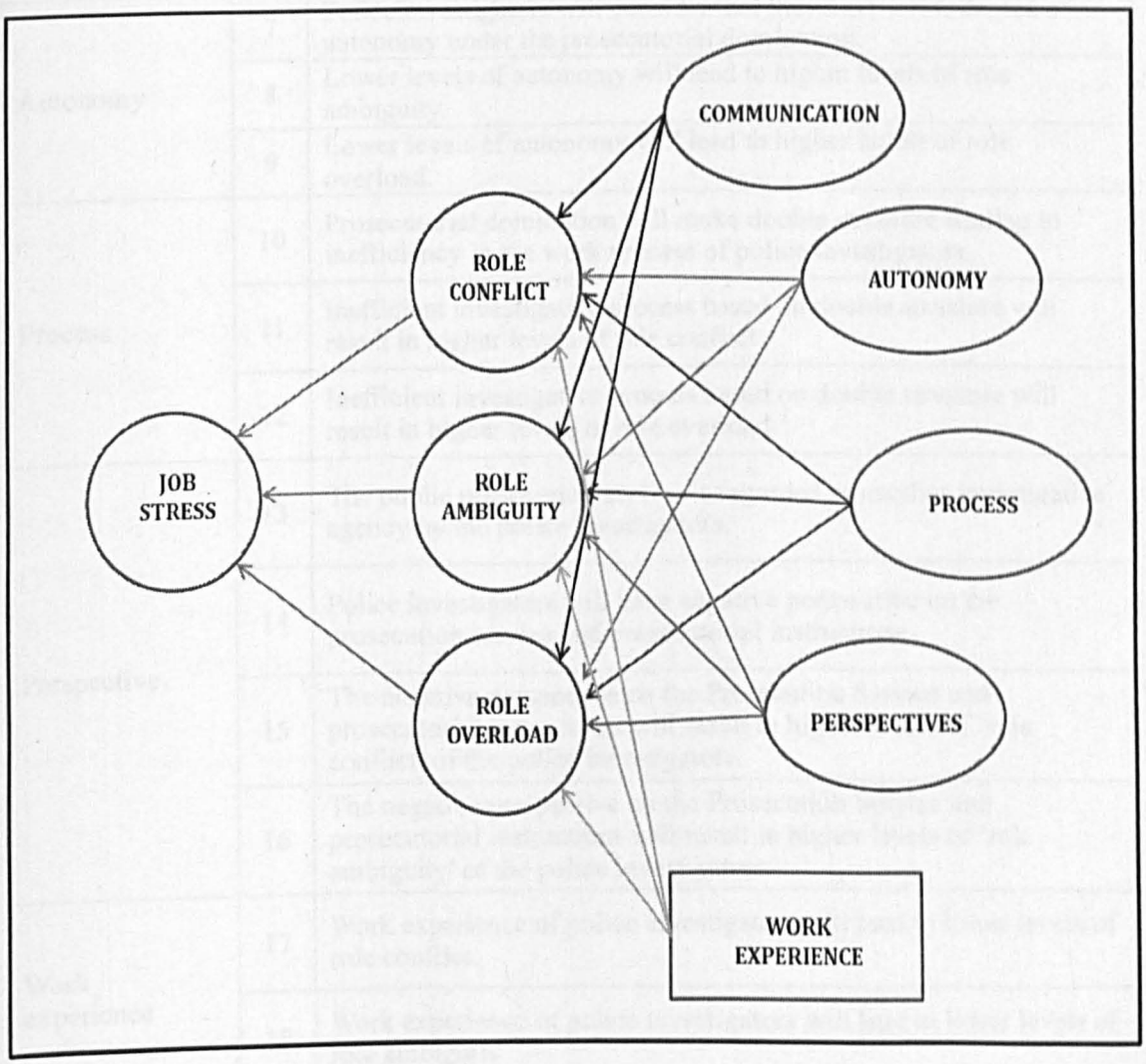
[67] Young-Lan Lee. 'Korean Investigation System' (1995) 7 Korean Criminal Justice Journal 187-205pp 199-204; Bo Hak Seo, 'The Reasonable Allocation of Investigative Powers between the Police and Prosecutors' in Supreme Prosecutors' Office and National Police Agency (eds), *Public Hearing for Allocating Investigative Powers in Korea* (SPO; NPA, Seoul 2005) 197, 208-211; Kuk Cho. 'The Ongoing Reconstruction of the Korean Criminal Justice System' (2006) 5(1) Santa Clara Journal of International Law 100, 118-120; Hak-Bae Kim, 'The Reasonable Reallocation of the Investigative Powers between the Police and Prosecutors: The Perspective of the Police' in Supreme Prosecutors' Office and National Police Agency (eds), *Public Hearing for Allocating Investigative Powers in Korea* (SPO; NPA, Seoul 2005) 2, 14-19; Hwan-Beom Lee et al. op. cit. 258-259.

[68] In addition to work experience, type-A behaviour pattern, locus of control, education and marital status can be significant indicators for the personal characteristics. *See* Montgomery et al. op. cit. 27-28 and Burke and Mikkelsen op. cit. 69.

organisational factors are selected which have an effect on the role stressors of police investigators. Secondly, those individual and organisational factors are hypothesised to have an impact on role conflict, role ambiguity and role overload, which are often referred to as significant role stressors.[69] Then, the correlations between the antecedent variables, role stressors and job stress are explored. Finally, the stress levels between the police investigators and normal police officers are compared.

As a consequence, this enables us to develop, as seen in Figure 8.1, a structural model. On the basis of previous studies and such an analytical model, I have suggested 19 hypotheses, as we shall see in Table 8.1.

Figure 8.1 A model of police investigator's job stress



[69] Montgomery et al. op. cit. 22.

Table 8.1 Hypotheses to test

Variance	**Hypothesis**	
Role stressors	1	Role conflict will result in job stress of the police investigators.
	2	Role ambiguity will result in job stress of the police investigators.
	3	Role overload will result in job stress of the police investigators.
Communication	4	Police investigators will have a low level of communication with prosecutors.
	5	Lack of communication between the police and prosecutors will lead to role ambiguity of the police investigators.
	6	Lack of communication between the police and prosecutors will lead to role conflict of the police investigators.
Autonomy	7	Police investigators will consider that they have a low degree of autonomy under the prosecutorial domination.
	8	Lower levels of autonomy will lead to higher levels of role ambiguity.
	9	Lower levels of autonomy will lead to higher levels of role overload.
Process	10	Prosecutorial domination will make double structure leading to inefficiency in the work process of police investigators.
	11	Inefficient investigative process based on double structure will result in higher levels of role conflict.
	12	Inefficient investigative process based on double structure will result in higher levels of role overload.
Perspective	13	The public prosecution service is regarded as another investigative agency by the police investigators.
	14	Police investigators will have negative perspective on the prosecution service and prosecutorial instructions.
	15	The negative perspective on the Prosecution Service and prosecutorial instructions will result in higher levels of 'role conflict' of the police investigators.
	16	The negative perspective on the Prosecution Service and prosecutorial instructions will result in higher levels of 'role ambiguity' of the police investigators.
Work experience	17	Work experience of police investigators will lead to lower levels of role conflict.
	18	Work experience of police investigators will lead to lower levels of role ambiguity.
Stress level	19	Police officers working at the investigation divisions have higher levels of stress than their counterparts in other departments.

4. Method

The data were collected through a self-completed questionnaire distributed to three different police training centres - Police Investigation Academy (Seoul), Police University (Yong-In), and Police Training Institute (A-San) - from 23 August to 6 October in 2010. Those educational institutions were chosen for the variety of possible samples. Police officers from all over the country participate in the training programmes managed by the national police agency. Therefore, the survey at the training centre can help the researcher to achieve various samples.

Of the 1,500 surveys that were distributed, 1,144 usable surveys were collected leading to overall response rate of 76.2 per cent. The surveys were sent to a designated contact person within each training centre who then distributed them to the respective administrators to coordinate training programmes. The surveys were completed before or after the training session. Upon completion, the surveys were gathered by the course administrator. Then, they were turned over to the researcher via the contact persons of the training centres.

Table 8.2 presents the demographic statistics for the population of 1,144 police officers and whole population of the police in Korea. As can be seen in the table, the final sample (N = 1,144) is a good representation of 100,460 Korean police personnel in 2010. However, among the respondents, the ratio of the police investigators is comparatively higher than normal. As this study aims to explore job stress of the police investigators, it needed a high ratio of police investigators. In particular, the relationship between the police investigators and prosecutors was compared with the relationship between the police officers and their superiors. As a consequence, a comparatively large number of samples for police investigators were collected.

Table 8.2 Sample demographics and population

	Final Sample (N = 1,144)		Korean Police Population (N =100,460)	
	N	%	N	%
Sex				
Male	1,037	90.6	93,844	93.4
Female	107	9.4	6,616	6.6
Division				
Investigation	730	63.8	22,453	22.4
Other	414	36.2	78,007	77.6

Rank				
PO	88	7.7	12,399	12.3
Assistant Sergeant	208	18.2	19,697	19.6
Sergeant	250	21.9	33,696	33.5
Inspector	424	37.1	28,756	28.6
Chief Inspector	99	8.7	3,753	3.7
Superintendent and above	75	6.6	2,159	2.2
Years of Service				
1-5 years	144	12.6		
6-10 years	130	11.4		
11-15 years	231	20.2		
16-20 years	226	19.8		
21 years and above	413	36.1		
Education				
Primary	1	0.1		
Middle School	1	0.1		
High School	324	28.3		
Undergraduate	746	65.2		
Graduate	72	6.3		
Working Area				
Seoul	259	22.6		
Metropolitan City	302	26.4		
City	441	38.5		
Rural Area	134	11.7		
Other	8	0.7		

4.1. Measures

Scales for the measurement of variables were mainly selected from previous studies. However, in order to make those scales appropriate for the police officers, slight modifications were carried out.

First of all, job stress was measured by four items, which were selected from Parker and DeCotiis's job stress items. An example item is, 'I have felt fidgety or nervous as a result of my job.'[70] Four items for job stress are mainly associated with the feeling of anxiety because, as Parker and DeCotiis suggested, role stressors were found to be more

[70] Donald F. Parker and Thomas A. DeCotiis. 'Organizational Determinants of Job Stress' (1983) 32(2) Organ Behav Hum Perform 160, 169.

strongly related to anxiety than to time stress.[71]

Secondly, for the role stressors, eleven items were selected from two studies. 'Role Conflict' and 'role ambiguity' were measured by eight items developed by Rizzo and others.[72] Sample items for those variables are as follows:

> *Role Conflict (Q23)* 'I work under incompatible policies and guidelines.'
>
> *Role Ambiguity (Q26)* 'I feel certain about how much authority I have.'

For the 'role overload', three items were employed from Schaubroeck and others' study.[73] They identified that 'role overload' has a significant and direct effect on job tension and is differentiable from role conflict as well as role ambiguity.[74] One sample item is thus:[75]

> *Role Ambiguity (Q30)* 'I have too much work to do everything well.'

Finally, the antecedent variables – organisational and personal characteristics of the police – were measured by 17 items. Among them, 13 items were selected and modified based on Lee and others' study and Teas's research on the organisation, task, and constraint variables.[76] The other four items were made with reference to previous studies discussing different perspectives of the police on the prosecution service.[77] Firstly, four organisational characteristics were measured by 16 items. The samples for these features are as follows:

> *Communication (Q7)* 'I frequently participate in the decision making process by prosecutors.'
>
> *Autonomy (Q11)* 'I frequently feel difficulty in dealing with duties due to lack of discretion.'
>
> *Process (Q16)* 'For the supervision of prosecutors, I need to make unnecessary paperwork.'
>
> *Perspective on the Prosecution Service (Q19)* 'Prosecutors put more emphasis on the investigation than the maintenance of prosecution.'

---

[71] ibid 172.
[72] John R. Rizzo, R. J. House and Sidney I. Lirtzman. 'Role Conflict and Ambiguity in Complex Organizations' (1970) 15(2) Adm Sci Q 150, 156.
[73] John Schaubroeck, John L. Cotton and Kenneth R. Jennings. 'Antecedents and Consequences of Role Stress: A Covariance Structure Analysis' (1989) 10(1) J Organ Behav 35, 44.
[74] ibid 53.
[75] ibid 44.
[76] Hwan-Beom Lee op. cit.; R. Kenneth Teas. 'An Empirical Test of Models of Salespersons, Job Expectancy and Instrumentality Perceptions' (1981) 18(2) J Market Res 209.
[77] Hak-Bae Kim op. cit.; Jong Gu Kim op. cit. Mi-Young Hong op. cit.

Secondly, work experience was surveyed with two items: rank and years of service. For the measurement of years of service, the item was recorded on a scale of one to twenty-one. Similarly, rank of police officers was recorded on a scale of one to six.

After all scales were completed, they had been pre-tested by use of 112 samples of police officers in the investigation development courses of the Police Investigation Academy (Seoul) in June of 2010.[78] The result of the pilot test was examined based on statistical methods such as confirmatory factor analysis and Cronbach's coefficient alpha.[79] Some of items were further modified as a result. In total, 37 items composed of the final survey questionnaire.[80] Most of items were measured by five-point Likert scale (from '*Strongly Disagree*' to '*Strongly Agree*' with a '*Neutral*' option).[81]

In particular, this study was not only designed to observe job stress for police investigators in the relationship with prosecutors, but it also constructed to compare the results with those of surveys on normal police officers and police investigators in the relationship with their superiors:

> Group 1 - *Police investigators* (N=623) who gave their perspectives on the organisational characteristics and job stress in the relationship with ***prosecutors***.
>
> Group 2 - *Police investigators* (N=107) who provided their views on the organisational characteristics and job stress in the relationship with ***superiors***.
>
> Group 3 - *Normal police officers* (N=414) who presented their ideas on the organisational characteristics and job stress in the relationship with ***superiors***.

However, the questionnaire for police investigators, which is referred to as 'Type-A' survey, could not be applied to police officers in Group 2 and 3. Hence, 12 items for

---

[78] The pilot test was carried out in the Korean Police Investigation Academy from 20th to 27th June 2010. Of the 120 surveys that were distributed, 112 usable surveys were collected. The surveys were sent to a designated contact person in the training department who then distributed the questionnaires to the respective administrators to coordinate training programmes. The surveys were completed before or after the training session. Upon completion, the surveys were gathered by the course administrator. Then, they were turned over to the researcher via the contact person.

[79] For the details on statistical methods, *see* below 'Statistical Methods'

[80] *See* a copy of Type-A questionnaire in the Appendix.

[81] Likert scale is one of the most common techniques for conducting an investigation of attitudes, which is a prominent area in much survey research. With regard to the value of Likert scale, Bryman stated that 'The Likert scale is essentially a multiple-indicator or multiple-item measure of a set of attitudes relating to a particular area. The goal of the Likert scale is to measure intensity of feelings about the area in question. In its most common format, it comprises a series of statements (known as 'items') that focus on a certain issue or theme. Each respondent is then asked to indicate his or her level of agreement with the statement.' *See* Alan Bryman, *Social Research Methods* (3rd edn Oxford University Press, Oxford; New York 2008) 748, 146.

'communication', 'autonomy', and 'process' were slightly modified to ask the relationship of police officers with their superiors. This questionnaire was referred to as 'Type-B' survey.[82] In Type-B questionnaire, for instance, the term of 'prosecutor' was replaced by 'superior':

> Communication (Q7) 'I frequently participate in the decision making process *by superiors.*'
>
> Autonomy (Q14) 'I often do not feel responsibility to my work because *superiors* decide almost everything.'
>
> Process (Q16) 'For the supervision of *superiors*, I need to make unnecessary paperwork.'

4.2. Statistical Methods

To analyse the data, statistical methods were used. First of all, in order to assess the reliability and validity of the questionnaire as well as the analytical model, confirmatory factor analysis was carried out by use of AMOS 18.[83] In addition, Cronbach's alpha was computed to summarise the internal consistency of the resulting subscales using PASW 18.[84] Then, as the items were recorded in ordinal scale, non-parametric tests were employed to find out the degree of difference in the opinions of police officers in three sample groups.[85] However, such comparisons between groups cannot be necessarily used to make inference of a causal relationship.[86] Hence, more detailed

---

[82] *See* a copy of questionnaires in the Appendix.

[83] Kim and Muller identified factor analysis as 'a variety of statistical techniques whose common objectives is to represent a set of variables in terms of a smaller number of hypothetical variables.' In particular, factor analysis can be separated into two categories: exploratory and confirmatory factor analysis. Exploratory factor analysis may be described 'as an expedient way of ascertaining the minimum number of hypothetical factors that can account for the observed covariation, and as a means of exploring the data for possible data reduction.' In contrast, confirmatory factor analysis refers to 'a means of confirming a certain hypothesis, not as a means of exploring underlying dimensions.' For instance, the researcher anticipates that there are two different underlying dimensions and that particular variables belong to one dimension while others belong to the second. In this circumstance, confirmatory factor analysis is employed to test such expectation. For more details, *see* Jae-On Kim and Charles W. Mueller, *Introduction to Factor Analysis: What it is and how to do it* (Sage Publications, Inc, 1978), 9; Barbara M. Byrne, *Structural Equation Modeling with AMOS: Basic Concepts, Applications, and Programming* (2nd edn Routledge, New York; Hove 2010)

[84] Cronbach's alpha is a commonly used test of internal consistency. A computed alpha coefficient varies between 1 (referring to perfect internal reliability) and 0 (referring to no internal reliability). For more details, *see* Alan Bryman op. cit. 149-153 and Paul R. Kinnear and Colin D. Gray, *SPSS 16 Made Simple* (1st edn Psychology Press, Hove, East Sussex; New York 2008), 428-435.

[85] Such a statistical method is generally used to compare different groups of samples. In particular, as in this study, it can be employed for the ordinal scales. For more details on a comparison of data, *see* Kultar Singh, *Quantitative Social Research Methods* (Sage Publications Pvt. Ltd, 2007), 122-176.

[86] Pamela A. Collins and A. C. Gibbs. 'Stress in Police Officers: A Study of the Origins, Prevalence and Severity of Stress-related Symptoms within a County Police Force' (2003) 53(4) Occupational Medicine

information on differences was considered with reference to the results of correlation and multiple regression analysis.

These two statistical methods were generally used to measure the relationship between variables.[87] Firstly, by use of correlation analysis, the strength and the direction of association between variables were observed.[88] Bryman and Cramer suggested that 'Correlation entails the provision of a yardstick whereby the intensity or strength of a relationship can be gauged. To provide such estimates, correlation coefficients are calculated. These provide succinct assessments of the closeness of a relationship among pairs of variables.'[89] Secondly, based on regression analysis, the strength and measure of the relationship between variables were determined by ascertaining the value of the regression coefficient.[90] Regression analysis is a set of techniques which utilises the presence of an association between two variables to predict the values of the dependent variable from the independent variables (regressors).[91]

5. Measurements of Properties

Before analysing the hypothesised relationship in the structural model, the scales used to define abstract concepts were examined through the confirmatory factor analysis and Cronbach's coefficients alpha.[92] Byrne stated about the importance of confirmatory factor analysis [CFA] as follows:

> [A]n important preliminary step in the analysis of full latent variable models is to test first for the validity of the measurement model before making any attempt to evaluate the

256, 258.

[87] Bryman and Cramer stated that 'Survey designs are often called correlational designs to denote the tendency for such research to be able to reveal relationships between variables and to draw attention to their limited capacity in connection with the elucidation of causal processes.' *See* Alan Bryman and Duncan Cramer, *Quantitative Data Analysis with SPSS 12 and 13: A Guide for Social Scientists* (Routledge, London; New York 2005), 16; Kultar Singh, *Quantitative Social Research Methods* (Sage Publications Pvt. Ltd, 2007), 145.

[88] ibid 145; Bryman and Cramer op. cit. 213-222.

[89] ibid 214.

[90] Kultar Singh, *Quantitative Social Research Methods* (Sage Publications Pvt. Ltd, 2007), 145; Bryman and Cramer op. cit. 230-246; In this study, the non-parametric test, correlation analysis, and multiple regression analysis were carried out by using PASW. For more details on this method, *see* Kinnear and Gray op. cit.

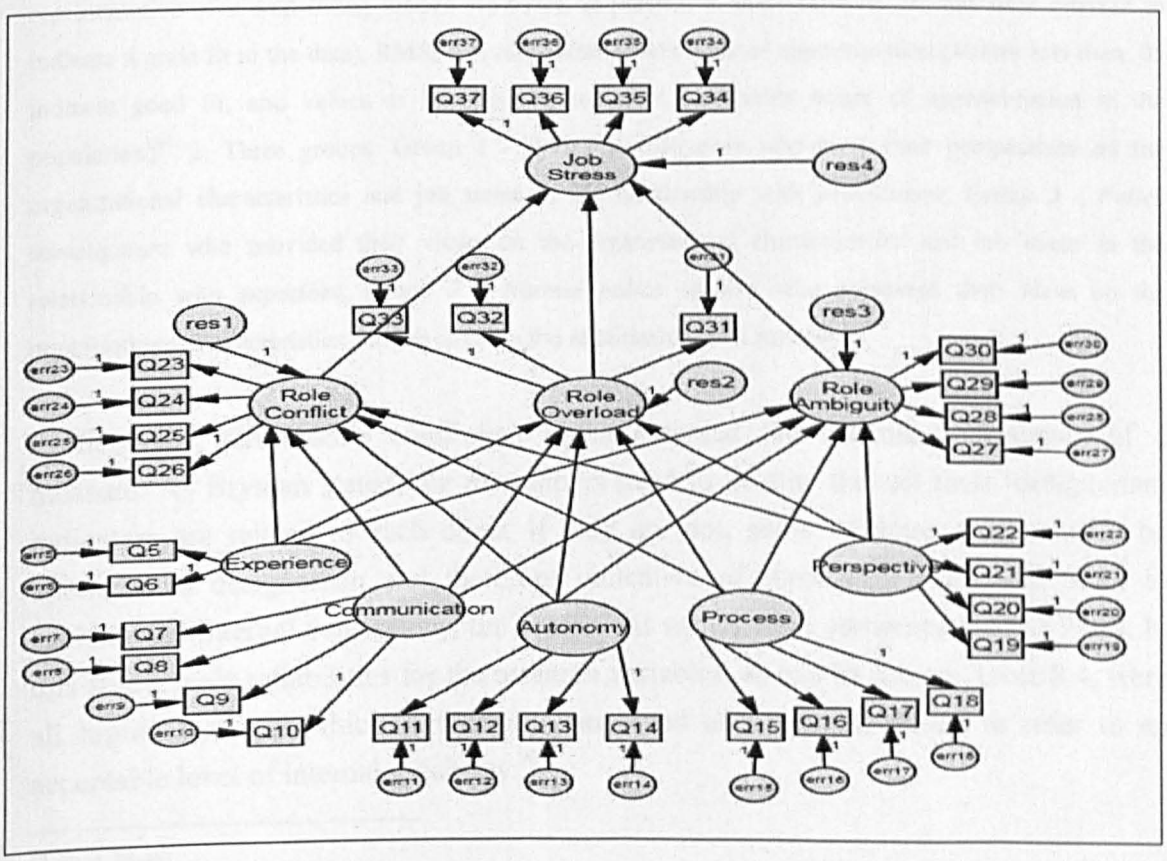
[91] ibid 436.

[92] Barbara M. Byrne, *Structural Equation Modeling with AMOS: Basic Concepts, Applications, and Programming* (2nd edn Routledge, New York; Hove 2010); Bryman op. cit.; For more details on confirmatory factor analysis and Cronbach's coefficient alpha, *see* above nn 83, 84.

> structural model. Accordingly, CFA procedures are used in testing the validity of the indicator variables. Once it is known that the measurement model is operating adequately, one can then have more confidence in findings related to the assessment of the hypothesized structural model.[93]

Firstly, two models (Model A and B) were examined through the CFA by use of AMOS 18. As seen in Figure 8.2, Model A was a causal structure model which has five factor variances. In Model B, one factor referring to the perspective on the prosecution service was excluded as this model focused on the internal relationship with superiors in the police organisation. In other words, Model A was created to test the data in Group 1 consisting of police investigators who responded to 'Type A' questionnaire, whereas Model B was designed to test the data of Group 2 and 3 which were surveyed based upon Type B questionnaire. However, Group 2 and 3, as discussed above, were different from each other as they respectively represent police investigators and normal police officers.

Figure 8.2 A model to test job stress of police investigators (Model A)



[93] Byrne op. cit. 164.

Note. In this figure, double-headed arrows which represent correlations among the independent factors in the model are excluded for the purpose of simplicity. Nevertheless, such specifications are essential to the analysis. Indeed, they were added to test the models.

Several fit indices were used to evaluate models. Table 8.3 presents the results of the CFA. As can be seen in the table, fit indices for all models were a significantly good fit to the data: CFI > .953, TLI > .945, RMSEA < .045, $p < .01$.

Table 8.3 Goodness-of-fit statistics for the confirmatory factor analysis models

Model	Group	*N*	X^2	df	*P*	TLI	CFI	RMSEA
A	1	623	935.209	451	.000	.945	.953	.042
B	2	107	413.190	340	.004	.953	.961	.045
	3	414	580.171	345	.000	.957	.963	.041

Note 1. X^2 = Minimum Discrepancy, df = Degrees of Freedom, *P* = Probability Value, TLI = Tucker-Lewis Index (TLI yields values ranging from zero to 1.00, with values close to .95 or higher being indicative of good fit), CFI = Comparative Fit Index (A value >.90 was originally considered representative of a well-fitting model. However, at present, a value close to .95 has been advised to indicate a good fit to the data), RMSEA = root-mean-square error of approximation (Values less than .05 indicate good fit, and values as high as .08 represent reasonable errors of approximation in the population)[94] 2. Three groups: Group 1 - *Police investigators* who gave their perspectives on the organisational characteristics and job stress in the relationship with ***prosecutors***; Group 2 - *Police investigators* who provided their views on the organisational characteristics and job stress in the relationship with ***superiors***; Group 3 - *Normal police officers* who presented their ideas on the organisational characteristics and job stress in the relationship with ***superiors***.

Secondly, Cronbach's coefficient alpha assessed the internal consistency of a measure. As Bryman stated, the researchers need to be sure that all their 'designerism indicators are related to each other. If they are not, some of items may actually be unrelated to designerism and therefore indicative of something else.'[95] In order to evaluate the internal consistency, the coefficient values were computed by PASW 18. In this study, scale reliabilities for the research variables, as can be seen in Table 8.4, were all higher than .70 which is typically employed as a rule of thumb to refer to an acceptable level of internal reliability.[96]

[94] ibid 78-80.
[95] Bryman op. cit. 150.
[96] ibid 151.

Table 8.4 Cronbach's coefficient alpha for the research variables

	Cronbach's Coefficient Alpha		
	Group 1 (N = 623)	Group 2 (N = 107)	Group 3 (N = 414)
Communication	.772	.878	.856
Autonomy	.805	.742	.760
Process	.797	.840	.818
Perspectives on PS	.714	.806	.841
Role Conflict	.846	.875	.863
Role Ambiguity	.882	.853	.856
Role Overload	.801	.811	.726
Job Stress	.896	.916	.886

In short, both the validity of models and reliability of surveys were found to be reasonably adequate to test the hypothesised structural models. As a consequence, as Byrne stated, the findings related to the assessment of hypotheses were trustworthy.[97]

6. Research Findings

Research findings are discussed in three aspects. Firstly, organisational features were explored. Secondly, the impact of organisational and individual characteristics on the role stressors was investigated based upon correlation and regression analysis. Finally, the influence of role stressors on job stress was examined. In particular, the findings on the police investigators [Group 1] were compared with the results of Group 2 and 3.

In terms of organisational features, four characteristics were set up as hypotheses: poor communication, low autonomy, inefficient work process and negative perspective on the prosecution service. Based upon the results of surveys and interviews, the validity of those predictions is examined in this section.

6.1. Communication between the Police and Prosecutors

As hypothesised [Hypothesis 4], police investigators experienced a low level of

[97] Byrne op. cit. 164.

communication with prosecutors. In particular, such an assumption was confirmed again by the comparison with two other groups of police officers.

54.8 per cent of police investigators in Group 1, as seen in Table 8.5, answered that they did not participate in decision making process by the prosecutors.

Table 8.5 A comparison between groups for a variable of communication

Positive Response (Agree and Strongly Agree)	**Questions**
G1 10.3 G2 48.6 G3 35.7	I frequently participate in decision making process by the prosecutors/ superiors. [Q7]
G1 10.0 G2 45.8 G3 27.6	Prosecutors/ Superiors are friendly and approachable.[Q8]
G1 7.4 G2 42.0 G3 24.7	Prosecutors/ Superiors often ask me my opinions about their directions. [Q9]
G1 8.3 G2 28.0 G3 20.0	I frequently receive feedback from prosecutors/ superiors.[Q10]

Note. In the tables of comparison between groups in terms of organisational characteristics, G1, G2, and G3 respectively refer to Group 1, 2 and 3: Group 1 - *Police investigators* who gave their perspectives on the organisational characteristics and job stress in the relationship with ***prosecutors***; Group 2 - *Police investigators* who provided their views on the organisational characteristics and job stress in the relationship with ***superiors***; Group 3 - *Normal police officers* who presented their ideas on the organisational characteristics and job stress in the relationship with ***superiors***..

In contrast, only 10.3 per cent of respondents said that they were involved in such a process. Similarly, 72.9 per cent of police investigators indicated that the prosecutors did not ask police investigators about the prosecutorial instructions. In particular, 91.6 per cent of police investigators said that they did not receive feedback from the prosecutors. Interviews with detectives show how the prosecutorial instructions are passed to the police without communication:

> [*PO3-IS1*] I've worked as a detective for 10 years. But I've never communicated with prosecutors in terms of investigation. All decisions regarding investigation have been made

> only by the prosecutors without discussion. That is one-sided communication. It's very rare for the police officer to communicate well with prosecutor.
>
> [*PO5-IS*] When I worked in the Serious Crimes Division, I sometimes rang up prosecutors to discuss the process of investigations and to attain advice. Now, prosecutorial instructions are conducted only based upon documents. We receive just papers including prosecutorial demands and follow those instructions.

As Mi-Yung Hong stated, police investigators tend to obey the instructions from the prosecutors even if such directions are perceived as unreasonable.[98] Where the police investigators raise an objection against the prosecutorial supervision, the prosecutors rarely discuss such an issue with police investigators, but instead, they often ignore it or bring criminal charges against the officers.[99]

The lack of communication can be addressed by two aspects. Firstly, police investigations are in general conducted based on one-sided directions. The prosecutors make decisions without discussion with the police investigators.[100] In addition, the prosecutors often order the police investigators to cease the investigation and to send the cases to the prosecutors' office without giving a reason.[101]

Secondly, police investigators do not have proper feedback from the prosecutors. In the organisational structure, feedback has been defined as on-going and timely information given by a supervisor regarding the job performance.[102] For instance, the results of investigations decided by the prosecutor can be significant feedback for the police investigators because such information can provide the police with praise, recognition, suggestions, and criticism.[103] However, the Korean prosecutors generally do not give such information to the police. In short, one-sided directions as well as

---

[98] According to the result of the survey, 68.1 per cent of respondents answered that they followed the unreasonable instructions from the prosecutors without refusing. *See* Mi-Young Hong, *The Relationship between the Police and Prosecutors: A Survey* (Korean National Assembly, Seoul 2005), 8.

[99] *See* pt 7 Discussion.

[100] Lee et al. argued that 'one-sided decision-making process by the prosecutors causes conflicts between the police and prosecutors in Korea.' *See* Hwan-Beom Lee et al. op. cit. 259.

[101] Hak-Bae Kim op. cit. 16 (Kim stated that 'the criminal cases involved with the prosecutors and their staff are generally investigated only by the prosecutors. Although the police investigators initiate investigations of those cases, such investigations are stopped by the prosecution service.')

[102] R. Kenneth Teas. 'Supervisory Behavior, Role Stress, and the Job Satisfaction of Industrial Salespeople' (1983) 20(1) J Market Res 84, 85 (Teas defined feedback as 'the degree to which organizationally mediated performance feedback is provided to a member.'); Montgomery et al. op. cit. 25-26.

[103] Ajay K. Kohli. 'Some Unexplored Supervisory Behaviors and their Influence on Salespeople's Role Clarity, Specific Self-Esteem, Job Satisfaction, and Motivation' (1985) 22(4) J Market Res 424 (Kohli suggested that such various types of critique can have impact on the role clarity.)

insufficient feedback generally result in the poor communication between the police and prosecutors.

The results of surveys on Group 2 and 3 showed very different figures. Normal police officers (Group 3) had a much higher level of communication with their superiors than police investigators (Group 1). In particular, police investigators (Group 2), in general, communicate much better with their superiors than with prosecutors. Those differences between groups were statistically significant (Kruskal-Wallis Test, X^2 = 339.706, df = 2, $p < .01$).[104]

6.2. Autonomy of Police Investigators

As assumed [Hypothesis 7], many police investigators considered that they had low degree of autonomy. More than half of the police investigators indicated that they had difficulty in conducting investigations because of a lack of autonomy.

Table 8.6 A comparison between groups for a variable of autonomy

Positive Response (Agree and Strongly Agree)	**Questions**
G1 52.5 G2 38.3 G3 41.1	I frequently feel difficulty in dealing with duties due to lack of discretion. [Q11]
G1 65.8 G2 58.9 G3 60.6	I don't have many opportunities to use my personal initiative or discretion.[Q12]
G1 56.8 G2 49.5 G3 52.2	I have too much responsibility and too few means to meet it. [Q13]
G1 43.5 G2 20.6 G3 28.3	I often do not feel responsibility to the investigation/work because the prosecutor/ superior decides almost everything. [Q14]

[104] The responses to these four questions were recoded into one variable with a scale of one to twenty by summing up the points of each item. Then, the differences between groups were computed by PASW 18. With a p-value < .01, the result is significant at the .01 level. For more details on the statistical test, *see* Paul R. Kinnear and Colin D. Gray, *SPSS 16 Made Simple* (1st edn Psychology Press, Hove, East Sussex; New York 2008), 266-269.

As seen in Table 8.6, 52.5 per cent of police investigators in Group 1 said that they 'frequently feel difficulty in dealing with duties due to lack of discretion'. On the contrary, only 13.6 per cent of respondents answered that they did not feel such difficulty. In addition, 56.8 per cent of police investigators indicated that they did not have sufficient discretion to fulfil their responsibilities. In particular, the low autonomy of police investigators was confirmed to result in a loss of responsibility. A large number of police investigators (43.5 per cent of respondents) said that they often did not feel responsibility to the investigation because the prosecutor decided almost everything. In contrast, the rate of police investigators who felt responsibility under the prosecutorial domination reached only to 29.3 per cent. As Hak-Bae Kim argued, 'a lack of autonomy of police investigators causes a loss of responsibility of the police. In practice, most police investigators carry out their duties in a passive way only by relying on the direction from prosecutors.'[105] This lack of autonomy has also led non-cooperation from suspects, victims, and witnesses who consider the police investigation to be an insignificant process.[106]

Finally, the level of autonomy of the police investigators in Group 1 was different from those of the other police officers in Group 2 and 3. Such a difference between groups was found to be statistically significant (Kruskal-Wallis Test, $X^2 = 31.860$, df = 2, $p < .01$).[107] As seen in Table 8.6 [Q12 and 13], the degree of autonomy of police investigators under the prosecutorial domination was lower than two other groups. At the same reason, the level of difficulty [Q11] which the police investigators felt during the investigation was higher than the other groups. Particularly, the level of lack of responsibility [Q14] resulting from prosecutorial domination was much higher than other police officers in different groups. For instance, the rates of police officers who responded that they did not feel responsibility because superiors decided almost everything were respectively 20.6 per cent in Group 2 and 28.3 per cent in Group 3. However, as stated above, in Group 1, 43.5 per cent of police investigators indicated a lack of responsibility.

6.3. The Efficiency of the Investigation Process

Police investigators in Korea can conduct investigations only under prosecutorial instruction. To have such an instruction, police investigators must submit document and

---

[105] Hak-Bae Kim op. cit. 16.
[106] ibid 17-18.
[107] For more information on statistical method, *see* n 104 above.

forms, and report the results of operations to the prosecutor as well as to their superior. Basically, those procedures are regulated by the rules made by the prosecutors' office.

Such a work process causes inefficiency of police investigation [Hypothesis 10]. As seen in Table 8.7, 58.1 per cent of police investigators in Group 1 said that they had to fill out unnecessary paperwork for the direction of prosecutors.

Table 8.7 A comparison between groups for a variable of work process

Positive Response (Agree and Strongly Agree)		**Questions**
G1	63.9	I frequently carry out duties based on complicated procedure. [Q15]
G2	54.2	
G3	53.8	
G1	58.1	For the direction of prosecutors/ superiors, I have to make unnecessary paperwork.[Q16]
G2	36.4	
G3	36.0	
G1	63.2	I have to report the result of operations to my superior and prosecutor/ other superior. [Q17]
G2	30.9	
G3	38.4	
G1	57.3	I frequently feel difficulty in conducting duties due to poor directions by prosecutor/ superior. [Q18]
G2	44.9	
G3	53.7	

In contrast, only 14.1 per cent of police investigators told that they did not have such difficulty. In addition, a large number of police investigators (63.2%) reported their actions not only to the superior but also to the prosecutor. As a consequence, 63.9 per cent of respondents in Group 1 indicated that they worked in a complicated process. Lee and others described such a circumstance as follows:

> The Korean police investigators have much difficulty in conducting investigations because they must have instructions from the prosecutors even in an emergent situation. In particular, the complex procedure for prosecutorial supervision makes the police investigation inefficient.[108]

[108] Hwan-Beom Lee et al. op. cit. 259.

Poor directions by the prosecutors were found to make the police investigators' work more difficult. 57.3 per cent of police investigators stated that they frequently had difficulty in conducting investigations due to poor directions by the prosecutor. Only 13.6 per cent of respondents in the same group said that they did not have such difficulty.

The supervisions in Korea are conducted by examining the documents prepared by the police investigators rather than by participating in investigations in the field.[109] Prosecutors do not have much time to direct police investigations in a precise way because they have a large number of cases to investigate and to direct.[110] As a consequence, the directions by prosecutors do not sufficiently reflect real situations.[111] Such poor supervision has occasionally led to unnecessary work for the police investigators.[112] A police officer said that such a problem was not rare:

> [*PO3-IS1*] There are lots of prosecutorial instructions which don't make sense at all. For me, I have sometimes ignored those ridiculous directions. One day, the prosecutor ordered me to drop by his office. So, I argued against his instruction in his office.

Those views of police investigators are significantly different from those of other police officers in Group 2 and 3 (Kruskal-Wallis Test, $X^2 = 52.586$, df = 2, $p < .01$).[113] The rate of police investigators who have to fill out unnecessary paperwork for the direction reached to 58.1 per cent [Q16]. However, for the normal police officers, such a rate was 36.0 per cent which is much lower than that in Group 1. Between Group 2 and 3, there was no such difference. In other words, the prosecutorial domination caused the work process of police investigators to be inefficient by increasing paperwork and bureaucratic red tape.

Differences can be easily observed in other items. The police officers in Group 2 and 3 as well as police investigators in Group 1 pointed to complicated procedures [Q15], double reporting to different superiors [Q17], and poor directions by the superiors [Q18]. However, the response rates which agree with the questions were all lower in Group 2

---

[109] Bo Hak Seo op. cit. 211-212.
[110] Hak-Bae Kim op. cit. 17.
[111] Bo Hak Seo op. cit. (Professor Seo said that 'the direct investigation by the prosecutors is one of the main reasons to make the poor prosecutorial supervision.')
[112] According to the result of the survey administered by Mi-Young Hong, 60 per cent of police officers in her study answered that they experienced unreasonable supervisions from the prosecutors, which were incompatible with the field operations. In addition, 72 per cent of the sample population answered that they conducted unnecessary works resulting from the poor supervision by the prosecutors. *See* Mi-Young Hong op. cit. 13.
[113] For more information on statistical method, *see* n 104.

and 3 than in Group 1. Consequently, as hypothesised, prosecutorial domination was confirmed to give rise to inefficiency in the police investigation.

6.4. Perspectives on the Prosecution Service

As expected, the prosecution service was regarded as another investigation agency by the police rather than as a supervisory authority [Hypothesis 13]. In particular, a large number of police investigators have negative ideas on the prosecution service and their supervision [Hypothesis 14].

A large number of police investigators (67.5 per cent of respondents in Group 1), as seen in Table 8.8, indicated that the prosecution service put more emphasis on investigation than on prosecution.

Table 8.8 A comparison between groups for a variable of perspective

Negative Response (Disagree and Strongly Disagree)		**Questions**
G1	67.5	Prosecutors put more emphasis on maintaining prosecution than investigating crimes. [Q19]
G2	70.1	
G3	75.3	
G1	54.3	Prosecutor always protects the human rights and justice. [Q20]
G2	56.0	
G3	65.9	
G1	56.6	Prosecutorial supervisions always correspond with justice. [Q21]
G2	52.3	
G3	58.7	
G1	74.0	Prosecutors do not pass their burden to the police through the instructions. [Q22]
G2	77.5	
G3	72.9	

Only 9.7 per cent of police investigators said that the Korean prosecution service was interested in trial work. Police investigators have in general negative views on the prosecution service. Firstly, police investigators are sceptical about the prosecutorial role as a protector of human rights and justice. 54.3 per cent of respondents in Group 1 did not agree with that prosecutors always protected the human rights and justice [Q20]. In contrast, the rate of police investigators who agree with such a statement was only

3.9 per cent.

Secondly, police investigators were found not to trust the prosecutorial supervision in terms of justice. 56.6 per cent of police investigators did not agree with that the prosecutorial supervision always corresponds with justice [Q21]. Such an idea was supported only by 2.8 per cent of police investigators. As Hong argued, the police officers do not trust in the instructions from the prosecutors as they often infringe the rights of defendants rather than protect them. Only a small number of police investigators regard the instructions from the prosecutors as necessary to their investigations.[114] Finally, the prosecutorial instruction was mostly considered as a tool to transfer the workload of the prosecution service to the police. Seventy-four per cent of police investigators stated that prosecutors passed their workload to the police [Q22].

Unlike other results, a negative perspective on the prosecution service was widespread between the police irrespective of groups (Kruskal-Wallis Test, $X^2 = 8.441$, $df = 2, p > .01$).[115]

6.5. The Impact of Demographics and Organisational Features on the Role Stressors

To assess the influence of individual and organisational characteristics upon the role stressors of police investigators [Group 1], firstly, correlations between research variables were analysed. Then, hierarchical multiple regression analysis was performed by means of the results of the correlation analysis. Finally, the differences between three sample populations were examined.

6.5.1. Levels of Role Stressors, Demographics, and Organisational Characteristics

The antecedent variables of the role stressors are demographics and organisational characteristics.

Firstly, of demographics, as seen in Table 8.9, 'years of service' of respondents was inversely related to all role stressors: 'role conflict' ($p < .01$), 'role ambiguity' ($p < .01$), and 'role overload' ($p < .05$). Similarly, 'rank' of the police investigators had a relationship with role ambiguity ($p < .01$) and role overload ($p < .01$).

---

[114] Mi-Young Hong op. cit. 10-17 (Hong states that the majority of police officers do not trust instructions from the prosecutors as they often lose their objectivity while conducting investigations.)
[115] *See* n 104.

Table 8.9 Means, standard deviations (SD), and correlation coefficients for the variables in Group 1 ($N = 623$)

	M	SD	1	2	3	4	5	6	7	8	9	10	11
Demographics													
1. Sex: *Male (1) Female (2)*	1.13	.33											
2. Education (years)	15.10	2.10	.234**										
3. Work Area: *City (1) → Rural Area (5)*	2.41	.94	-.020	-.035									
4. Rank: *Lowest (1) → Highest (6)*	3.35	1.52	-.182**	.144**	-.022								
5. Years of Service	13.61	6.45	-.238**	-.188**	-.033	.705**							
Organisational Variables													
6. Communication: *Worst (1) → Best (20)*	8.12	2.71	.102*	-.007	.010	.011	.090*						
7. Autonomy: *Insufficient (1) → Sufficient (20)*	10.18	2.89	-.064	-.030	.080*	.003	-.042	-.281**					
8. Work Process: *Inefficient (1) → Efficient (20)*	9.79	2.72	-.150**	-.048	.059	-.008	-.036	-.273**	.608**				
9. Perspective: *Negative (1) → Positive (20)*	9.15	2.35	.156**	-.003	-.080*	-.108**	-.057	.442**	-.339**	-.339**			
Role Stressors													
10. Role Conflict: *Lowest (1) → Highest (20)*	13.42	2.69	-.075	.044	.116**	-.047	-.127**	-.205**	.409**	.572**	-.295**		
11. Role Ambiguity: *Lowest (1) → Highest (20)*	11.26	2.80	.076	-.017	.024	-.255**	-.302**	-.158**	.250**	.187**	-.159**	.293**	
12. Role Overload: *Lowest (1) → Highest (15)*	10.65	2.07	-.064	-.027	.016	-.115**	-.093*	-.217**	.365**	.547**	-.223**	.472**	.174**

Note. The mean scores of organisational variables and role stressors as well as correlation coefficients were computed after recoding. Four observed variables in each factor based on a five point scale (*1 = Strongly Disagree, 2 = Disagree, 3 = Neutral, 4 = Agree, 5 = Strongly Agree*) were respectively recoded into one category with minimum score 1 and maximum score 20 by summing points assigned to responses for each factor. However, for 'role overload' factor, there were only three observed variables, and consequently, maximum score in the recoded category was 15. In addition, the scores of 'autonomy' and 'work process' were recoded such that a high score indicates a positive view on each variable, e.g. a high score of autonomy refers to sufficient autonomy. At the same reason, 'role ambiguity' was recoded to correspond with other two latent factors.

* $p < .05$, ** $p < .01$ (two-tailed)

In other words, high rank or experienced police investigators generally had a low level of 'role ambiguity' and 'role overload'. However, 'work area' was unexpectedly found to have a positive and significant relationship with 'role conflict' ($p < .01$). That is, police investigators who work in rural area had higher level of role conflict than those in city area. Apart from those three individual variables, 'sex' and 'years of education' had no relationship with role stressors.

Secondly, all organisational variables had a significant and negative relationship with three role stressors ($p < .01$). That is, police investigators who have better communication with prosecutors or a positive perspective on the prosecution service had lower level of role stressors. In addition, sufficient autonomy and efficient work process were also respectively related to a low level of role stressors.

To examine the relationship between demographics, organisational characteristics, and role stressors, hierarchical multiple regressions were conducted with three role stress dimensions as dependent variables.[1] The predictors were entered in two blocks. On the first step, demographic variables such as work area, rank, and years of service were entered.[2] Then, four organisational features were entered on the second step. The results are presented in Table 8.10.

Overall, demographics accounted for a small part of the variance in role conflict and role overload, respectively three and one per cent. However, ten per cent of the variance was explained by demographics in relation to 'role ambiguity'. In particular, 'years of service', which was employed to reflect the work experience of police investigators, was found to play a significant role in decreasing a level of role ambiguity ($\beta = -.24$). The work experience had a negative effect on role conflict ($\beta = -.18$) as well. Those who have much work experience had a low level of role conflict. With regards to 'work area', there was an unexpected outcome. Work area had an effect on a rise in role conflict of police investigators ($\beta = .11$). In other words, police investigators who work in rural areas have a higher level of role conflict.

---

[1] In order to examine the difference between effects of demographics and organisational features, hierarchical multiple regression was employed. For this analysis, as Pallant stated, 'Variables or sets of variables are entered in steps (or blocks), with each independent variable being assessed in terms of what it adds to the prediction of the dependent variable, after the previous variables have been controlled for.' For more information on hierarchical multiple regression, *see* Julie Pallant, *SPSS Survival Manual: A Step by Step Guide to Data Analysis Using SPSS for Windows* (3rd edn Open University Press, 2007), 147, 160-164.

[2] Of the demographics, 'sex' and 'years of education' were excluded in the regression analysis because they were found to have no relationship with the role stressors. *See* Table 8.8.

Table 8.10 Hierarchical multiple regression analysis for role stressors (role conflict, role ambiguity, and role overload)

Variables	Role Conflict			Role Ambiguity			Role Overload		
	β	R^2	ΔR^2	β	R^2	ΔR^2	β	R^2	ΔR^2
Step1: Demographics		.03	.03***		.10	.10***		.01	.01*
Work Area	.11**			.01			.01		
Rank	.09			-.09			-.10		
Years of Service	-.18**			-.24***			-.02		
Step 2: Organisational		.36	.35***		.17	.16***		.32	.31***
Communication	.01			-.04			-.06		
Autonomy	-.07			-.18***			-.04		
Work Process	-.49***			-.02			-.50***		
Perspectives on PS	-.11**			-.10**			-.03		

Note. This study had a relatively large sample (N = 623) to which Central Limit Theorem could be applied. As a result, there is no question on normality of the data.[3] Multicollinearity among independent variables and auto correlation problems of the data were examined by Tolerance test, Variance Inflation Factor (VIF), and Durbin-Watson value. Firstly, none of the Tolerance values was 0.1 or less. All VIF values were well below 10. Finally, Durbin-Watson Values were from 1.7 to 2.0, which are between acceptable ranges, i.e., 1.5 - 2.5.[4]

* < .05, ** <.01, *** < .001

After controlling for demographic variables, organisational characteristics significantly contributed to the prediction of all three role stressors. Such characteristics explained thirty-five per cent of role conflict, sixteen per cent of role ambiguity, and thirty-one per cent of role overload. When examining individual predictors, firstly, role conflict was significantly predicted by 'work process' (β = -.49) and 'perspectives on prosecution service (PS)' (β = -.11). Police investigators who scored low on 'work process' and 'perspectives on PS' reported a high level of role conflict. Secondly,

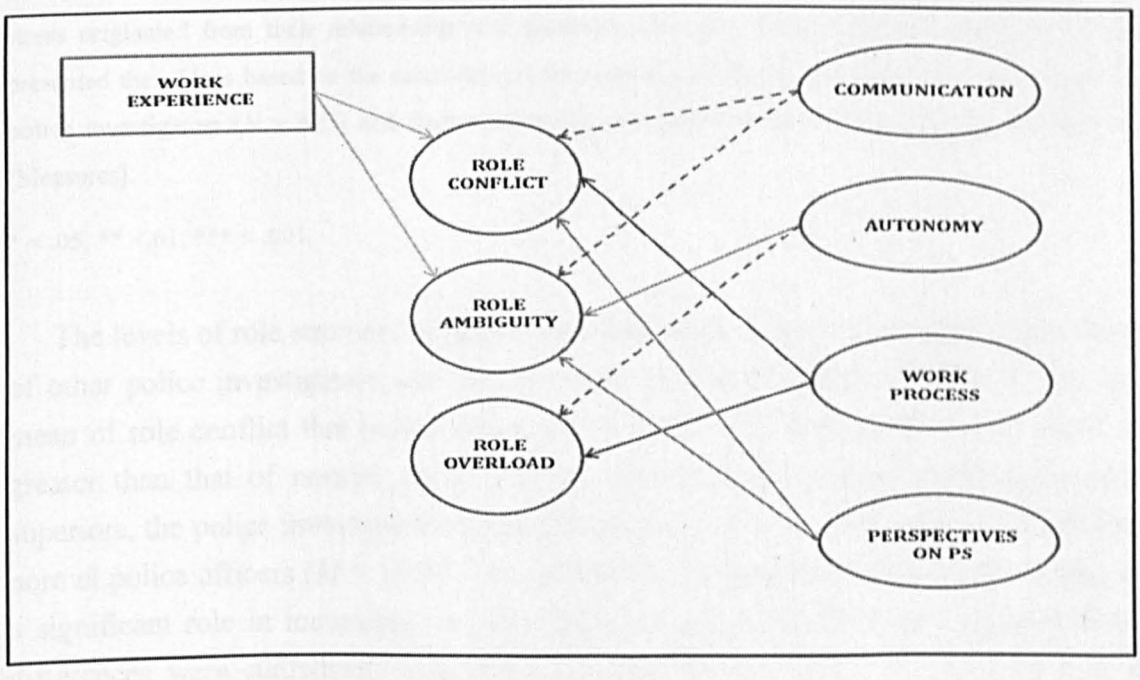
[3] For more information on Central Limit Theorem, *see* Thomas H. Wonnacott and Ronald J. Wonnacott, *Introductory Statistics* (4th edn John Wiley & Sons, 1985), 163-165; Prem S. Mann, *Introductory Statistics* (6th edn John Wiley & Sons, 2007), 309-310; Sheldon M. Ross, *Introductory Statistics* (3rd edn Academic Press, London; New York 2010), 304-311.

[4] Pallant op. cit. 155-156.

'autonomy (β = -.18)' and 'perspectives on PS (β = -.10)' significantly predicted the role ambiguity of police investigators. Those, who scored lower on 'autonomy' or more negative on 'perspectives on PS,' had higher levels of role ambiguity. Finally, the impact of 'work process' on the role overload was statistically significant (β = -.50). Those who regarded the investigative process as inefficient had a high level of role overload.

Taken together, as hypothesised [Hypothesis 8], police investigators who reported lower levels of autonomy experienced greater levels of role ambiguity. Hypothesis 11 and 12 were confirmed: police investigators who experienced inefficiency resulting from double reporting system under the prosecutorial domination indicated higher levels of role conflict and role overload. Hypothesis 15 and 16 were also confirmed: police investigator who had the negative perspectives on prosecution service experienced greater levels of role conflict and role ambiguity. Finally, greater work experience, as hypothesised [Hypothesis 17 and 18] led to lower levels of role conflict and role ambiguity. However, surprisingly, lack of communication between police investigators and prosecutors had no significant effect on role conflict [Hypothesis 5] and role ambiguity [Hypothesis 6]. In addition, contrary to Hypothesis 9, lower levels of autonomy had no effect on role overload. Such results are presented in Figure 8.3.

Figure 8.3 The impact of demographics, and organisational characteristics on role stressors



Note. [——→] denotes confirmed hypotheses, whereas [- - - -→] refers to rejected predictions.

6.5.2. Comparisons between Sample Populations

The overall level of role stressors of police investigators and normal police officers in Group 1, 2, and 3 is shown in Table 8.11. The scores of police investigators in Group 1 were compared to the mean scores of two other groups.

Table 8.11 Mean scores of role stressors for police investigators in Group 1 and comparison groups

Role Stressors	*Group 1*: Police Investigators (N = 623)		Comparison Groups [a] *Group 2*: Police Investigators (N = 107)		*Group 3*: Normal Police Officers (N = 414)		
	M	SD	M	SD	M	SD	X^2
Role Conflict	13.42	2.69	12.17	3.22	13.04	2.90	15.61***
Role Ambiguity	11.26	2.80	9.90	2.70	10.79	2.59	22.45***
Role Overload	10.65	2.07	10.18	2.25	9.78	1.97	47.17***

Note. The mean score was based on a five-point scale. The scores were recoded to compare and analyse. For more details on recoding, *see* a note in Table 8.8.

[a] Two groups, as stated before, were separated by work department and different work conditions: Group2 - Police investigators (N = 107) provided their views on the organisational characteristics and job stress originated from their relationship with superiors; Group3 - Normal police officers (N = 414) presented their ideas based on the relationship with superiors. Unlike these groups, Group1 focused on police investigators (N = 623) and their relationship with prosecutors. For more details, *see* Part 4.2 [Measures].

* < .05, ** <.01, *** < .001

The levels of role stressors of police investigators in Group 1 were higher than those of other police investigators and normal police officers in Group 2 and 3. Firstly, the mean of role conflict that police investigators in Group 1 scored was 13.42, which is greater than that of normal police officers. However, in terms of relationship with superiors, the police investigators reported lower level of role conflict (M = 12.17) than normal police officers (M = 13.04). In other words, the prosecutorial domination played a significant role in increasing the level of role conflict of police investigators. Such differences were statistically significant (Kruskal-Wallis Test, X^2 = 15.61, df = 2, p < .001).

Secondly, the levels of role ambiguity were also significantly different from each other (X^2 = 22.45, df = 2, p < .001). In particular, the police investigators having a relationship with prosecutors scored the highest in the dimension of role ambiguity (M = 11.26). However, as in the dimension of role conflict, the police investigators in Group 2 reported lower level of role ambiguity (M = 9.90) than normal police officers (M = 10.79). That is, ambiguity was the result of the relationship with the prosecutors.

Finally, the level of role overload of the police investigators in Group 1 (M = 10.65) was also higher than that of other sample populations. However, unlike other dimensions, police investigators in general had higher level of role overload than normal police officers (M = 9.78) regardless of group. However, the level of role overload of police investigators increased in the relationship with the prosecutors from 10.18 to 10.65. Those differences were also statistically significant (X^2 = 47.17, df = 2, p < .001). In short, the police investigators who work with prosecutors experienced greater levels of role stressors than their counterparts in other circumstances. In addition, differences were found in the relationship between demographics, organisational features, and role stressors.

To assess the relationship between demographics, organisational features, and role stressors in Group 2 and 3, hierarchical multiple regression analyses were performed by entering same variables as in the analysis of Group 1. However, as stated earlier, 'perspectives on prosecution service' was excluded from this analysis because it was constructed to measure only the relationship between the police and prosecutors for Group 1. The results are presented in Table 8.12.

In this analysis, as in the results for Group 1, demographics explained a small part of the variance. 'Years of service' predicted the role ambiguity for Group 2 at the significant level of 0.01. However, the role stressors of normal police officers in Group 3 were not significantly affected by demographics. As a result, most of the variances were accounted for by organisational characteristics resulting from the relationship with their superiors. Those organisation features explained respectively thirty-seven and forty-six per cent of role conflict, sixteen and eleven per cent of role ambiguity, and thirty-one and thirty-two per cent of role overload in Group 2 and 3. However, individual predictors which have a significant effect on role stressors were very different between groups in three aspects.

Firstly, 'communication' with prosecutors was not a significant factor for role stressors for Group 1.

Table 8.12 Hierarchical multiple regression analysis for role stressors in Group2 and 3

Variables	*Group2*: Police Investigators ($N = 107$)						*Group3*: Normal Police Officers ($N = 414$)					
	Role Conflict		Role Ambiguity		Role Overload		Role Conflict		Role Ambiguity		Role Overload	
	β	ΔR^2	β	ΔR^2	β	ΔR^2	β	ΔR^2	β	ΔR^2	β	ΔR^2
Step1												
Demographics		.04		.07*		.03		.00		.03**		.01
Work Area	-.14		-.06		-.13		-.05		.02		-.09	
Rank	.09		.22		-.13		.01		-.04		-.17	
Years of Service	-.25		-.44**		-.08		-.06		-.15		.11	
Step 2												
Organisation		.37***		.16**		.31***		.46***		.11***		.32***
Communication	-.06		-.25*		.25**		-.16***		-.25***		-.04	
Autonomy	-.09		-.02		-.13		-.16**		-.12*		-.04	
Work Process	-.50***		-.14		-.50***		-.52***		.04		-.53***	

Note. The data for this analysis were, as in Group 1, normally distributed. Multicollinearity among independent variables and auto correlation problems of the data were not detected: none of the Tolerance values was 0.1 or less. All VIF values were well below 10. Durbin-Watson Values were between acceptable ranges: $1.73 < DW < 2.16$.

* < .05, ** <.01, *** < .001

However, in other groups, 'communication' with superiors significantly predicted role stressors: role ambiguity (β = -.25) and role overload (β = .25) in Group 2; role conflict (β = -.16) and role ambiguity (β = -.25) in Group 3. In the relationship with superiors, poor communication was reported as a significant factor to increase the level of role ambiguity of both police investigators (β = -.25) and normal police officers (β = -.25). In addition, for normal police officers, poor communication with their superiors resulted in a high level of role conflict (β = -.16).

Secondly, a high level of role conflict of police investigators in Group 1 was mainly explained by inefficient work processes and negative perspectives on prosecution service. However, the level of role conflict of normal police officers was accounted for not only by 'work process' (β = -.52), but also by 'communication' with superiors (β = -.16) and 'autonomy' (β = -.16).

Finally, unlike Group 1 and 3, 'autonomy' was not a significant predictor for the role stressors of police investigators in their relationship with superiors. In other words, when it comes to the relationship with superiors, the police investigators did not experience a lack of autonomy which has an effect on role stressors. In short, the levels of role stressors between police investigators and normal police officers were different. Such a difference became more apparent in relationship with prosecutors.

6.6. The Impact of Role Stressors on Job Stress

At the first stage in the structural model, the relationship between demographics as well as organisational features and role stressors was explored. To verify the rest of the sequence, this part deals with the relationship between role stressors and job stress.

6.6.1. Levels of Role Stressors and Job Stress

To examine the impact of role stressors on job stress of police investigators in Group 1, firstly, correlation analysis was performed. Table 8.13 presents correlation coefficients between role stressors and job stress. As predicted, three role stressors had a significant and positive relationship with job stress ($p < .01$). Police investigators who experienced a high level of role stressors (role conflict, role ambiguity, and role overload) reported greater level of job stress.

Table 8.13 Means, standard deviations (SD), and correlation coefficients for Group 1 ($N = 623$)

	M	SD	1	2	3
Role Stressors					
1. Role Conflict: *Lowest (1) → Highest (20)*	13.42	2.69			
2. Role Ambiguity: *Lowest (1) → Highest (20)*	11.26	2.80	.29**		
3. Role Overload: *Lowest (1) → Highest (15)*	10.65	2.07	.47**	.14**	
Job Stress					
4. Job Stress: *Lowest (1) → Highest (20)*	14.55	2.90	.47**	.26**	.68**

Note. The mean scores of job stress and correlation coefficients were computed after recoding variables. Four observed variables in job stress based on a five point scale (*1 = Strongly Disagree, 2 = Disagree, 3 = Neutral, 4 = Agree, 5 = Strongly Agree*), as in the analysis of role stressors, were recoded into one category with minimum score 1 and maximum score 20 by summing points assigned to responses.
* $p < .05$, ** $p < .01$ (two-tailed)

Secondly, multiple regression analysis was conducted with job stress as a dependent variable in order to explore the impact of role stressors on job stress. Regression results in Table 8.14 show that the three significant and positive relationships between role stressors and job stress in the correlation analysis remained significant in the multivariate models. Such characteristics explained forty-nine per cent of job stress of police investigators in Group 1. When exploring individual predictors, job stress was predicted by all three role stressors: role conflict ($\beta = .16$), role ambiguity ($\beta = .11$), and role overload ($\beta = .58$). In other words, as hypothesised [Hypothesis 1, 2 and 3], the increase of levels of each role stressors resulted in raising the level of job stress.

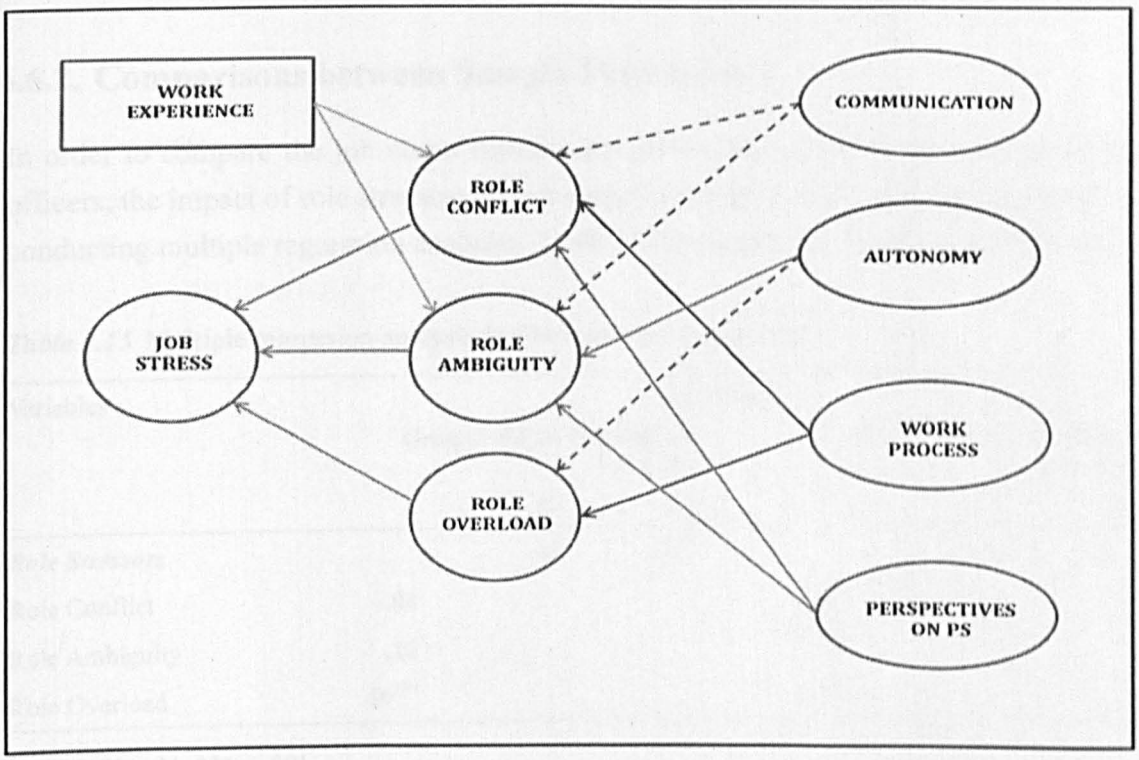
Table 8.14 Multiple regression analysis for job stress

Variables			Job Stress
	β	R^2	ΔR^2
Role Stressors		.49	.49***
Role Conflict	.16***		
Role Ambiguity	.11***		
Role Overload	.58***		

* < .05, ** <.01, *** < .001

Taken together, in the causal structure for Group 1, organisational features and demographics had an effect on job stress of police investigators via three role stressors. Such relationships are collectively presented in Figure 8.4.

Figure 8.4 The results of analysis and structural model for Group 1



Note. [——→] denotes confirmed hypotheses, whereas [- - - -→] refers to rejected predictions.

According to the results of the causal structure model, 'work process' had an effect on job stress by way of 'role conflict' and 'role overload.' Similarly, 'perspectives on the prosecution service' influenced job stress via 'role conflict' and 'role ambiguity.' However, 'autonomy' had an impact simply on 'role ambiguity'. Nevertheless, such an influence also increased the job stress of police investigators.

Finally, 'work experience' had an inverse impact on 'role conflict' and 'role ambiguity'. As a consequence, experienced police investigators had comparatively lower level of job stress because the factor played a role in reducing the levels of two role stressors. As previous studies noted, work experience is helpful to decrease a level of job stress of police officers.[1] For instance, in the study of stress among US marshals,

[1] Vivian B. Lord. 'An Impact of Community Policing: Reported Stressors, Social Support, and Strain among Police Officers in a Changing Police Department' (1996) 24(6) Journal of Criminal Justice 503, 515-516 (Lord argued that 'Experienced sergeants may have discovered other means to cope with stress

Newman and Rucker-Reed argued that police officers 'who chose to remain in police work throughout their careers eventually adapted to the job-related stressors and experienced a decrease in their stress levels.'[2] In general, the police come to understand their roles more clearly and how to achieve a high level of performance as they gain more work experience.[3] However, the effect was not considerable.

6.6.2. Comparisons between Sample Populations

In order to compare the job stress between the police investigators and normal police officers, the impact of role stressors on job stress in Group 2 and 3 was also explored by conducting multiple regression analyses. Table 8.15 presents the results of such analyses.

Table 8.15 Multiple regression analysis for job stress in Group2 and 3

Variables	Job Stress					
	Group2: Police Investigators ($N = 107$)			*Group3*: Normal Police Officers ($N = 414$)		
	β	R^2	ΔR^2	β	R^2	ΔR^2
Role Stressors		.49	.47***		.48	.48***
Role Conflict	-.04			.28***		
Role Ambiguity	.12			.08*		
Role Overload	.69***			.51***		

* < .05, ** <.01, *** < .001

As in the analysis for Group 1, role stressors explained a large portion of job stress for both groups: forty-seven per cent for Group 2 and forty-eight per cent for Group 3. However, job stress for police investigators in Group 2 was accounted for mainly by

---

or may have less stress in general than inexperienced sergeants. It is a hopeful indicator that less stress comes with experience and/or age.'); Robert J. Kaminski and David W. M. Sorensen. 'A Multivariate Analysis of Individual, Situational and Environmental Factors Associated with Police Assault Injuries' (1995) 14(3) Am J Police 3; Deborah W. Newman and M. LeeAnne Rucker-Reed. 'Police Stress, State-Trait Anxiety, and Stressors among US Marshals' (2004) 32(6) Journal of Criminal Justice 631; Burke and Mikkelsen op. cit. 72-75 (Burke and Mikkelson suggest that police officers who had longer police tenure reported less cynicism. Moreover, such officers were found to report higher levels of meaningful work.)

[2] Newman and Rucker-Reed op. cit. 634; However, in other studies, work experience is occasionally found not to have an impact on the job stress. *See* Collins and Gibbs op. cit. 259; Peter M. Marzuk and others. 'Suicide among New York City Police Officers, 1977-1996' (2002) 159(12) Am J Psychiatry 2069 (Marzuk et al. found that 'Marital problems, alcoholism, and job suspensions are the most important individual characteristics associated with police suicides ...[However] Age, race, years of service, and rank were not associated with this risk.'); Montgomery et al. op. cit. 30.

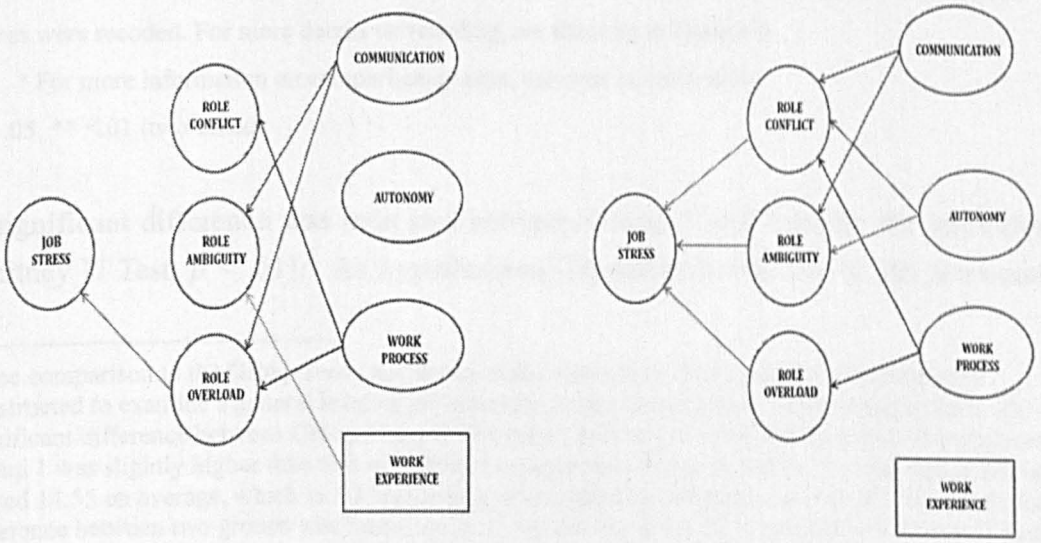
[3] Kaminski and Sorensen op. cit. 30-38; Burke and Mikkelsen op. cit. 72-79.

'role overload' (β = .16). Role conflict and role ambiguity did not reach conventional significance threshold. In contrast, for the normal police officers [Group 3], all three role stressors were found to be statistically significant factors which have an effect on job stress: role conflict (β = .28), role ambiguity (β = .08), and role overload (β = .51). As the results in Group 1, a high level of role stressors resulted in a greater level of job stress.

Figure 8.5 collectively shows the results of analyses for Group 2 and 3. When it comes to the relationship with superiors, organisational characteristics did not have much effect on job stress of police investigators. Autonomy and work process were not significant variables leading to job stress for police investigators. However, poor communication with superiors resulted in the increase of job stress through role overload. Work experience was also a significant factor to reduce job stress as more experience led to a lower level of job stress by decreasing role ambiguity.

Figure 8.5 The Results of Analysis and Structural Models for Group 2 and 3

Group2: Police Investigators (N = 107)	*Group3*: Normal Police Officers (N = 414)



Given the causal structure of Group 2, in which only role overload had an impact on job stress, most factors causing job stress of the police investigators, as shown in Figure 8.4, were found to result from the relationship with the prosecutors.

For the normal police officers, work experience was not a significant variable. However, their communication with superiors was one of the most important elements predicting job stress. Communication had an impact on two role stressors leading to job stress – role conflict and role ambiguity. In addition to communication, autonomy and work process influenced job stress by means of two different role stressors, e.g. role conflict and role ambiguity for autonomy and role conflict and role overload for work process.

The overall level of job stress of police investigators and normal police officers is presented in Table 8.16. The mean score of job stress for police investigators in Group 1 was compared to that of Group 3.[4]

Table 8.16 Mean scores of job stress for police investigators in Group 1 and comparison groups

	Group 1: Police Investigators ($N = 623$)		*Group 3*: Normal Police Officers ($N = 414$)	
	M	SD	M	SD
Job Stress	14.55	2.90	14.00	2.91
Z		-3.09**		

Note. The mean scores were based on a five-point scale. However, for comparison and analysis, the scores were recoded. For more details on recoding, *see* the note in Table 8.8.

[a] For more information on comparison groups, *see* note in Table 8.10

* < .05, ** <.01 (two-tailed)

A significant difference was indicated between Group 1 and 3 at the .01 level (Mann-Whitney U Test, $p < .01$).[5] As hypothesised [Hypothesis 19], due to the prosecutorial

[4] The comparison to the Group 2 was not shown in the Table 8.15. The items for job stress were constructed to examine a general level of job stress for police investigators. Subsequently, there was no significant difference between Group 1 and 2. The mean level of job stress for the police investigators in Group 1 was slightly higher than that of police investigators in Group 2. Police investigators in Group 1 scored 14.55 on average, which is .02 higher than other police investigators in Group 2. However, the difference between two groups was found not to be significant at the .05 level (Mann-Whitney U Test, $p = .941$). That is, police investigators in Group 1 and 2 had a similar level of job stress.

[5] It is very difficult to indicate whether the difference between stress levels is significant or not because of a lack of empirical studies dealing with the relationship between the police and prosecutors. However, such a difference seems to be similar to that of other previous studies although the level of job stress for Korean police officers appears to be much higher than others. For instance, in Jamal and Baba's study, managers ($M = 9.86$) had a higher level of job stress than nurses ($M = 9.16$). *See* Muhammed Jamal and Vishwanath V. Baba. 'Job Stress and Burnout among Canadian Managers and Nurses: An Empirical Examination' (2000) 91(6) Canadian Journal of Public Health 454, 455; In another research of Jamal, workers working with non-standard schedules ($M = 11.72$) had a greater level of job stress than those with standard work schedules ($M = 10.36$). *See* Muhammed Jamal. 'Burnout, Stress and Health of Employees

domination, police investigators experienced a greater level of job stress than normal police officers. Indeed such an impact, as we have seen at the results of regression analyses, can explain a part of job stress for police officers. In other words, there should be a number of other elements which can have an effect on job stress. For instance, investigation or normal policing itself can make a difference in the level of occupational stress. Nevertheless, when considering the explanatory powers of each variable in this study, such a difference is an important finding because it can indicate that prosecutorial domination in the investigation process plays a significant role in causing the increase in job stress of police investigators.

7. Discussion

In this study, I performed a systematic comparison of how the organisational characteristics associated with the prosecutorial domination had an effect on job stress of police investigators. Through empirical observation, the level of job stress of police investigators was measured and a number of factors which have an impact on job stress of police officers were found.

The most significant finding is that the police investigators experienced a higher level of job stress than normal police officers. Such a difference stemmed mainly from three aspects. The first aspect is the negative perspectives on the prosecution service. The Korean prosecution service, as seen in Chapter 3, dominates the criminal process. In particular, it places emphasis on the investigations which are conducted by prosecutors themselves. One of judges whom I interviewed said that the prosecution service does not exist in the Korean criminal justice system:

> [*J4-IC*] The Korean prosecutors consider the investigation as the most important function for themselves. They generally think they can increase their powers by conducting investigations. The Korean prosecution service is a power-oriented group. In this situation, if they don't investigate, they can't achieve their goal, that is, power. Judges often say, in Korea there is no prosecution service. Only two investigative agencies carry out their duties. The Korean prosecution service is another investigation agency. The prosecutors don't care for maintaining prosecution. They regard their role is finished when arrest the suspects and get confessions from them

---

on Non-standard Work Schedules: A Study of Canadian Workers' (2004) 20(3) Stress Health 113, 117. Indeed, those figures were recalculated because of a different range of scales.

In this circumstance, as Jong Gu Kim stated, police investigators regard the prosecution service as another investigation agency.[6] A police officer who works as a detective in the police station said that the prosecution service is a rival of the police:

> [*PO5-IS*] The prosecutors like to investigate cases by themselves. The investigative prosecutors are more easily promoted to high position than other prosecutors. Generally they move to the good positions. ... *The police agency and prosecution service are all equal investigative agencies.* But the prosecution service deals with more important cases. For example, they investigate high profile civil servants, politicians, and entrepreneurs. By doing so, they gain praise from society. However, those investigations can be conducted by the police as well. The police can have sufficient ability to carry out such investigations. But, the prosecutors argue only they can investigate important cases. They behave as if only they owned those investigations. I don't like such a situation. Sometimes, we begin the investigation of important cases based on our own information. But, if the prosecutor orders us to send the cases to the prosecutors' office, we have to give them to the prosecutors. Such circumstances often take place. That is the most unsatisfactory event for the police.[7]

As a consequence, a large number of police investigators do not trust prosecutor's quasi-judicial role by which the prosecutors are expected to protect defendant's rights and justice.[8]

The police investigators in general have negative perspectives on the prosecutorial supervisions. They do not think that prosecutor's direction is a significant method to protect defendant's rights. Instead, such direction is mostly regarded as a tool to transfer the workload of prosecutors to the police. In this situation, a high level of role conflict of police investigators must be a natural result. Notwithstanding their statutory role, police investigators often become confused whether they have to follow the instructions from the prosecutors or not.

For instance, in 2006, a superintendent, who worked at the police station in Kang-Lung, was charged as a result of the rejection of a prosecutorial direction.[9] In this case, the prosecutor directed the police officer to bring a suspect into a police station for custody, who had been interviewed by the prosecutor. However, he refused such a

---

[6] Jong Gu Kim op. cit. 529-536.

[7] The interviews with legal professionals show that the Korean prosecution service focuses on investigation. For various statements of legal professionals, *see* ch 3 and 4.

[8] For more information on the quasi-judicial role of the prosecutors, *see* ch 3.

[9] *2007 GOHAP 6* (2007) 48 Kakgong 30 April 2007 1713 (Chunchon District Court Kanglung Branch Court)

direction by arguing that the investigators working in the prosecutor's office should bring the suspect into the police station because such an activity is not the role of the police. In this instance, the police officer must have experienced the role conflict in which he was not sure whether to follow prosecutorial instructions or not. In the end, he rejected the prosecutorial instruction and was charged.

There is another example which shows such 'role conflict' of the police investigator. In 2005, based upon the complaints, the Police Agency, which is the headquarters of the Korean police, issued a guideline directing the police officers not to bring the suspects of the prosecutor's offices into the police station although the prosecutors directed the police to do so. The National Police Agency (quoting the complaints from the district agencies) argued that 'the prosecutors' offices should deal with their suspects themselves because the investigation is conducted by the prosecutors themselves and they have sufficient resources to administer their work.' However, this measure caused a conflict between the police and the prosecution service, and was abrogated by the decision of the government.[10] A large number of police officers consider that some instructions from the prosecutors are misused as a tool to shift prosecutor's works onto the police. In this context, the police investigators experience role conflict because they have to follow a prosecutorial instruction which is incompatible with their perception on the role of the police.

In addition to role conflict, the negative view on the prosecution service leads the police investigators to report a high level of role ambiguity. A large number of police investigators were not certain about the quasi-judicial role of the prosecution service. They rejected the idea that the prosecution service protects defendant's rights or a prosecutorial instruction corresponds with justice.[11] Police investigators are unclear whether the prosecutorial supervision is needed to protect the suspects and whether the prosecutors review the investigations with objectivity. Such a lack of clarity, as Hardy and Hardy suggested, leads to job stress by making role obligations vague.[12] This result corresponds with a previous study on the role ambiguity of the police officers stemming

---

[10] *See* Jae-Hyun Rho. 'The New Guideline of the Police Agency in relation to the Prosecutorial Investigation' *Yun-Hap News* (7 November 2005) and Won Su Jung. 'Activities related to the Prosecutorial Investigation are not the Work of the Police' *Dong-Ah Il-bo* (8 November 2005)

[11] The Korean prosecution service argues that 'the criminal justice system needs prosecutorial supervision over the police investigation in order to protect human rights and due process.' *See* Hoe-Jae Kim. 'The Scope of Supervision of the Public Prosecutor over the Investigation of the Police' (Public Prosecutors' Office and Police Agency, Seoul 11 April 2005) 99-196, 122-124.

[12] Margaret Hardy and W. Hardy, 'Role Stress and Role Strain' in Margaret E. Hardy and Mary E. Conway (eds), *Role Theory: Perspectives for Health Professionals* (2nd edn Appleton & Lange, Norwalk 1988) 159, 76.

from a lack of clarity on the role and purpose.[13] Role conflict and role ambiguity affected by negative perspectives on the prosecution service result in a greater level of job stress.

The second aspect is that prosecutorial domination causes a complicated and double reporting structure for the police investigation. Such complexities lead to role conflict and role overload resulting in an increase in job stress. In particular, where the instructions from superiors and prosecutors were incompatible each other, the level of role conflict must have been higher than normal. As Jawahar and others suggested, role conflict takes place because the police investigators face incompatible demands and expectations from multiple role partners, which are not readily achieved at the same time.[14]

Such a situation often takes place in practice. In 2006, Young-Il Kim, the Chief Inspector working at the Chung-Nam Police Agency, rejected prosecutor's direction based on the internal instruction. However, the prosecutor charged this police officer and he was convicted of a violation of prosecutorial orders.[15] Where two directions from superiors and prosecutors are incompatible each other, police investigators cannot help but experience the role conflict.

In addition, as several police investigators said, the superiors in the police organisation are in general reluctant to give specific directions to the investigators:

> [*PO3-IS1*] In terms of investigation, I've never received instructions from the superiors. They mainly ask me to quickly finish a case within due date. They haven't given me specific directions.

> [*PO5-IS*] Mostly, the superiors don't give clear directions on the investigation. We always

---

[13] Jennifer M. Brown and Elizabeth A. Campbell, *Stress and Policing: Sources and Strategies* (John Wiley & Sons, Chichester; New York; Brisbane; Toronto; Singapore 1994), 28-29 (Brown and Campbell suggest an example in regards to the role ambiguity resulting from a lack of clarity: 'there is a lack of clarity about the role and purpose of the police exemplified by two extreme pictures of the British police officer – the bobby on the beat exercising individual discretion and as a member of a riot squad functioning as a paramilitary officer. In Britain, the same officers may be required to perform both roles. There is no explicit evidence to demonstrate that flipping form community policing to riot control is a source of stress in itself. There is, however, an indication that exposure to public order duties is stressful.')

[14] Jim I. M. Jawahar, Thomas H. Stone and Jennifer L. Kisamore. 'Role Conflict and Burnout: The Direct and Moderating Effects of Political Skill and Perceived Organizational Support on Burnout Dimensions' (2007) 14(2) International Journal of Stress Management 142, 149.

[15] *2007 GOHAP 4* (2007) 51 Kakgong 13 September 2007 2453 (Daejon District Court); Criminal Act [*Hyungbeop*] 1953 partially amended on 29 July 2005 No.7623 art. 139 'A person who, while performing, or assisting in, police duties, interfere with the execution by a prosecutor of functions for the vindication of human rights or who does not follow his instructions, shall be punished by penal servitude for not more than 10 years.' *Cited from* Korea (Republic) and Gerhard O. W. Mueller, *Korean Criminal Code* (The American series of foreign penal codes, F.B. Rothman, South Hackensack, N.J. 1960) 74-75.

> report the results of investigation to the superiors. But, the decision is made only by the prosecutors. The superiors generally don't give different directions from the prosecutorial instructions. If I say 'prosecutors directed the case like this', then superiors rarely give their ideas on the case.

This situation, as one superintendent pointed out, largely results in a lack of responsibility of the directors of the police investigation division:

> [*PO4-IS1*] In principle, prosecutorial directions are considered as more important than those from superiors. However, I think the directors of investigation division of the police should have responsibility for the investigation. If they face a complicated case, they are reluctant to direct the detectives. Instead, they order the subordinates to get the instructions from the prosecutors. They tend to avoid their responsibility. That's the big problem with us.

Together with role conflict, police investigators experience a high level of role overload due to inefficient work process dominated by prosecutors. Such a high level of role overload consequently results in a rise in the job stress of police investigators. As Vagg and Spielberger suggested, excessive paperwork occurring with high frequency substantially contributes to the stress for most police officers.[16] A detective working at the police station in Seoul says that such a process is a waste of police workforce:

> [*PO5-IS*] There are lots of petty offences. Two friends were in a small fight after drinking. In a minute, they made up with each other. However, the work of the police doesn't stop at this moment. We have to fill out forms and send them to the prosecutors' office even though the cases are very trivial. Such a process is a waste of police workforce. It's not only a waste of time, but it's also inconvenient for citizens. If the police themselves can deal with those petty offences, it will save the time and money. But now we can't do that.

This shows how the prosecutorial domination has an impact on role overload of police investigators and what their job stress is.

Finally, the Korean police investigators feel that they do not have sufficient autonomy to fulfil their duties. The prosecutorial domination can be an important factor which diminishes the autonomy of the police. Professor Seo argued that 'in Korea, the

---

[16] Peter R. Vagg and Charles D. Spielberger. 'The Job Stress Survey: Assessing Perceived Severity and Frequency of Occurrence of Generic Sources of Stress in the Workplace' (1999) 4 J Occup Health Psychol 288, 288-289.

police officer has been regarded as one of the difficult occupations because they have lots of responsibilities without proper powers to conduct their duties. As a consequence, such a situation plays a significant role in destroying the morale of the police.'[17] This circumstance brings about a loss of ownership of case on part of the police.

This results in a high level of role ambiguity of police investigators. As House and Rizzo suggested, the police do not see themselves as exercising discretion or taking responsibilities, and consequently, a lack of clarity and predictability of the outcomes of one's behaviour led to the role ambiguity.[18] Such a role ambiguity, as seen in the results of previous studies on job stress of police officers, causes a rise in job stress for police investigators.

The police investigators often do not feel ownership of case and tend to attribute the blame to prosecutors. The interview with a detective clearly shows such a loss of ownership:

> [*PO3-IS1*] In the criminal process, there is no discretion that a police investigator can exercise. So, in cases that victims raise an objection to the results of investigation, I often talk to them thus: 'if you want to make a complaint, please go to the prosecutors' office. I haven't decided at all. ***Every decision was made by the prosecutors. I don't have any powers.***'

Such a problem is suggested not only by police officers, but also implied by a judge:

> [*J2-IM*] Now, the police investigators seem to conduct their duties without having responsibility. They mostly think that they don't need to pay much attention to the investigation of crimes because the prosecutors themselves investigate crimes again. As the police officers aren't provided with the powers to carry out investigations, ***they don't feel the responsibility for the results of investigations. As a consequence, the investigations can't be thoroughly conducted.***

In short, the prosecutor's complete control over the police investigation leads the police officers to avoid the responsibility for their investigation. The police rely on

---

[17] Bo Hak Seo, 'The Reasonable Allocation of Investigative Powers between the Police and Prosecutors' in Supreme Prosecutors' Office and National Police Agency (eds), *Public Hearing for Allocating Investigative Powers in Korea* (SPO; NPA, Seoul 2005) 197, 209-211; Hak-Bae Kim op. cit. 18; Kuk Cho op. cit. 117-120; Dong-Hee Lee. 'A Comparative Study on the Structure of Crime Investigation Authorities in Korea and the Reform Strategy' (2004) 7 Korean Police Journal 146, 176-177.

[18] Robert J. House and John R. Rizzo. 'Role Conflict and Ambiguity as Critical Variables in a Model of Organizational Behavior' (1972) 7(3) Organ Behav Hum Perform 467, 474.

decisions made by prosecutors. As seen in the statement of a judge, prosecutors tend to keep police at arm's length from the responsibility. The police investigators lose any clear sense of their powers and responsibility, and consequently, have a high level of job stress. In this respect, the Korean criminal justice system needs to look carefully at the suggestion by Runciman report of Royal Commission on Criminal Justice (1993) concerning prosecutorial supervision over the police investigation and a loss of commitment of the police: [19]

> [W]e believe that the police should consult the CPS at the earliest possible stage in serious and complex cases where the sufficiency of evidence seems likely to be a serious issue, and that the CPS should be free to ask the police to search for further evidence before deciding finally whether to continue the prosecution. But we do not consider it appropriate for the CPS to supervise police officers in the investigation. It is the responsibility of the police to investigate crime. There is no reason to believe that another service, whose members are recruited and promoted for their legal skills and experience, would be more proficient at investigating crime or at supervising and monitoring investigations conducted by those specifically trained for the purpose. Moreover, serious confusion of roles would be likely to result to no good purpose if the CPS, whose task is to assess the results of investigations in terms of the prospects of prosecution to conviction for the offence involved, were to direct investigations themselves. *Such a step would also remove accountability in this area from the police, with whom it most naturally belongs. Although, therefore, the CPS must be in a position to advise on the evidence that is required if the case is to go forward to trial, it should not be in the position of supervising the gathering of the evidence.*

Another interesting finding in this study is that the low degree of communication between police investigators and prosecutors, unlike predictions, does not have an effect on role stressors. In contrast, poor communications with a superior, which are observed in Group 2 and 3, have an adverse impact on the role stressors although such communications are reported better than those with prosecutors. In other words, normal police officers and police investigators communicate comparatively well with their superiors. Nevertheless, they experience a high level of role ambiguity. Such an interesting fact may be explained by a difference between face-to-face communication and information processing by depending on documents.

---

[19] Walter G. Runciman, 'The Royal Commission on Criminal Justice: Report' HMSO (Cm 2263, London) ch 2 para 67 (Emphasis added)

In the relationship with superiors, the communication is conducted based on face-to-face method. However, the police investigators communicate with prosecutors mostly by documents. They send the documents to the prosecutor's office and receive a written instruction from the prosecutor. Therefore, the face-to-face communication rarely takes place between police investigators and prosecutors. Such information processing, as Marginson suggested, may play a significant role in decreasing the role ambiguity of police investigators.[20]

Written documents, in most organisations, use a limited variety of language.[21] They mainly convey facts which are restrictive in use and of interpretation. The information in the impersonal documents, as Roberts stated, tends to be aggregated, simplified, and relatively objective, reproducing the sequential complexity of the situation in more straightforward media.[22] Hence, unlike face-to-face communications, information processing based on documents may help the communicators to clearly understand what should be done and how it should be done. As a result, role stressors can be avoided or at least reduced by such a type of communication media.[23] This avoidance or reduction of role stressors is also noted in the interview with a police investigator:

> [*PO3-IS1*] To be honest, it's more comfortable to communicate with prosecutors than with superiors. We don't need to meet the prosecutors, you know, face-to-face. We communicate through investigative documents. I don't need to wait in front of prosecutor's office. I don't need to explain the results of investigation in person because they are all in the papers. Actually, it is much clearer to communicate by documents than by face-to-face. And it can also save my time.

Face-to-face communications can facilitate 'equivocality reduction' by leading communicators to overcome a difficult frame of reference and to be capable of processing complex and subjective messages.[24] However, communication by depending

---

[20] David Marginson. 'Information Processing and Management Control: A Note Exploring the Role Played by Information Media in Reducing Role Ambiguity' (2006) 17(2) Management Accounting Research 187.

[21] ibid 189; Richard L. Daft and Robert H. Lengel. 'Organizational Information Requirements, Media Richness and Structural Design' (1986) Management science 554.

[22] John Roberts. 'The Possibilities of Accountability' (1991) 16(4) Accounting, Organizations and Society 355.

[23] Daft and Lengel op. cit. 560 (Daft and Lengel suggest that 'Communication media vary in the capacity to process rich information. In order of decreasing richness, the media classifications are (1) face-to-face, (2) telephone, (3) personal documents such as letters or memos, (4) impersonal written documents, and (5) numeric documents. The reason for richness differences includes the medium's capacity for immediate feedback, the number of cues and channels utilized, personalization, and language variety.')

[24] ibid 560.

on documents may be more effective because they process explicit messages and standard data.[25]

8. Conclusion

The prosecutor's domination causes an adverse impact on the police investigation by monopolising most powers and making the police a supplementary agency. A large numbers of police investigators experience low autonomy, lack of ownership, and an inefficient work process. Moreover, they have negative perspectives on the prosecution service and prosecutorial supervision. Such experiences and views result in a high level of role stressors. As a consequence, as Hart and others and others suggested, job stress of police investigators is increased, and their job performance is downgraded.[26]

There are few factors which offset such an impact. Only the work experience has a part to play in reducing the level of role conflict and role ambiguity of the police investigators. However, this influence is found to be very slight. As a result, the Korean criminal justice system needs to be reformed. The police and prosecution service have to find out their own roles which cannot be replaced by others. The prosecution service should focus its attention on reviewing the investigation and trial work. The investigation should be performed by the police on their own responsibility.

However, this does not mean a complete exclusion of the prosecution service from the investigation. The police can take advice from the prosecutors in terms of investigation. At the same time, the prosecutors also need to ask the police to perform a particular investigation in order to conduct an effective prosecution. As a result, the police and prosecution service must cooperate for the criminal justice rather than conflict with each other.[27]

---

[25] Marginson suggested that 'the sense of role clarity that is achieved through control reports is acquired irrespective of any deficiency or uncertainty in the information emanating from the general environment or significant others (e.g. the superior) about acceptable role behaviours. The person autonomously 'knows' what should be done.' *See* David Marginson. 'Information Processing and Management Control: A Note Exploring the Role Played by Information Media in Reducing Role Ambiguity' (2006) 17(2) Management Accounting Research 187, 189.

[26] Peter M. Hart, Alexander J. Wearing and Bruce Headey. 'Police Stress and Well-being: Integrating Personality, Coping and Daily Work Experiences' (1995) 68(2) J Occup Organ Psychol 133, 150 (Hart et al. argued that 'According to the empirical models reported in this paper, organizational, rather than operational, experiences are more important in determining psychological well-being. This is consistent with a growing body of evidence suggesting that police organizations are the main source of psychological distress among police officers.')

[27] Professor Fionda emphasised the co-operation between the prosecution service and the police as well as independence of the prosecution service: 'The importance of consultation and co-operation on a practical level between the police and the CPS cannot be underestimated in a process which requires

9. Study Limitations and Further Direction for Research

Limitations of this study are some bias from leading questions and the restricted explanatory power for job stress. Firstly, a few questions in relation to the views of the prosecution service and its supervision may hint at the preferred or desirable answer. Efforts were made to minimise the effect of any leading questions. The survey was pretested to determine whether they were any suggestive questions and to monitor the relevance of the questions. Nevertheless, a few leading questions might influence response. However, the data, which were produced by those questions, showed conflicting views. This might indicate that leading questions did not have a significant impact on the response.

Secondly, observed organisational and personal factors can explain only a part of the job stress. There may be other, unspecified variables which can account for the job stress for police officers. It would have been interesting to examine empirically more elements which have an effect on the job stress. Such information could have allowed the managers of the police agency or the policy makers for the relationship between the police and prosecutors to assess better the adverse impact of job stress of the police.

However, such extensive variables were not included in this survey due to a couple of reasons. Firstly, there were not sufficient studies on the relationship between the police and prosecutors. In particular, empirical works on this relationship were hardly noted. As a result, I could not find proper variables to estimate the police investigator's stress which is influenced by prosecutor's preeminent position. Secondly, because of the limited length of the questionnaires, a large number of variables could not be included in the survey.

In the future research, other various elements which have an impact on the job stress for the police investigators under the prosecutorial domination need to be considered. In addition, comparisons with other professionals such as prosecutors, judges, defence lawyers, and correctional officers can be useful.

---

interdependence between each branch in order to operate efficiently. ... At the same time, it is difficult for the CPS to perform to the required standards of objectivity without a firm and explicit statement of its independence. *See* Julia Fionda. 'The Crown Prosecution Service and the Police: A Loveless Marriage?' (1994) 110(Jul) Law Q Rev 376, 378-379.

Conclusion

This study was designed to answer the following questions: to what extent does the prosecution service dominate criminal proceedings in Korea?; is that dominant position of the prosecution service appropriate to preserve the defendant's constitutional rights and to achieve efficiency in the criminal procedure?; and do the functions, discretion, and accountability of the Korean prosecution service correspond to the international standards?

To research these questions, unlike previous studies, several empirical methods have been employed including content analysis, a survey based on self-completion questionnaires, and semi-structured interviewing. In addition, in order to gain insight into the Korean criminal procedure, the role, power and accountability of the Korean prosecution service are compared to those of five representative systems in England and Wales, the USA, France, Germany and Japan.

This study has found that a ninety-nine per cent conviction rate does not demonstrate any great capability of the prosecution service. Rather, it leads to restricted constitutional rights of the defendants and meaningless trials which serve only to confirm the prosecutorial decisions. In addition, this domination over the criminal justice system and the powers of direct investigation increase occupational stress for police officers. This in turn leads to the performance of the police being downgraded, and as a result, inefficiency in the criminal justice system.

The first finding is that the prosecution service plays a dominant role in the Korean criminal process and prosecutors focus their attention on investigation. The public prosecutors can decide: whether or not to initiate criminal investigations; how to end the investigations; what to charge; and whom to charge. Although the suspect has confessed to a crime and there is sufficient evidence to prove his guilt, they can suspend the prosecution instead of bring him to the criminal court. Moreover, they have an impact on outcomes of the trial by recommending a sentence and by appealing against verdicts as well as sentences. Due to these various functions, powers and discretion, the Korean prosecution service has been regarded as the most influential organisation within the Korean criminal justice which has sometimes been described as 'Prosecutorial Justice'. Occasionally, the Republic of Korea has been termed a 'Prosecutorial Republic'.[1]

[1] Hee Su Kim et al. argued that 'the prosecution service is a very powerful organisation in Korea, and in fact, manipulates society by using its various powers and discretion. By conducting investigations of high

A key element among these functions is the investigation of crime. The Korean prosecutor focuses on this task and it is considered the most significant duty for the prosecution service. The Korean prosecutors, unlike other jurisdictions, have not only legal authority, but also sufficient resources to carry out their own investigations. All prosecutors' offices, even the Supreme Prosecutors' Office, have their own investigation units. In terms of prosecutorial investigation, the Korean prosecution service is one of the most developed systems in the world.

Such a highly developed version of prosecutorial investigation embraces Packer's crime control model and can be explained as a result of Korea's history. The origins lay within the Japanese colonial period (1910-1945). Although modern criminal procedure was established in 1954, the Korean War (1950-1953) meant that there were very unstable social circumstances. The most significant objective in the establishment of the new system was to stabilise society with limited resources by controlling efficiently the offences against the state as well as individuals.

One critical element in achieving that objective was to concentrate most powers in the criminal proceedings in the prosecution service, which was a nationalised and hierarchical organisation. The law provided that all police forces were subject to the orders from the prosecutors. Under this order-obedience relationship, most decisions in relation to the investigation and prosecution are made by prosecutors. The government is able to control every aspect of law enforcement through its oversight and influence of the prosecution service.

At the same time, the Korean law opened what may be termed a "high speed rail link" from confessions to convictions in order to maximise efficiency by reducing the workload of the courts. That is to say, where the suspects confess to crimes before prosecutors, such confessions are not only accepted into evidence but their evidential impact is such that these will determine the outcome, namely conviction, despite the suspect's denials in court. For these reasons, Packer's crime control model illustrates well the Korean criminal process:

> The process must not be cluttered up with ceremonious rituals that do not advance the progress of a case. Facts can be established more quickly through interrogation in a police station than through the formal process of examination and cross-examination in a court...

---

profile cases, the prosecutors have gathered much information on politicians, entrepreneurs, and civil organisations, and have exclusively used such data. Due to the considerable powers of the prosecution service, the terms such as "Prosecutorial Republic" and "Prosecutorial Fascism" are often used to describe the prosecutorial potential. Indeed, this context leads the political party in power to control the prosecutorial decisions.' *See* Hee Su Kim and others, *Prosecutorial Republic of Korea* (Samin, Seoul 2011) 276, 147.

> The criminal process, in this model, is seen as a screening process in which each successive stage – pre-arrest investigation, arrest, post-arrest investigation, preparation for trial, trial or entry of plea, conviction, disposition – involves a series of routinized operations whose success is gauged primarily by their tendency to pass the case along to a successful conclusion. What is a successful conclusion? One that throws off at an early stage those cases in which it appears unlikely that the person apprehended is an offender and then secures, as expeditiously as possible, the conviction of the rest, with a minimum of occasions for challenge, let alone post-audit. By the application of administrative expertness, primarily that of the police and prosecutors, an early determination of probable innocence or guilt emerges. Those who are probably innocent are screened out. Those who are probably guilty are passed through the remaining stages of the process.[2]

The only distinctive feature of the Korean system which departs from this description is that facts are established, not in the police station, but through interrogation in the prosecutor's room. Such measures were introduced to safeguard suspects against brutal interrogation by the police but have meant that the problems are now centred in the prosecutor's office instead and have reduced a suspect's ability to challenge any confession, which will play a major role in determining the conviction.

It can be argued that such measures contribute to effective crime control and prevention. The pre-eminent position of the prosecutors and their direct involvement in the investigation provides advantages. This can improve the efficiency and effectiveness in dealing with cases. Most important decisions in the criminal proceedings are taken by the prosecutors. They make a decision to initiate investigations, charge the suspects, maintain prosecutions, and recommend sentences. Thus, the decisions taken by the public prosecutors at an investigation stage progress seamlessly to verdicts and sentences without obstacles such as prosecutorial and judicial reviews. Packer termed this as 'an assembly-line conveyor belt':

> [It] moves [down] an endless stream of cases, never stopping, carrying the cases to workers who stand at fixed stations and who perform on each case as it comes by the same small but essential operation that brings it one step closer to being a finished product, or, to exchange the metaphor for reality, a closed file.[3]

---

[2] Herbert L. Packer, *The Limits of the Criminal Sanction* (Stanford University Press, Stanford, Calif. 1968) 159-160.

[3] ibid.

The Korean prosecution service seems to deal with a large number of cases in an effective and efficient way.[4] This is shown by the very high conviction rate, exceeding ninety-nine per cent.

However, the roles, duties, and discretion of the Korean prosecution service do not correspond to the international standards. The wide ranging powers and functions of the Korean prosecutor over the whole of the criminal justice system means that they can be convincingly described as 'monopolist'. Their role is very different from that in other representative systems where the prosecution service mainly plays a role as a filter with objectivity.

In the English, US and French systems, the public prosecution service acts as a 'supplementary filter.' In England and the USA, the police review cases as a gatekeeper before any prosecutorial review. As a result, a large number of cases are initially discontinued by the police. Then, the prosecution service acts as a supplementary filter. In the English and US criminal process, two filters exist in order to prevent innocent suspects from being charged and convicted.

In particular, in England, the police drop cases by considering not simply evidentiary sufficiency, but also public interest. Thus, prosecutors have relatively less discretion. The discretion of the police is more extensive than in the USA. In addition, the Code for Crown Prosecutors not only provides specific conditions for the public interest test, but it emphasises that such factors can be taken into account at sentencing in the trial rather than requiring pre-trial decisions by prosecutors. As a result, the English law does not allow the prosecution to have extensive discretion, but requires them to serve as a supplementary filter.

In France, the role of preliminary filter is assigned not only to the police, but also to the investigating judge. Minor offences are firstly dropped by the police, and serious crimes, where there is no sufficient evidence, are discontinued by the investigating judges. Then, those filtered cases are reviewed again by the public prosecutors. In other words, the French system of criminal justice does not permit the prosecution service to monopolise the pre-trial stage, but tries to separate the discretion and leads the police and the judges to be involved more actively in the pre-trial process.

In Germany, the prosecution service acts as a 'key filter'. All cases can, in theory, be concluded only by the public prosecutors at the pre-trial stage as the police do not have discretion to discontinue. Nevertheless, the function of the German prosecutors, unlike their counterparts in Korea, can be defined as a filter rather than monopolist because

[4] Presidential Committee on the Judicial Reform, 'Committee Report (III): From 1st to 13th Conference' PCJR (Seoul May 2004), 102.

most prosecutorial decisions are monitored by the court. Furthermore, cases where there is sufficient evidence cannot be discontinued by the prosecutors due to the principle of compulsory prosecution. In short, the prosecution service, as in other representative systems, simply serves as a filter, albeit a key one to screen the cases.

In Japan, the public prosecutors have more extensive filtering role than their counterparts in other jurisdictions. They do not simply filter cases, but they also have the right to 'forgive' the offenders by considering various conditions as if they were quasi-judges. The prosecution service can be described as 'benevolent paternalist'. The Japanese law provides public prosecutors with considerable discretion. Unlike their counterparts in Germany, about ninety per cent of cases are concluded by the public prosecutors without intervention from the court. In particular, most cases are dropped based on application of the public interest test. The concept of public interest is interpreted more broadly than in other jurisdictions. Prosecutors will often refuse to file an indictment where they regard the prosecution as inappropriate considering the circumstances of the offence and the offender, even where the offender has confessed and there is ample evidence. This leads to the description of Japanese prosecutors acting as a benevolent paternalist.

However, they do not monopolise pre-trial procedure and in general cannot intervene in the police investigation. As a result, the Japanese police are empowered to carry out investigations acting on their own responsibility.[5] After the police finish the investigation, the prosecutors can direct the police to conduct supplementary investigations or may conduct investigation with their own units. Unlike in Korea, these units are only installed in some offices rather than in all branches. Investigations by the prosecutors are limited. Moreover, the prosecutorial decisions to charge are controlled by an independent committee consisting of citizens. By use of their considerable discretion, prosecutors discontinue a large number of cases. Nevertheless, the system of criminal justice does not allow the prosecutors to monopolise the procedure, but still stresses their filtering role.

---

[5] In the interview with Togashi Susumu, a Japanese police officer working for the Japanese National Police Agency for about 15 years, he stated as follows: 'The Japanese police officers mostly feel responsibility for the investigation. There're several reasons. Firstly, the police are able to conduct an investigation by themselves without intervention from the prosecution service. In other words, police officers have to work with their own accountability. Secondly, the prosecutor sends the result of the case to the police. In particular, when the accused person is found not guilty in the court, the result is given to the police officer, who investigated the case, by the prosecutor. So, the police generally try hard to gather sufficient evidence. For the similar reason, in case of serious crimes, the police officers voluntarily ask the prosecutors to supervise the investigation even though they're not legally subject to the prosecutorial supervision.' This interview was administered by the author in the Korean Police Agency on 20th August 2010.

Unlike other representative systems, in Korea, the prosecution service can be described as 'monopolist' where over ninety per cent of criminal cases are concluded as a result of decisions by the prosecution. All investigations are conducted either by the police under the supervision of the prosecutors or by the prosecutors themselves utilising their own investigation units. Prosecutor's decisions mostly determine the outcomes of trials based on the strong evidentiary impact of investigative dossiers. Nevertheless, such decisions in general are not reviewed by either the court or any independent body. Thus, if the prosecutor decides to charge a suspect, there is no independent mechanism to screen the prosecutorial decisions before the trial.

Such extraordinary functions and extensive powers of the Korean prosecution service restrict reliable fact finding by the courts. They are inappropriate to preserve the defendant's constitutional rights. Ironically, such a system does not achieve efficiency in the criminal procedure either.

First of all, due to the evidentiary impact of the prosecutor's interview documents, judges cannot make informed decisions as to whether to admit confessions into evidence and what weight to put on them. Unlike electronic recordings, the documents provide judges with incomplete information to determine whether the prosecutors employed coercive methods or extracted an involuntary and unreliable confession. Wrongful convictions are in general based on interview documents rather than tape-recording or audio-visual. In the interview documents, the accounts of disputants are incomplete, selective, and potentially biased about what occurred. The written interview is law enforcement's version of instant replay. Thus the interview reports, summarised and interpreted by prosecutors, cannot be appropriately reviewed by the courts. The judges do not have sufficient information to determine the propriety of investigation process or to challenge the evidence being provided by the prosecutors.

The interview is one of the most important investigative stages as it contributes to both reorganise the investigator's statements of the accused offence and construct a case on the basis of the accounts from the suspects, witnesses, and victims. In particular, for the purpose of constructing a case, obtaining a confession is regarded as a significant factor. The stress on obtaining a confession can lead interviewers to resort to various interrogative methods ranging from torture to trickery. However, while such tactics can produce reliable confessions, they lead to untrustworthy self-incriminating statements leading to wrongful convictions. False confessions resulting from the pressure of the interrogation have become one of the main concerns in the criminal justice systems because miscarriages of justice play a role in reducing the public trust in the criminal process.

Thus, each jurisdiction has set up procedural safeguards to protect the suspects against false confessions. The drafters of the KCPA also realised this problem. But their method was different from other jurisdictions, permitting the prosecutor's interview records to be accepted as presumptive evidence with the aim of controlling coercive questioning tactics by the police. This attempt, however, failed as it led to coercive methods being used in the prosecutor's interview. In particular, the risk of abuse cannot be properly controlled as there are weaknesses in interviewing practices: secrecy and abridged documents; length of detention; and lack of disclosure. Prosecutorial interviews are conducted in a relatively secret way. The interrogation process cannot be effectively monitored even by internal methods. Indeed, such secrecy undermines the privilege against self-incrimination. In addition, the lengthy detention period in the Korean system increases the inequality of arms between the defence and prosecutors. The prosecutors can detain suspects generally up to 480 hours for investigation which include interrogation. Detention can be extended up to 960 hours for the investigations of crimes against the security of the state. This is employed as an important method to elicit confessions. Particularly, a lack of schemes to guarantee the disclosure of evidence exacerbates the abuse of interviewing tactics.

Secondly, the direct investigation by the prosecutor cannot guarantee the defendant's basic rights. Direct investigation hinders prosecutors in their quest for objectivity. Prosecutors have two contrary roles: a minister of justice and an advocate. In most countries, research suggests that they put the emphasis on their adversarial role. The prosecutors generally assume the guilt of the defendants from the beginning of the prosecution process because they believe only the guilty person is charged. This is no different from other countries. However, unlike other jurisdictions, the Korean prosecution service stresses thorough investigation by prosecutors. This can affect prosecutors from the beginning of the investigation rather than at the later stage of the prosecution. The prosecutors seek to construct a case from the start even when they have sufficient information. In particular, prosecutors use several unethical methods in order to gain confessions and information from suspects.

Prosecutorial investigation also causes a defect in the filter mechanism in the criminal process. One of the significant functions of the public prosecution service is to review the investigations independently as a filter. However, the prosecutor's direct involvement in the investigation can result in a faulty situation in which no independent filter exists to screen investigations. In particular, given the impact of the tunnel vision, the separation of the function of investigation and prosecution must be a significant element to protect defendants.

Prosecutor's monopoly over the investigation also means a complete control over information. The lack of disclosure for courts and defendants may increase the inequality of arms between the state and defendants. Unfair evidence is produced by the informational monopoly. In this regard, the disclosure of evidence by prosecutors is very important. The disclosure has a main role to play in breaking the informational monopoly by the state. Such an obligation of prosecutors is necessary to strike a balance between the state and defendants. However, there is a lack of an effective mechanism for the disclosure of exculpatory evidence in Korea. This may increase a risk that the information is used only to achieve a conviction.

Finally, the prosecutor's domination causes an adverse impact on the police investigation by monopolising most powers and making the police a supplementary agency. A large numbers of police investigators experience low autonomy, lack of ownership, and an inefficient work process. Moreover, they have negative perspectives on the prosecution service and prosecutorial supervision. Such experiences and views result in a high level of role stressors. As a consequence, job stress of police investigators is increased, and their job performance is downgraded.

There are few factors which offset such an impact. Only the work experience has a part to play in reducing the level of role conflict and role ambiguity of the police investigators. However, this influence is found to be very slight. As a result, the Korean criminal justice system needs to be reformed. The police and prosecution service have to find out their own roles which cannot be replaced by others.

The Korean prosecution service may contribute to increase the efficiency by dealing with a large number of criminal cases with minimal efforts but a ninety-nine per cent conviction rate does not demonstrate any great capability of the prosecution service. Rather, it leads to restricted constitutional rights of the defendants and meaningless trials which serve only to confirm the prosecutorial decisions.

Since 1987, along with the development of a democratic state, the Korean system of criminal justice has tried to preserve the defendant's right to a fair trial. To this end, a number of constitutional rights have been provided in the Constitution such as the right to counsel, the privilege against self-incrimination, the right to request judicial hearing for arrest and detention, an exclusionary rule for illegally obtained confessions, the right to open trial, and the presumption of innocence. However, incorporating those basic rights in the constitution has not been enough to guarantee due process values in the day to day operations of the criminal process.

What this study has shown is that justice cannot be achieved by the monopoly of one legal actor over all criminal proceedings. It can be accomplished based on democratic

values such as public accountability, checks and balances, and separation of powers. The roles, duties and discretion of the Korean prosecution service must be reformed to guarantee the defendant's constitutional rights. Firstly, investigation should be separated from prosecution. The prosecution service should be independent from the investigation. Instead, the service needs to turn its attention to reviewing the investigation as the second filter, charging offenders and carrying out prosecutions. By doing so, the prosecution service can recover its quasi-judicial role. With a significant filter between the investigation and prosecution should come a decrease of wrongful convictions.

This functional separation will also contribute to increase the sense of ownership of the police by providing them with the main responsibility for investigation. Furthermore, the negative views of the prosecution service held by the police will be reduced. The prosecution service will not be regarded as another investigation agency. The police and prosecution service can find their own distinctive roles in the criminal process. However, this new relationship would not necessarily mean the clear separation between the investigation and prosecution. Such obvious separation is not only impossible, but also undesirable. Rather, the police, as noted in the interview with a Japanese police officer, will seek advice or supervision from the prosecutors. As a consequence, the police and prosecution service will co-operate towards a common goal, criminal justice, rather than acting in conflict with each other.

Secondly, courts must no longer accept without challenge the documentary evidence advanced by the prosecution. The KCPA must not give precedence to the prosecution interview record as opposed to that of the police. Indeed the interview of the suspect by the prosecution should become the exception rather than the rule. Inappropriate interrogation measures by the police can be prevented by establishing procedural safeguards rather than by prosecutors' repeating the interview. For example, electronic recordings of interview will protect the suspects from both giving false confessions by coercive interrogation methods. However, electronic recording itself is not a perfect safeguard. Hence, the system needs a number of other procedural reforms, e.g. a guarantee of the right to counsel during the interrogation, the mandatory presence of appropriate adults for vulnerable populations, limitations to the length of interrogation, and a prohibition of promises of leniency to induce confessions.

Finally, prosecutorial powers and discretion must be controlled based on a system of checks and balances. Prosecutor's decisions must be put under scrutiny of courts, citizens, or independent monitoring mechanisms. Criminal process needs a system that makes it impossible for the prosecution service to undertake actions unilaterally without

the cooperation or consent of other authorities.[6] As Hampton and Kavka suggest, this is the foundation of rule of law.[7]

For last 20 years, Korea has sought to move from a colonial authoritarian regime to a liberal democratic state. This entailed embedding due process values within the criminal justice system. However, those measures for defendants' rights in the Constitution have proved inadequate in face of the institutionalized culture of the prosecution service. Those elements must be reformed to be compatible with the values of due process. In the criminal proceedings, the reform of powers and functions of the prosecution service must be a significant priority for the development of democracy in South Korea.

[6] Bernard Manin, 'Checks, Balances and Boundaries: The Separation of Powers in the Constitutional Debate of 1787' in Biancamaria Fontana (ed), *The Invention of the Modern Republic* (Cambridge University Press, Cambridge 1994) 27 quoted in Jose Maria Maravall and Adam Przeworski (eds), *Democracy and the Rule of Law* (Cambridge University Press, 2003), 10.

[7] Jean Hampton. 'Democracy and the Rule of Law' (1994) The Rule of Law 15; Gregory S. Kavka, *Hobbesian Moral and Political Theory* (Princeton Univ Pr, Princeton 1986).

Appendix

1. Data Sources for Interviewees

Demographics

	Final Sample		Police Officers (PO)	Public Prosecutors (PP)	Defence Lawyers (DL)	Judges (J)
	$N = 20$	100%	$N = 5$	$N = 5$	$N = 5$	$N = 5$
Sex						
Male	19	95	4	5	5	5
Female	1	5	1	-	-	-
Years of Service						
1-5 years (1)	-	-	-	-	1	1
6-10 years (2)	5	25	-	2	2	2
11-15 years (3)	7	35	2	1	1	1
16-20 years (4)	6	30	2	1	1	1
21 years and above (5)	2	10	1	1	-	-
Work Condition						
Incumbent (I)	17	85	5	3	5	4
Retired (R)	3	15	-	2	-	1
Work Area						
Seoul (S)	12	60	4	2	4	2
Metropolitan City (M)	2	10	1	-	-	2
City (C)	5	25	-	2	1	1
Rural Area (R)	1	5	-	1	-	-

Note. In the main body, each interviewee was introduced as an acronym. For instance, 'PP3-IS' refers to an incumbent prosecutor who had 12 years' experience in the prosecution service and worked in Seoul when the interview was conducted.

Bibliographical Notes for Interviewees

PO3-IS1 Chief Inspector with 13 years' experience: mainly worked as an investigator in Seoul; two years in a small city.

PO3-IS2 Chief Inspector with 12 years' experience: mainly worked at the Information Department in the district police agency; one year in Seoul.

PO4-IS1 Superintendent with 18 years' experience: mainly worked as an investigator in different cities; for recent three years, worked as a director of the investigation division at the police station.

PO4-IS2 Inspector with 20 years' experience: worked as a detective in the police station.

PO5-IS Inspector with 21 years' experience: worked as a detective in the police station.

PP2-RR Retired prosecutor: worked as a junior prosecutor in rural area for six years; acted as a lawyer for last four years.

PP3-IS1 Junior prosecutor with eight years' experience: mainly directed police investigations working at the Criminal Department; worked at the High Tech Crime Department for last one year.

PP3-IS2 Junior prosecutor with ten years' experience: mainly worked for the direction of the police investigation at the Criminal Department.

PP3-RC Retired prosecutor: worked as a junior prosecutor in the city for ten years; after retirement, worked as a lawyer for ten years.

PP5-IC Senior prosecutor with 24 years' experience: worked as both investigative and trial prosecutor in different areas.

DL1-IS Defence lawyer with five years' experience: worked as a detective for four years in a city; after retirement, worked as a lawyer for five years in Seoul.

DL2-IS1 Defence lawyer with six years' experience: worked in a law firm in Seoul.

DL2-IS2 Defence lawyer with six years' experience: mainly worked as a court-appointed attorney in a city.

DL3-IS Defence lawyer with 14 years' experience: worked in a law firm in Seoul.

DL4-IS Defence lawyer with 16 years' experience: worked in a law firm in Seoul.

J1-IM Junior judge with two years' experience: worked at the criminal court in a metropolitan city; before being appointed as a judge, worked as a defence lawyer for eight years.

J2-RS Retired judge with 10 years' experience: mostly worked at the Criminal Court; after retirement worked as a representative lawyer in a law firm.

J2-IM Junior judge with 10 years' experience: worked only at the district court in a metropolitan city; had been in charge of both civil and criminal cases.

J3-IS Senior judge with 13 years' experience: worked in both civil and criminal court in Seoul and other cities.

J4-IC Senior judge with 16 years' experience: worked at both civil and criminal court in various cities including Seoul.

2. Self-Completion Questionnaires

Type A: Relationship with Public Prosecutors

INTRODUCTION

This survey has been designed to find out the impact of organisational characteristics of the Korean police on the job performance. It is your opportunity to give your opinions on what you think about the features that you felt could have been improved. Finally, you and your response remain anonymous at all times. Your answers will be only used to gain statistical data. Please tick or circle the answer that represents you and your job conditions.

BACKGROUND

1. Sex: ☐ Female ☐ Male
2. Education (Please circle the highest year of school completed):

1 2 3 4 5 6	7 8 9 10 11 12	13 14 15 16	17 18 19 20 21 22	23+
(primary)	(high school)	(college/ university)	(graduate school)	

3. Are you currently working at the:
   ☐ Investigation Divisions ☐ Other Divisions
4. Working Area:
   ☐ Seoul ☐ Metropolitan City ☐ City
   ☐ Rural Area ☐ Other Region
5. Rank of Position:
   ☐ PO ☐ Assitant Sergeant ☐ Sergeant ☐ Inspector
   ☐ Chief Inspector ☐ Superintendent and Higher ranks
6. How many years have you worked as a police officer (Years of Service):

1 2 3 4 5	6 7 8 9 10	11 12 13 14 15	16 17 18 19 20	21+

RELATIONSHIP WITH PROSECUTORS

Communication

		Strongly disagree	Disagree	Neutral	Agree	Strongly Agree
7	I frequently participate in decision making process by the prosecutors.	1	2	3	4	5
8	Prosecutors are friendly and approachable.	1	2	3	4	5
9	Prosecutors often ask me my opinions about their directions.	1	2	3	4	5
10	I frequently receive feedback from prosecutors.	1	2	3	4	5

Autonomy

		Strongly disagree	Disagree	Neutral	Agree	Strongly Agree
11	I frequently feel difficulty in dealing with duties due to lack of discretion.	1	2	3	4	5
12	I don't have many opportunities to use my personal initiative or discretion.	1	2	3	4	5
13	I have too much responsibility and too few means to meet it.	1	2	3	4	5
14	I often do not feel responsibility to the investigation because the prosecutors decide almost everything.	1	2	3	4	5

RELATIONSHIP WITH PROSECUTORS

Process

		Strongly disagree	Disagree	Neutral	Agree	Strongly Agree
15	I frequently carry out duties based on complicated procedure.	1	2	3	4	5
16	For the direction of prosecutors, I have to make unnecessary paperwork.	1	2	3	4	5
17	I have to report the result of operations to both superior and prosecutor.	1	2	3	4	5
18	I frequently have difficulty in conducting duties due to poor directions by prosecutors.	1	2	3	4	5

Perspective on the Prosecution Service

		Strongly disagree	Disagree	Neutral	Agree	Strongly Agree
19	Prosecutors put more emphasis on maintaining prosecution than investigating crimes.	1	2	3	4	5
20	Prosecutor always protects the human rights and justice.	1	2	3	4	5
21	Prosecutorial supervisions always correspond with justice.	1	2	3	4	5
22	Prosecutors do not pass their burden to the police through the instructions.	1	2	3	4	5

ROLE STRESSORS

Role Conflict

	Strongly disagree	Disagree	Neutral	Agree	Strongly Agree
23 I have to do things that should be done differently.	1	2	3	4	5
24 I work under incompatible policies and guidelines.	1	2	3	4	5
25 I receive incompatible requests from two or more people.	1	2	3	4	5
26 I have to work under vague directives and orders.	1	2	3	4	5

Role Ambiguity

	Strongly disagree	Disagree	Neutral	Agree	Strongly Agree
27 I feel certain about how much authority I have.	1	2	3	4	5
28 I know that I have divided my time properly.	1	2	3	4	5
29 I know what my responsibilities are.	1	2	3	4	5
30 I know exactly what is expected of me.	1	2	3	4	5

ROLE STRESSORS

Role Overload

	Strongly disagree	Disagree	Neutral	Agree	Strongly Agree
31 I have too much work to do everything well.	1	2	3	4	5
32 The amount of work I am asked to do is unfair.	1	2	3	4	5
33 I never seem to have enough time to get everything done.	1	2	3	4	5

JOB STRESS

	Strongly disagree	Disagree	Neutral	Agree	Strongly Agree
34 I have felt fidgety or nervous as a result of my job.	1	2	3	4	5
35 My job gets to me more than it should.	1	2	3	4	5
36 There are lots of times when my job drives me right up the wall.	1	2	3	4	5
37 Sometimes when I think about my job I get a tight feeling in my chest.	1	2	3	4	5

- Thank you very much for your help -

Type B: Relationship with Superiors

INTRODUCTION

This survey has been designed to find out the impact of organisational characteristics of the Korean police on the job performance. It is your opportunity to give your opinions on what you think about the features that you felt could have been improved. Finally, you and your response remain anonymous at all times. Your answers will be only used to gain statistical data. Please tick or circle the answer that represents you and your job conditions.

BACKGROUND

1. Sex: ☐ Female ☐ Male

2. Education (Please circle the highest year of school completed):

1 2 3 4 5 6	7 8 9 10 11 12	13 14 15 16	17 18 19 20 21 22	23+
(primary)	(high school)	(college/ university)	(graduate school)	

3. Are you currently working at the:

☐ Investigation Divisions ☐ Other Divisions

4. Working Area:

☐ Seoul ☐ Metropolitan City ☐ City

☐ Rural Area ☐ Other Region

5. Rank of Position:

☐ PC ☐ Sergeant ☐ Inspector

☐ Chief Inspector ☐ Superintendent and Higher ranks

6. How many years have you worked as a police officer (Years of Service):

1 2 3 4 5	6 7 8 9 10	11 12 13 14 15	16 17 18 19 20	21+

RELATIONSHIP WITH SUPERIORS IN THE ORGANISATION

Communication

	Strongly disagree	Disagree	Neutral	Agree	Strongly Agree
7 I frequently participate in decision making process by the superiors.	1	2	3	4	5
8 My superiors are friendly and approachable.	1	2	3	4	5
9 My superiors often ask me my opinions about their directions.	1	2	3	4	5
10 I frequently receive feedback from the superiors.	1	2	3	4	5

Autonomy

	Strongly disagree	Disagree	Neutral	Agree	Strongly Agree
11 I frequently feel difficulty in dealing with duties due to lack of discretion.	1	2	3	4	5
12 I don't have many opportunities to use my personal initiative or discretion.	1	2	3	4	5
13 I have too much responsibility and too few means to meet it.	1	2	3	4	5
14 I often do not feel responsibility to my work because the superiors decide almost everything.	1	2	3	4	5

RELATIONSHIP WITH PROSECUTORS

Process

		Strongly disagree	Disagree	Neutral	Agree	Strongly Agree
15	I frequently carry out duties based on complicated procedure.	1	2	3	4	5
16	For the direction of superiors, I have to make unnecessary paperwork.	1	2	3	4	5
17	I have to report the result of operations to different superiors.	1	2	3	4	5
18	I frequently have difficulty in conducting duties due to poor directions by superiors.	1	2	3	4	5

Perspective on the Prosecution Service

		Strongly disagree	Disagree	Neutral	Agree	Strongly Agree
19	Prosecutors put more emphasis on maintaining prosecution than investigating crimes.	1	2	3	4	5
20	Prosecutor always protects the human rights and justice.	1	2	3	4	5
21	Prosecutorial supervisions always correspond with justice.	1	2	3	4	5
22	Prosecutors do not pass their burden to the police through the instructions.	1	2	3	4	5

ROLE STRESSORS

Role Conflict

	Strongly disagree	Disagree	Neutral	Agree	Strongly Agree
23 I have to do things that should be done differently.	1	2	3	4	5
24 I work under incompatible policies and guidelines.	1	2	3	4	5
25 I receive incompatible requests from two or more people.	1	2	3	4	5
26 I have to work under vague directives and orders.	1	2	3	4	5

Role Ambiguity

	Strongly disagree	Disagree	Neutral	Agree	Strongly Agree
27 I feel certain about how much authority I have.	1	2	3	4	5
28 I know that I have divided my time properly.	1	2	3	4	5
29 I know what my responsibilities are.	1	2	3	4	5
30 I know exactly what is expected of me.	1	2	3	4	5

ROLE STRESSORS

Role Overload

	Strongly disagree	Disagree	Neutral	Agree	Strongly Agree
31 I have too much work to do everything well.	1	2	3	4	5
32 The amount of work I am asked to do is unfair.	1	2	3	4	5
33 I never seem to have enough time to get everything done.	1	2	3	4	5

JOB STRESS

	Strongly disagree	Disagree	Neutral	Agree	Strongly Agree
34 I have felt fidgety or nervous as a result of my job.	1	2	3	4	5
35 My job gets to me more than it should.	1	2	3	4	5
36 There are lots of times when my job drives me right up the wall.	1	2	3	4	5
37 Sometimes when I think about my job I get a tight feeling in my chest.	1	2	3	4	5

- Thank you very much for your help -

References

Ahn, Kyung Ock, 'The Admissibility of Police Interrogation Documents: A Comparative Study' (2009) 25 Journal of Public Security [*Chian-Nonchong*] 101.

Albrecht, Hans-Jorg, 'Criminal Prosecution: Developments, Trends and Open Questions in the Federal Republic of Germany' (2000) 8 European Journal of Crime, Criminal Law and Criminal Justice 245.

Alschuler, Albert W., 'Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process' (1986) 85(3) Mich Law Rev 510.

Alschuler, Albert W., 'The Trial Judge's Role in Plea Bargaining, Part I' (1976) 76 Colum L Rev 1059.

Alschuler, Albert W., 'The Defense Attorney's role in Plea Bargaining' (1975) 84(6) Yale Law J 1179.

Alschuler, Albert W., 'Prosecutor's Role in Plea Bargaining' (1968) 36 U.Chi.L.Rev. 50.

Anderson, Craig A., Mark R. Lepper and Lee Ross, 'Perseverance of Social Theories: The Role of Explanation in the Persistence of Discredited Information' (1980) 39(6) J Pers Soc Psychol 1037.

Ashworth, Andrew, 'Developments in the Public Prosecutor's Office in England and Wales' (2000) 8 European Journal of Crime, Criminal Law and Criminal Justice 257.

Ashworth, Andrew, 'Review of the Crown Prosecution Service' (1998) Crim L R 517.

Ashworth, Andrew and Meredith Blake, 'The Presumption of Innocence in English Criminal Law' (1996) 306 Criminal Law Review.

Ashworth, Andrew, 'Four Threats to the Presumption of Innocence' (2006) 10 International Journal of Evidence & Proof 241.

Ashworth, Andrew and Mike Redmayne, *The Criminal Process* (3rd edn Oxford University Press, Oxford England ; New York 2005).

Ask, Karl and Pär Anders Granhag, 'Motivational Bias in Criminal Investigators' Judgments of Witness Reliability' (2007) 37(3) J Appl Soc Psychol 561.

Aubusson de Cavarlay, Bruno, 'The Prosecution Service Function within the French Criminal Justice System' in Jehle, Jörg-Martin and Marianne Wade (eds), *Coping with Overloaded Criminal Justice Systems: The Rise of Prosecutorial Power Across Europe* (Springer, Berlin; Heidelberg 2006).

Aubusson de Cavarlay, Bruno and others., 'Dealing with Various offence Types in Different Criminal Justice Systems - Case Examples' in Jehle, Jörg-Martin and Marianne Wade (eds), *Coping with Overloaded Criminal Justice Systems: The Rise of Prosecutorial Power Across Europe* (Springer, Berlin; Heidelberg 2006).

Auld, Robin and Great Britain. Lord Chancellor's Dept, *The Review of the Criminal Courts of England and Wales: a Report* (Stationery Office, London 2001).

Baek, Kwang-Hun, Dong-Il Shin and Chun-Hyun Lee, *A Desirable Reform of the Prosecution Service* (Korean Institute of Criminology, Seoul 2003).

Baldwin, John, 'Police Interview Techniques: Establishing Truth or Proof?' (1993) 33(3) Br J Criminol 325.

Bandes, Susan, 'Loyalty to One's Convictions: The Prosecutor and Tunnel Vision' (2006) 49(2) Howard Law J 475.

Barnes, James H. and Noah Webster, *Police Interrogation: Tape Recording* (Royal Commission on Criminal Procedure Research Study No. 8, HMSO, London 1980).

Baruch, Grace K. and Rosalind C. Barnett, 'Role Quality, Multiple Role Involvement, and Psychological Well-being in Midlife Women.' (1986) 51(3) J Pers Soc Psychol 578.

Bator, Paul M., 'Finality in Criminal Law and Federal Habeas Corpus for State Prisoners' (1963) 76(3) Harv Law Rev 441.

Bayley, David H., *Patterns of Policing: A Comparative International Analysis* (Rutgers Univ Pr, 1990).

Beale, Sara S., 'Still Tough on Crime-Prospects for Restorative Justice in the United States' (2003) Utah L.Rev. 413.

Beck, Stephanie, 'Under Investigation: A Review of Police Prosecutions in New Zealand's Summary Jurisdiction' (2006) 12 Auckland University Law Review 150.

Beehr, Terry A., Jeffrey T. Walsh and Thomas D. Taber, 'Relationship of Stress to Individually and Organizationally Valued States: Higher Order needs as a Moderator' (1977) 19(11) Journal of Occupational and Environmental Medicine 771.

Beloof, Douglas E., 'The Third Model of Criminal Process: The Victim Participation Model' (1999) Utah L.Rev. 289.

Belsky, Martin H., 'On Becoming and Being a Prosecutor' (1983) 78 Northwestern University Law Review 1485.

Berelson, Bernard, 'Content Analysis in Communication Research' (1952) New York - Healthcare Related Statutes and Regulations.

Bernard, Thomas J. and Robin Shepard Engel, 'Conceptualizing Criminal Justice Theory' (2001) 18 Justice Quarterly 1-30.

Bibas, Stephanos, 'Prosecutorial Regulation versus Prosecutorial Accountability' (2008) 157 U Pa L Rev 959.

Bibas, Stephanos, 'Transparency and Participation in Criminal Procedure' (2006) 81 NYUL Rev. 911.

Blom, Martine and Paul Smit, 'The Prosecution Service Function within the Dutch Criminal Justice System' in Jehle, Jörg-Martin and Marianne Wade (eds), *Coping with Overloaded Criminal Justice Systems* (Springer Berlin· Heidelberg, 2006).

Bottoms, Anthony E., 'The Suspended Sentence in England, 1967-1978' (1981) 21(1) Br J Criminol 1.

Bottoms, Anthony E. and John D. McClean, *Defendants in the Criminal Process* (Routledge & Kegan Paul, 1976).

Brazier, Rodney, *Constitutional Reform* (Clarendon Press, Oxford 1991).

Bresler, Kenneth, 'I Never Lost a Trial: When Prosecutors Keep Score of Criminal Convictions' (1995) 9 Georgetown Journal of Legal Ethics 537.

Bresler, Kenneth, 'Pretty Phrases: The Prosecutor as Minister of Justice and Administrator of Justice' (1995) 9 Georgetown Journal of Legal Ethics 1301.

Brough, Paula, 'A Comparative Investigation of the Predictors of Work-related Psychological Well-being within Police, Fire and Ambulance Workers' (2005) 34(2) New Zealand Journal of Psychology 127.

Brown, Jennifer M. and Elizabeth A. Campbell, *Stress and Policing: Sources and Strategies* (John Wiley & Sons, Chichester; New York; Brisbane; Toronto; Singapore 1994).

Brownlee, Ian D., 'The Statutory Charging Scheme in England and Wales: Towards a Unified Prosecution System?' (2004) Crim L R 896.

Bryman, Alan, *Social Research Methods* (3rd edn Oxford University Press, Oxford ; New York 2008).

Buchanan, John, US Dept of Justice and National Institute of Justice, *Police-Prosecutor Teams: Innovations in Several Jurisdictions* (US Dept. of Justice, Office of Justice Programs, National Institute of Justice, 1989).

Burke, Ronald J. and Aslaug Mikkelsen, 'Burnout among Norwegian Police Officers: Potential Antecedents and Consequences.' (2006) 13(1) International Journal of Stress Management 64.

Burke, Ronald J. and A. M. Richardson, 'Psychological Burnout in Organizations: Research and Intervention' in Golembiewski, R. T. (ed), *Handbook of organizational behavior* (2nd edn Marcel Dekker, New York 2001).

Burke, Alafair S., 'Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science' (2006) 47(5) William and Mary Law Review 1587.

Butterfield, Neil and Great Britain. Treasury., *Review of Criminal Investigations and Prosecutions Conducted by HM Customs and Excise* (HM Treasury, London 2003).

Byrne, Barbara M., *Structural Equation Modeling with AMOS: Basic Concepts, Applications, and Programming* (2nd edn Routledge, New York; Hove 2010).

Caldeira, Teresa P. R. and James Holston, 'Democracy and violence in Brazil' (1999) 41(04) Comparative Studies in Society and History 691.

Cape, Ed and Richard Young (eds), *Regulating Policing: The Police and Criminal Evidence Act 1984 Past, Present and Future* (Hart Pub., Oxford; Portland, Oregon 2008).

Cardenas, Juan, 'The Crime Victim in the Prosecutorial Process' (1986) 9 Harvard Journal of Law & Public Policy 357.

Carley, Kathleen M., 'Coding Choices for Textual Analysis: A Comparison of Content Analysis and Map Analysis' (1993) Sociological methodology 75.

Carlier, Ingrid V. E., A. E. Voerman and Berhold P. R. Gersons, 'The Influence of Occupational Debriefing on Post-traumatic Stress Symptomatology in Traumatized Police Officers' (2000) 73(1) Br J Med Psychol 87.

Castberg, A. Didrick, 'Effective Administration of Police and Prosecution in the United States' in Eratt, Sean (ed), *UNAFEI Annual Report for 2001 and Resource Material Series No. 60* (UNAFEI, 2003).

Castberg, A. Didrick, 'Prosecutorial Independence in Japan' (1997) 16 UCLA Pac.Basin LJ 38.

Cha, Bung Jik, 'The Development, Characters, and Problems of Korean Legal Profession' (2006) 77 Critical Review of Korean History 46-66.

Chang, Yun-Shik, Seok, Hyun-Ho and Baker, Donald L. (eds), *Korea Confronts Globalization* (Routledge, New York; Abingdon 2009)

Chappell, Duncan and Paul Wilson, *The Australian Criminal Justice System: The Mid 1980s* (1986).

Chemerinsky, Erwin, 'The Role of Prosecutors in Dealing with Police Abuse: The Lessons of Los Angeles' (2000) 8 Va.J.Soc.Pol'y & L. 305.

Cheney, Deborah and others, *Criminal Justice and the Human Rights Act 1998* (Jordans, Bristol 1999).

Chitwood, Oliver Perry, *Justice in colonial Virginia* (Ams Pr Inc, 1905).

Cho, Kuk, 'The Prevention of Inappropriate Interrogation Methods' (Seoul 14th October 2010).

Cho, Kuk, 'Political Independence of the Prosecution Service' *Hankyoreh* (2nd June 2009).

Cho, Kuk, 'The 2007 Revision of the Korean Criminal Procedure Code' (2008) 8 Journal of Korean Law 1.

Cho, Kuk, 'The Ongoing Reconstruction of the Korean Criminal Justice System' (2006) 5(1) Santa Clara Journal of International Law 100.

Cho, Kuk, 'Reallocation of the Investigative Power between Prosecutors and Police Officers' (2005) 46(4) Seoul Law Journal 219-241.

Cho, Kuk, 'The Unfinished "Criminal Procedure Revolution" of Post-Democratization South Korea' (2002) 30(3) Denver J Int Law Policy 377.

Cho, Kuk, 'The Appeal Against Decisions of the Prosecutor as an Exception Being Emphasised' (2000) 8 Hyungsapanre-Yungu 550.

Cho, Kuk, 'Transitional Justice in Korea: Legally Coping with Past Wrongs after Democratization' (2007) 16(3) Pacific Rim Law & Policy Journal 579.

Cho, Kuk, '"Procedural weakness" of German Criminal Justice and its Unique Exclusionary Rules based on the Right of Personality' (2001) 15(1) Temple International and Comparative Law Journal 1.

Cho, Kuk, 'Reconstruction of the English Criminal Justice System and its Reinvigorated Exclusionary Rules' (1999) 21(2) Loyola of Los Angeles International and Comparative Law Journal 259.

Cho, Kuk, 'The Japanese "Prosecutorial Justice" and its Limited Exclusionary Rule' (1998) 12(1) Columbia Journal of Asian Law 39.

Cho, Kuk, 'Tension between the National Security Law and Constitutionalism in South Korea: Security for What?' (1997) 15 Boston University International Law Journal 125.

Chun, Jin Ho, 'A Study on the Efficient Investigation System' (2005) 9 Korean Police Journal 9-44.

Chung, Hae-Chang, 'The Criminal Justice System in Korea: The Role of Public Prosecutor' (1982) 10 Korean Journal of Comparative Law 53-69.

Cole, George F., Stanislaw J. Frankowski and Marc G. Gertz, 'Comparative Criminal Justice: An Introduction' in Cole, George F., Stanislaw J. Frankowski and Marc G. Gertz (eds), *Major Criminal Justice Systems: A Comparative Survey* (Sage Publications, Inc, 1987).

Cole, George F., Stanislaw J. Frankowski and Marc G. Gertz (eds), *Major Criminal Justice Systems: A Comparative Survey* (2nd edn Sage Publications, Inc, 1987).

Cole, George F. and Andrew Sanders, 'Criminal Prosecution in England: Evolution and Change' (1981) 14 Connecticut Law Review 23.

Cole, George F. and Christopher E. Smith, *The American System of Criminal Justice* (12th edn Wadsworth, Belmont 2010).

Collins, Pamela A. and A. C. Gibbs, 'Stress in Police Officers: A Study of the Origins, Prevalence and Severity of Stress-related Symptoms within a County Police Force' (2003) 53(4) Occupational Medicine 256.

Cooper, Cary L., Philip Dewe and Michael P. O'Driscoll, *Organizational Stress: A Review and Critique of Theory, Research, and Applications* (Sage Publications, Inc, 2001).

Cordes, Cynthia L. and Thomas W. Dougherty, 'A Review and an Integration of Research on Job Burnout' (1993) 18(4) Academy of management review 621.

Cumings, Bruce, 'Civil society in West and East' in Armstrong, Carles K. (ed), *Korean Society: Civil Society, Democracy and the State* (2nd edn Routledge, Oxon; New York 2007).

Daft, Richard L. and Robert H. Lengel, 'Organizational Information Requirements, Media Richness and Structural Design' (1986) Management science 554.

Daintith, Terence and Alan C. Page, *The Executive in the Constitution: Structure, Autonomy, and Internal Control* (Oxford University Press, 1999).

Damaska, Mirjan, 'Structures of Authority and Comparative Criminal Procedure' (1974) 84 Yale LJ 480.

Damaska, Mirjan, 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study' (1972) 121 University of Pennsylvania Law Review 506.

Dammer, Harry R., Erika Fairchild and Jay S. Albanese, *Comparative Criminal Justice Systems* (3rd edn Wadsworth/Thomson Learning, Belmont, CA 2006).

Davies, Sharon L., 'The Reality of False Confessions-Lessons of the Central Park Jogger Case' (2005) 30 New York University Review of Law & Social Change 209.

Davis, Angela J., 'The American Prosecutor: Independence, Power, and the Threat of Tyranny' (2001) 86 Iowa L.Rev. 393.

Summers, Mark A. (tr), Delmas-Marty, Mireille, *The Criminal Process and Human Rights: Toward a European Consciousness* (Martinus Nijhoff Publishers, 1995).

Delmas-Marty, Mireille and John R. Spencer (eds), *European Criminal Procedures* (Cambridge University Press, 2002).

Dervieux, Valerie, 'The French system' in Delmas-Marty, Mireille and John R. Spencer (eds), *European Criminal Procedures* (Cambridge University Press, 2002).

Devlin, Patrick, *The Criminal Prosecution in England* (Oxford University Press, London 1960).

Diamond, Larry J. 'Is the Third Wave Over?' (1996) 7 Journal of Democracy 20

Ditto, Peter H. and David F. Lopez, 'Motivated Skepticism: Use of Differential Decision Criteria for Preferred and Nonpreferred Conclusions' (1992) 63 J Pers Soc Psychol 568.

Dixon, David, 'Interrogating Myths. A Comparative Study of Practices, Research, and Regulation' (2010) University of New South Wales Faculty of Law Research Series 40.

Drizin, Steven A. and Richard A. Leo, 'The Problem of False Confessions in the Post-DNA World' (2004) 82 N C Law Rev 891.

Drizin, Steven A. and Marissa J. Reich, 'Heeding the Lessons of History: The Need For Mandatory Recording of Police Interrogations to accurately Assess the Reliability and Voluntariness of Confessions' (2004) 52 Drake L.Rev. 619.

Edwards, Kari and Edward E. Smith, 'A Disconfirmation Bias in the Evaluation of Arguments' (1996) 71(1) J Pers Soc Psychol 5.

Eisenstein, James and Herbert Jacob, *Felony Justice* (Boston: Little, Brown, 1977).

Elsner, Beatrix, Chris Lewis and Josef Zila, 'Police Prosecution Service Relationship within Criminal Investigation' (2008) 14(2-3) European Journal on Criminal Policy and Research 203–224.

Elsner, Beatrix and Julia Peters, 'The Prosecution Service Function within the German Criminal Justice System' in Jehle, Jörg-Martin and Marianne Wade (eds), *Coping with Overloaded Criminal Justice Systems* (Springer, Berlin; Heidelberg 2006).

Elsner, Beatrix, Paul Smit and Josef Zila, 'Police Case-Ending Possibilities within Criminal Investigations' (2008) 14(2-3) European Journal on Criminal Policy and Research 11.

Simpson, John (tr), Esmein, Adhémar, *A History of Continental Criminal Procedure, with Special Reference to France* (The continental legal history series...[vol.v], Little, Brown, and company, Boston 1913).

Fairchild, Erika and Harry R. Dammer, *Comparative Criminal Justice Systems* (2nd edn Wadsworth/Thomson Learning, Belmont, CA 2000).

Felkenes, George T., 'Prosecutor: A Look at Reality' (1975) 7 Sw.UL Rev. 98.

Ferguson-Gilbert, C., 'It Is Not Whether You Win or Lose, It Is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors' (2001) 38 California Western Law Review 283.

Findley, Keith A., 'Innocents at Risk: Adversary Imbalance, Forensic Science, and the Search for the Truth' (2008) 38 Seton Hall Law Rev 893.

Findley, Keith A. and Michael S. Scott, 'The Multiple Dimensions of Tunnel Vision in Criminal Cases' (2006) 2 Wis Law Rev 291.

Finn, Peter and Julie Esselman Tomz, *Developing a Law Enforcement Stress Program for Officers and their Families* (National Institute of Justice: Issues and Practices, DIANE Publishing, 1997).

Fionda, Julia, 'The Crown Prosecution Service and the Police: A Loveless Marriage?' (1994) 110(Jul) Law Q Rev 376.

Fionda, Julia and Andrew Ashworth, 'The New Code for Crown Prosecutors: Part 1: Prosecution, Accountability and the Public Interest' (1994)(Dec) Criminal Law Review 894.

Fionda, Julia, *Public Prosecutors and Discretion: A Comparative Study* ([Oxford monographs on criminal law and criminal justice], Clarendon Press; Oxford University Press, Oxford; New York 1995).

Fisher, Henry, *Report of an Inquiry into the circumstances leading to the trial of three persons on charges arising out of the death of Maxwell Confait and the fire at 27 Doggett Road, London SE6 (HCP 90)* (HMSO, London 1977).

Fisher, Stanley Z., 'The Prosecutor's Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons From England' (1999-2000) 68 Fordham L Rev 1379.

Fisher, Stanley Z., 'In Search of the Virtuous Prosecutor: A Conceptual Framework' (1988) 15 Am J Crim Law 197.

Fisher, Howard D., *The German Legal System and Legal Language: A General Survey together with Notes and German Vocabulary* (4th edn Routledge-Cavendish, London ; New York 2009).

Flaherty, David H., 'An Introduction to Early American Legal History' in Flaherty, David H. (ed), *Essays in the history of early American law* (Published for the Institute of Early American History and Culture of Williamsburg, Va., by the University of North Carolina Press, Chapel Hill 1969).

Flatman, Geoff, 'Independence of the Prosecutor' (Australian Institute of Criminology Conference Australian Institute of Criminology, Melbourne 18-19 April 1996) accessed 23 January 2009.

Foote, Daniel H., 'The Benevolent Paternalism of Japanese Criminal Justice' (1992) 80 Cal.L.Rev. 317.

Foote, Daniel H., 'Confessions and the Right to Silence in Japan' (1991) 21 Georgia Journal of International and Comparative Law 415.

Frase, Richard S., 'Comparative Criminal Justice as a Guide to American Law Reform: How do the French do it, how can we find out, and why should we care' (1990) 78 Calif Law Rev 539.

Frase, Richard S. and Thomas Weigend, 'German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions' (1995) 18 Boston College International and Comparative Law Review 317.

George, B. J., 'Screening, Diversion and Mediation in the United States' (1984) 29 NYL Sch.L.Rev. 1.

Gershman, Bennett L., 'Prosecutor's Duty to Truth' (2000) 14 Georgetown Journal of Legal Ethics 309.

Gershman, Bennett L., 'The New Prosecutors' (1991) 53 U.Pitt.L.Rev. 393.

Gershman, Bennett L., 'Burger Court and Prosecutorial Misconduct' (1985) 21(3) Crim Law Bull 217.

Ginsburg, Tom, *Legal reform in Korea* (RoutledgeCurzon advances in Korean studies, RoutledgeCurzon, London ; New York 2004).

Glaeser, Edward L. and Andrei Shleifer, 'Legal Origins' (2002) 117(4) Q J Econ 1193.

Glidewell Working Group. 'An Early Assessment of Collocated Criminal Justice Units' <http://www.cps.gov.uk/publications/research/collocjus.html> accessed on 10 August 2008.

Iain Glidewell, 'The Review of the Crown Prosecution Service' The Stationery Office (Cm 3960, London) <http://www.archive.official-documents.co.uk/document/cm39/3972/3972.htm>

Goldberg, Judith A. and David M. Siegel, 'The Ethical Obligations of Prosecutors in Cases Involving Postconviction Claims of Innocence' (2001) 38 California Western Law Review 389.

Goldstein, Abraham S., 'Defining the Role of the victim in Criminal Prosecution' (1982) 52 Miss.LJ 515.

Goldstein, Abraham S., *The Passive Judiciary: Prosecutorial Discretion and the Guilty Plea* (Louisiana State University Press, Baton Rouge, 1981).

Goldstein, Abraham S., 'Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure' (1973) 26 Stan.L.Rev. 1009.

Goldstein, Abraham S., 'The State and the Accused: Balance of Advantage in Criminal Procedure' (1959) 69 Yale LJ 1149.

Goldstein, Abraham S. and Martin Marcus, 'The Myth of Judicial Supervision in Three Inquisitorial Systems: France, Italy, and Germany' (1977) 87 Yale LJ 240.

Goldstein, Joseph, 'Police Discretion Not to Invoke the Criminal Process; Low-Visibility Decisions in the Administration of Justice' (1959) 69 Yale LJ 543.

Gomme, Ian M. and Mary P. Hall, 'Prosecutors at Work: Role Overload and Strain' (1995) 23(2) Journal of Criminal Justice 191.

Goodman, Marcia E., 'Exercise and Control of Prosecutorial Discretion in Japan' (1986) 5 UCLA Pac.Basin LJ 16.

Green, Bruce A., 'Why Should Prosecutors Seek Justice' (1998) 26 Fordham Urban Law J 607.

Green, Bruce A. and Fred C. Zacharias, 'Prosecutorial Neutrality' (2004) Wis L Rev 837.

Griffin, Leslie, 'Prudent Prosecutor' (2000) 14 Georgetown Journal of Legal Ethics 259.

Griffiths, John, 'Ideology in Criminal Procedure or a Third Model of the Criminal Process' (1969) 79 Yale LJ 359.

Gudjonsson, Gisli H., *The Psychology of Interrogations and Confessions: A Handbook* (John Wiley & Sons Ltd, 2003).

Gudjonsson, Gisli H. and Jon F. Sigurdsson, 'How Frequently do False Confessions Occur? An Empirical Study among Prison Inmates' (1994) 1(1) Psychology, Crime & Law 21.

Ha, Tae-Hun, 'Political Prosecutor [*Jungchi Kumchal*]' (2008)(9) Participatory Society [*Chamyusahoi*].

Hafetz, Jonathan L., 'Pretrial Detention, Human Rights, and Judicial Reform in Latin America' (2002) 26 Fordham Int'l LJ 1754.

Haley, John O., 'The Japanese Judiciary: Maintaining Integrity, Autonomy and the Public Trust' in Foote, Daniel H. (ed), *Law in Japan: A Turning Point* (Univ of Washington Pr, 2008).

Hamai, Koichi and Tom Ellis, 'Genbatsuka: Growing Penal Populism and the Changing Role of Public Prosecutors in Japan?' (2008) 33 Japanese Journal of Sociological Criminology 67.

Hampton, Jean, 'Democracy and the Rule of Law' (1994) The Rule of Law 15.

Han, In Seop, 'Legal Control on High Profile Corruption: the Public Prosecutor's Role and Limitation' in *A Vision for the New Millennium: The Establishment of Transparent Society* (The Korean Association for Public Administration, Seoul 1999).

Han, Sang Hee, 'The Change of the Prosecution Service' (2008)(9) Participatory Society [*Chamyusahoi*].

Hardy, Margaret and W. Hardy, 'Role Stress and Role Strain' in Hardy, Margaret E. and Mary E. Conway (eds), *Role Theory: Perspectives for Health Professionals* (2nd edn Appleton & Lange, Norwalk 1988).

Harris, David J., M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (Butterworths, London, Dublin, Edinburgh 1995).

Hart, Peter M., Alexander J. Wearing and Bruce Headey, 'Police Stress and Well-being: Integrating Personality, Coping and Daily Work Experiences' (1995) 68(2) J Occup Organ Psychol 133.

Harvey, Rod, 'The Independence of the Prosecutor: A Police Perspective' (Prosecuting Justice Australian Institute of Criminology, Melbourne 18-19 April 1996) accessed 23 January 2009.

Hatchard, John, Barbara Huber and Richard Vogler, *Comparative Criminal Procedure* (British Institute of International and Comparative Law, 1996).

Hawkins, Keith, *Law as Last Resort: Prosecution Decision-making in a Regulatory Agency* (Oxford University Press, USA, 2002).

Hazareesingh, Sudhir, *Political Traditions in Modern France* (Oxford University Press, 1994).

Heinz, Wolfgang, 'Diversion in German Juvenile Justice: Its Practice, Impact, and Penal Policy Implications' in Albrecht, Günter and Wolfgang Ludwig-Mayerhofer (eds), *Diversion and Informal Social Control* (Walter de Gruyter, 1995).

Hellman, Chan M., 'Job Satisfaction and Intent to Leave' (1997) 137(6) J Soc Psychol 677.

Herbst, Karl P., 'The Chinese Criminal Process: Revolutionary Ideology and Human Rights' 30 Stanford Law Rev 469.

Herman, Susan N., 'Tail that Wagged the Dog: Bifurcated Fact-Finding under the Federal Sentencing Guidelines and the Limits of Due Process, The' (1992) 66 S.Cal.L.Rev. 289.

T. Alexander Hickman, 'Royal Commission on the Donald Marshall, Jr., Prosecution: Report' Lieutenant Governor in Council (Nova Scotia)

Hilgendorf, E. Linden and Barrie Irving, 'A Decision-making Model of Confessions' in Lloyd-Bostock, Sally M. (ed), *Psychology in Legal Contexts. Applications and Limitations* (MacMillan, London 1981).

HM Crown Prosecution Service Inspectorate, *Assuring Justice: HM Chief Inspector of the Crown Prosecution Service Annual Report 2008-2009* (The Stationary Office, London 2009).

Hodgson, Jacqueline, *French Criminal Justice: A Comparative Account of the Investigation and Prosecution of Crime in France* (Blackwell Synergy, 2005).

Hodgson, Jacqueline, 'The Detention and Interrogation of Suspects in Police Custody in France: A Comparative Account' (2004) 1(2) European Journal of Criminology 163.

Hodgson, Jacqueline, 'Hierarchy, Bureaucracy, and Ideology in French Criminal Justice: Some Empirical Observations' (2002) 29(2) Journal of Law and Society 227.

Hodgson, Jacqueline, 'The Police, the Prosecutor and the Juge D'Instruction: Judicial Supervision in France, Theory and Practice' (2001) 41(2) Br J Criminol 342.

Hodgson, Jacqueline, 'Vulnerable Suspects and the Appropriate Adult' (1997) Crim. L. R. 785.

Hoffman, Vincent J., 'The Development of Modern Police Agencies in the Republic of Korea and Japan: A Paradox' (1982) 5 Policing: An International Journal of Police Strategies & Management 3.

Holsti, Ole R., *Content Analysis for the Social Sciences and Humanities* (Addison-Wesley Reading, MA, 1969).

Home Office/Law Officers' Department, 'An Independent Prosecution Service For England and Wales' HMSO (Cmnd 9074, London).

Home Office and Martin Narey, *Review of Delay in the Criminal Justice System: a Report* (Home Office, London 1997).

Hong, Mi-Young, *The Relationship between the Police and Prosecutors: A Survey* (Korean National Assembly, Seoul 2005).

House, Robert J. and John R. Rizzo, 'Role Conflict and Ambiguity as Critical Variables in a Model of Organizational Behavior' (1972) 7(3) Organ Behav Hum Perform 467.

Houston, James, Phillip B. Bridgmon and William W. Parsons, *Criminal Justice and the Policy Process* (University Press of America, Lanham; Plymouth 2008).

Howard, Margaret, 'The Law of Unintended Consequences' (2006) 31 S Ill ULJ 451.

Illinois. Governor's Commission on Capital Punishment, *Report of the Governor's Commission on Capital Punishment* (State of Illinois, Springfield, Ill. 2002).

Illuminati, Giulio, 'Frustrated Turn to Adversarial Procedure in Italy (Italian Criminal Procedure Code of 1988), The' (2005) 4 Washington University Global Studies Law Review 567.

Inbau, Fred E. and others, *Criminal Interrogation and Confessions* (4th edn Jones & Bartlett Learning, 2004).

Ishimatsu, Takeo, 'Are Criminal Defendants in Japan Truly Receiving Trials by Judges?' in Foote, Daniel H. (tr), *Law in Japan* (1989).

Jackson, John D., 'The Ethical Implications of the Enhanced Role of the Public Prosecutor' (2006) 9(1) Legal Ethics 35.

Jackson, John D., 'The Effect of Legal Culture and Proof in Decisions to Prosecute' (2004) 3(2) Law, Probability and Risk 109.

Jackson, John D., 'Theories of Truth Finding in Criminal Procedure: An Evolutionary Approach' (1988) 10 Cardozo Law Review 475.

Jackson, John D. and R. Castle, 'The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?' (2005) 68(5) Modern Law Review 737.

Jacoby, Joan E., 'The American Prosecutor: From Appointive to Elective Status' (1997) 31(5) The Prosecutor.

Jamal, Muhammed, 'Burnout, Stress and Health of Employees on Non-standard Work Schedules: A Study of Canadian Workers' (2004) 20(3) Stress Health 113.

Jamal, Muhammed and Vishwanath V. Baba, 'Job Stress and Burnout among Canadian Managers and Nurses: An Empirical Examination' (2000) 91(6) Canadian Journal of Public Health 454.

Jang, Chul Cho, 'The Right to a Fair Trial' (1997) 76 Jaepanjaryo 491.

Jawahar, Jim I. M., Thomas H. Stone and Jennifer L. Kisamore, 'Role Conflict and Burnout: The Direct and Moderating Effects of Political Skill and Perceived Organizational Support on Burnout Dimensions' (2007) 14(2) International Journal of Stress Management 142.

Jehle, Jörg-Martin, *Criminal Justice in Germany: Facts and Figures* (5th edn Federal Ministry of Justice, Berlin 2009).

Jehle, Jörg-Martin, Paul Smit and Josef Zila, 'The Public Prosecutor as Key-Player: Prosecutorial Case-Ending Decisions' (2008) 14(2) European Journal on Criminal Policy and Research 161.

Jehle, Jörg-Martin, Marianne Wade and Beatrix Elsner, 'Prosecution and Diversion within Criminal Justice Systems in Europe: Aims and Design of a Comparative Study' (2008) 14(2-3) European Journal on Criminal Policy and Research 7.

Jehle, Jörg-Martin and others, *Coping with Overloaded Criminal Justice Systems: The Rise of Prosecutorial Power across Europe* (Springer, Berlin ; New York 2006).

Jeong, Ik Won, 'Prosecutorial Role for the Prevention of Crimes' (March 1970) Prosecution Service [*Keomchal*] 36.

Johns, Margaret Z., 'Reconsidering Absolute Prosecutorial Immunity' (2005) 2005 Brigham Young University Law Review 53.

Johnson, David T., *The Japanese Way of Justice: Prosecuting Crime in Japan* (Studies on law and social control, Oxford University Press, Oxford England ; New York 2002).

Johnson, David T., 'Organization of Prosecution and the Possibility of Order' (1998) 32 Law & Society Review 247.

Jonakait, Randolph N., 'The Ethical Prosecutor's Misconduct' (1987) 23(6) Crim Law Bull 18.

Jung, Byung Dae, *Investigation Structure: A Comparative Study* (Legal Research and Training Institute, 2007).

Jung, Jin-Su and others, *21C The Direction for the Reform of the Criminal Justice System and the Development of Judicial Service [II, IV]* (Korean Institute of Criminology, Seoul 2004).

Jung, Wan and Jin Kuk Lee, 'The Analysis of the Relocation of Investigative Power' (2003) 14(2) Korean Criminal Justice Journal 157.

Jung, Woong Suk, *A Study on the Public Prosecutor's Supervision over the Police Investigation* (Dae Myung Press, Seoul 2007).

Justice, 'The Prosecution Process in England and Wales' (1970) Crim L R 668.

Juy-Birmann, Rodolphe, 'The German system' in Delmas-Marty, Mireille and John R. Spencer (eds), *European Criminal Procedures* (Cambridge University Press, 2002).

Kahn, Robert L. and Robert P. Quinn, 'Role stress: A framework for analysis' in McLean, Alan A. (ed), *Occupational Mental Health* (Rand McNally, New York 1970).

Kaminski, Robert J. and David W. M. Sorensen, 'A Multivariate Analysis of Individual, Situational and Environmental Factors Associated with Police Assault Injuries' (1995) 14(3) Am J Police 3.

Kassin, Saul M., 'The Psychology of Confession Evidence' (1997) 52(3) Am Psychol 221.

Kassin, Saul M. and others, 'Police-Induced Confessions: Risk Factors and Recommendations' (2010) 34(1) Law Hum Behav 3.

Kassin, Saul M. and Gisli H. Gudjonsson, 'The Psychology of Confessions' (2004) 5(2) Psychological Science in the Public Interest 33.

Kavka, Gregory S., *Hobbesian Moral and Political Theory* (Princeton Univ Pr, Princeton 1986).

Khanna, Vikramaditya S., 'Double Jeopardy's Asymmetric Appeal Rights: What Purpose Do They Serve' (2002) 82 B U L Rev 341.

Khanna, Vikramaditya S., 'How does Double Jeopardy Help Defendants?' (2001) Discussion Paper no. 315.

Kim, Chan Jin, 'Constitutional Review in Korea' (2006) 34 Korean Journal of International and Comparative Law 29.

Kim, Haeng Sern, 'A Brief Review on the Prosecution's Attempt to Adopt Foreign Judicial Systems and New Types of Crimes' (2010) 43 Democratic Legal Studies [*Minju Beophak*] 317.

Kim, Hak-Bae, 'The Reasonable Reallocation of the Investigative Powers between the Police and Prosecutors: The Perspective of the Police' in Supreme Prosecutors' Office and National Police Agency (eds), *Public Hearing for Allocating Investigative Powers in Korea* (SPO; NPA, Seoul 2005).

Kim, Hee Su and others, *Prosecutorial Republic of Korea* (Samin, Seoul 2011).

Kim, Hee-Kyoon, 'The Role of the Public Prosecutor in Korea: Is He Half-Judge' (2006) 6 J.Korean L. 163.

Kim, Hoe-Jae, 'The Scope of Supervision of the Public Prosecutor over the Investigation of the Police' (Public Prosecutors' Office and Police Agency, Seoul 11 April 2005) 99-196.

Kim, Il Soo, *New Perspectives On the Prosecutorial Culture* (Se-Chang Pub., Seoul 2010).

Kim, Jae-On and Charles W. Mueller, *Introduction to Factor Analysis: What it is and how to do it* (Sage Publications, Inc, 1978).

Kim, Jong Gu, *The Reform of the Korean Criminal Justice System* (2nd edn BuB-Mun-Sa, Seoul 2004).

Kim, Sun-Hyuk, 'Civil Society and Democratization in South Korea' in Armstrong, Carles K. (ed), *Korean Society: Civil Society, Democracy and the State* (2nd edn Routledge, Oxon; New York 2007).

Kim, Yong Se, 'The Problems of the Current Investigation System' (2000) 19(1) Daejon Social Sciences Journal 77.

Kim, Young-Chul, 'The Effective System of Criminal Investigation and Prosecution in Korea' (2003) 60 UNAFEI Annual Report For 2001 and Resource Material Series 77-93.

Kirk, David, 'All Change' (2008) 72(3) Journal of Criminal Law 179.

Kittayarak, Kittipong and David T. Johnson, 'Prosecution in Seven Countries: A Comparative Study' (1994) ACPF TODAY.

Kohli, Ajay K., 'Some Unexplored Supervisory Behaviors and their Influence on Salespeople's Role Clarity, Specific Self-Esteem, Job Satisfaction, and Motivation' (1985) 22(4) J Market Res 424.

Kop, Nicolien, Martin Euwema and Wilmar Schaufeli, 'Burnout, Job Stress and Violent Behaviour among Dutch Police Officers' (1999) 13(4) Work & Stress 326.

Korea (Republic) and Gerhard O. W. Mueller, *Korean Criminal Code* (The American series of foreign penal codes, F.B. Rothman, South Hackensack, N.J. 1960).

Korean Institute of Criminology, *Source Book on the Establishment of Korean Criminal Procedure Code* (Korean Institute of Criminology, Seoul 1990).

Korean Supreme Prosecutors' Office, *The History of Public Prosecutors' Office Law* (KSPO, Seoul 1996).

Koyama, Masaki, 'The Public Prosecutor, Criminal Law and the Rights of Accused in Japan: Yet to Strike a Balance?' in Nagel, Stuart S. (ed), *Handbook of Global Legal Policy* (CRC, 2000).

Krippendorff, Klaus, *Content Analysis: An Introduction to its Methodology* (Sage, 2004).

Kuckes, Niki, 'The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury' (2006) 94 Georgetown Law J 1265.

Kuckes, Niki, 'The Useful, Dangerous Fiction of Grand Jury Independence' (2004) 41 Am Crim Law Rev 1.

Kye, Kyoung-Moon, 'Evidential Capacity of Protocol About Suspect Examination Written by the Prosecutor' (2005) 17 Kukmin Law Journal 141.

LaFave, Wayne R., 'The Prosecutor's Discretion in the United States' (1970) 18(3) The American Journal of Comparative Law 532.

LaFave, Wayne R., 'Detention for Investigation by the Police: An Analysis of Current Practices' (1962) Wash.ULQ 331.

LaFave, Wayne R., Jerold H. Israel and Nancy J. King, *Criminal Procedure* (Hornbook series, 3rd edn West Group, St. Paul, Minn. 2000).

Lam, Danny, Jeremy T. Paltiel and John H. Shannon, 'The Confucian Entrepreneur? Chinese Culture, Industrial Organization, and Intellectual Property Piracy in Taiwan' (1994) 20(4) Asian Affairs 205.

Langbein, John H., 'Controlling Prosecutorial Discretion in Germany' (1974) 41(3) The University of Chicago Law Review 439.

Langbein, John H., 'The Origins of Public Prosecution at Common Law' (1973) 17(4) The American Journal of Legal History 313.

Langbein, John H., *Prosecuting Crime in the Renaissance: England, Germany, France* (Studies in legal history, Harvard University Press, Cambridge, Mass. 1974).

Lee, Dong Hee, 'The Reality of Interrogation and its Remedy' (2003) 20(1) Journal of Korean Criminal Law [*Hyungsabeop Yeonku*] 219.

Lee, Dong Hee and others, *Investigation Systems: A Comparative Study [Bigyosusajedoron]* (Pakyoungsa, Seoul 2004).

Lee, Dong-Hee, 'The Reform of Korean Criminal Procedure and Its Impact on the Role of the Police and Prosecution Service' (2005) 9 Korean Police Journal 45-75.

Lee, Dong-Hee, 'A Comparative Study on the Structure of Crime Investigation Authorities in Korea and the Reform Strategy' (2004) 7 Korean Police Journal 146.

Lee, Ho Joong, 'Reformation and Democratic Control of the Public Prosecution Service' (2008) 9(2) Seo-Kang Law Journal 43.

Lee, Ho Joong, 'Criminal Procedure and Related Human Rights' (2006) 19 Hanyang Law Journal 45.

Lee, Hwan-Beom, Soo-Chang Lee and Deog-Bo Shim, 'The Effects of Police Investigator's Role Conflict on Job Stress in Korean Police Investigation Structure' (2007) 45(1) Korea Journal of Public Administration [Hangjeong Nonchong] 255.

Lee, Jae-Sang, *Korean Criminal Procedure* (2nd edn Park Young Sa, Seoul 2008).

Lee, Wan Kyu, *The Status of the Korean Public Prosecutor* (Sungmin, Seoul 2005).

Lee, Woong Hyuk, 'The Analysis of Multiple Organizational Outcome of the Public Prosecution Service' (2006) 15(1) Korean Journal of Public Administration 3.

Lee, Young-Lan, 'Korean Investigation System' (1995) 7 Korean Criminal Justice Journal 187-205.

Lee, Peter H. and William Theodore De Bary, *Sources of Korean Tradition: Volume II from the Sixteenth to the Twentieth Centuries* (Introduction to Asian civilizations, Columbia University Press, New York; Chichester 1997).

Leo, Richard A., *Police Interrogation and American Justice* (Harvard Univ Pr, 2008).

Leo, Richard A., 'Police Interrogation and Social Control' (1994) 3 Social and Legal Studies 93.

Leo, Richard A. and Deborah Davis, 'From False Confession to Wrongful Conviction: Seven Psychological Processes' (2009) Journal of Psychiatry and Law 2.

Leo, Richard A. and Richard J. Ofshe, 'The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation' (1998) Journal of Criminal Law and Criminology 429.

Leo, Richard A. and Kimberly D. Richman, 'Mandate the Electronic Recording of Police Interrogations' (2007) 6(4) Criminology and Public Policy 791.

Levasseur, Alain A., 'The Major Periods of Louisiana Legal History' (1995) 41 Loyola Law Review 585.

Lewis, Chris, 'The Prosecution Service Function within the English Criminal Justice System' in Jehle, Jörg-Martin and Marianne Wade (eds), *Coping with Overloaded Criminal Justice Systems* (Springer Berlin· Heidelberg, 2006).

Lidstone, K. W. and T. L. Early, 'Questioning Freedom: Detention for Questioning in France, Scotland and England' (1982) 31(03) International and Comparative Law Quarterly 488.

Lim, Hyun-Chin, 'Stumbling Democracy in South Korea: The Impacts of Globalization and Restructuring' in Yun-Shik Chang, Hyun-Ho Seok and Donald L. Baker (eds), *Korea Confronts Globalization* (Routledge, New York; Abingdon 2009).

Little, Rory K., 'Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role' (1999) 68 Fordham Law Review 723.

Lord, Charles G., Lee Ross and Mark R. Lepper, 'Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence' (1979) 37(11) J Pers Soc Psychol 2098.

Lord, Vivian B., 'An Impact of Community Policing: Reported Stressors, Social Support, and Strain among Police Officers in a Changing Police Department' (1996) 24(6) Journal of Criminal Justice 503.

Love, Kevin G. and others, 'Symptoms of Undercover Police Officers: A Comparison of Officers Currently, Formerly, and Without Undercover Experience' (2008) 15(2) International Journal of Stress Management 136.

Ma, Yue, 'Exploring the Origins of Public Prosecution' (2008) 18(2) International Criminal Justice Review 190.

Ma, Yue, 'A Comparative View of the Law of Interrogation' (2007) 17(1) International Criminal Justice Review 5.

Ma, Yue, 'Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany, and Italy: A Comparative Perspective' (2002) 12 International Criminal Justice Review 22.

Macdonald, Ken, 'Building a Modern Prosecuting Authority' (2008) 22(1) International Review of Law, Computers & Technology 7.

Manin, Bernard, 'Checks, Balances and Boundaries: The Separation of Powers in the Constitutional Debate of 1787' in Fontana, Biancamaria (ed), *The Invention of the Modern Republic* (Cambridge University Press, Cambridge 1994).

Mann, Prem S., *Introductory Statistics* (6th edn John Wiley & Sons, 2007).

Manning, Peter K., *Symbolic Communication: Signifying Calls and the Police Response* (The MIT press, 1988).

Maravall, Jose Maria and Adam Przeworski (eds), *Democracy and the Rule of Law* (Cambridge University Press, 2003).

Martin, Dianne L., 'Lessons about Justice from the Laboratory of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence' (2001) 70 UMKC Law Review 847.

Martinussen, Monica, Astrid M. Richardsen and Ronald J. Burke, 'Job Demands, Job Resources, and Burnout among Police Officers' (2007) 35(3) Journal of Criminal Justice 239.

Marzuk, Peter M. and others, 'Suicide among New York City Police Officers, 1977-1996' (2002) 159(12) Am J Psychiatry 2069.

Maute, Judith L., 'In Pursuit of Justice in High Profile Criminal Matters' (2001) 70 Fordham Law Review 1745.

McCloskey, James, 'Convicting the Innocent' (1989) 8 Crim.Just.Ethics 2.

McConville, Mike and John Baldwin, 'The Role of Interrogation in Crime Discovery and Conviction' (1982) 22(2) Br J Criminol 165.

McConville, Mike and John Baldwin, *Courts, Prosecution, and Conviction* (Clarendon, Oxford 1981).

McConville, Mike and Chester Mirsky, 'The Rise of Guilty Pleas: New York, 1800-1865' (1995) 22(4) Journal of Law and Society 443.

McConville, Mike and Philip Morrell, 'Recording the Interrogation: Have the Police Got It Taped?' (1983) Criminal Law Review 158.

McConville, Mike, Andrew Sanders and Roger Leng, *The Case for the Prosecution: Police Suspects and the Construction of Criminality* (Routledge, London 1991).

McCreary, Donald R. and Megan M. Thompson, 'Development of Two Reliable and Valid Measures of Stressors in Policing: The Operational and Organizational Police Stress Questionnaires' (2006) 13(4) International Journal of Stress Management 494.

McIntyre, Donald M., 'Impediments to Effective Police-Prosecutor Relationships' (1975) 13 Am Crim Law Rev 201.

Medwed, Daniel S., 'The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence' (2004) 84 Boston University Law Review 125.

Merton, Robert K., 'The Unanticipated Consequences of Purposive Social Action' (1936) 1(6) Am Sociol Rev 894.

Montgomery, Daniel Cameron, Jeffrey G. Blodgett and James H. Barnes, 'A Model of Financial Securities Salespersons' Job Stress' (1996) 10(3) Journal of Services Marketing 21.

Moohr, Geraldine S., 'Prosecutorial Power in an Adversarial System: Lessons from Current White Collar Cases and the Inquisitorial Model' (2004) 8(1) Buffalo Criminal Law Review 165.

Moore, Mark H., 'Notable Speech: Legitimizing Criminal Justice Policies and Practices' (1997) 66(10) FBI Law Enforcement Bulletin 8.

Moston, Stephen and Geoffrey M. Stephenson, *The Questioning and Interviewing of Suspects Outside the Police Station* (Royal Commission on Criminal Procedure Research Study No. 22, HMSO, London 1993).

Mun, Jun Young, *The Establishment of the Court and Prosecution Service in Korea* (Yuksa Bypyung Sa, Seoul 2010).

Mun, Jun Young, 'The Checks on the Prosecutorial Powers by the Citizens' (2005) 29 Democratic Legal Studies [*Minju Beophak*] 173.

Murray, John, 'Paralegal Police Prosecutor--For How Long?' (From Improving Access to Justice: The Future of Paralegal Professionals Australian Institute of Criminology, Canberra 19-20 February 1990 1991) 97-101 accessed 23 January 2009.

Nagashima, Atsushi, 'The Accused and Society: The Administration of Criminal Justice in Japan' in Von Mehren, Arthur Taylor (ed), *Law in Japan: The Legal Order in a Changing Society* (Harvard University Press, Cambridge, Mass. 1963).

Namenwirth, J. Zvi and Robert P. Weber, *Dynamics of Culture* (Allen & Unwin Boston, 1987).

Nelken, David and Michael Levi, 'The Corruption of Politics and the Politics of Corruption: An Overview' (1996) Journal of Law and Society 1.

Newman, Deborah W. and M. LeeAnne Rucker-Reed, 'Police Stress, State-Trait Anxiety, and Stressors among US Marshals' (2004) 32(6) Journal of Criminal Justice 631.

Nickerson, Raymond S., 'Confirmation Bias: A Ubiquitous Phenomenon in Many Guises' (1998) 2 Review of General Psychology 175.

O'Donnell, Guillermo, 'Delegative Democracy' (1994) 5 Journal of Democracy 55.

O'Driscoll, Michael P. and Terry A. Beehr, 'Supervisor Behaviors, Role Stressors and Uncertainty as Predictors of Personal Outcomes for Subordinates' (1994) 15(2) J Organ Behav 141.

Ofshe, Richard J. and Richard A. Leo, 'The Decision to Confess Falsely: Rational Choice and Irrational Action' (1997) 74(4) Denver Univ Law Rev 979.

Ofshe, Richard J. and Richard A. Leo, 'The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions' (1997) 16 STUDIES IN LAW POLITICS AND SOCIETY 189.

Oh, Byung Ju, *An Examination about the Rationalization of Judgments* (Pusan High Prosecutors' Office, Pusan 2003).

Oh, Jae Rock, *Bureaucratic Power in Korea* (Korean Studies Information, Paju 2007).

Packer, Herbert L., *The Limits of the Criminal Sanction* (Stanford University Press, Stanford, Calif. 1968).

Padfield, Nicola, *Text and Materials on the Criminal Justice Process* (4th edn Oxford University Press, Oxford ; New York 2008).

Pakes, Francis J., *Comparative Criminal Justice* (Willan Publishing, Cullompton; Portland 2004).

Pakes, Francis J., 'The Positioning of the Prosecution Service in the Netherlands and England and Wales: Lessons from One Extreme to Another' (1999) 21(2) Liverpool Law Rev 261.

Panzavolta, Michele, 'Reforms and Counter-Reforms in the Italian Struggle for an Accusatorial Criminal Law System' (2004) 30 North Carolina Journal of International Law and Commercial Regulation 577.

Park, No Seop, 'The Adoption of Plea Bargaining in Korea' (2008) 20(1) Journal of Korean Criminal Law [*Hyungsabeop Yeonku*] 115.

Park, No-Wook and Rohini Somanathan, 'Patronage in Public Administration: Presidential Connections, Position Assignments and the Performance of Korean Public Prosecutors, 1992-2000' (NEUDC 2001 Conference at Boston University 2004).

Park, Sang Jin, 'Suggestions for Reforming the Prosecution of Organization and Prosecution of Power' (2002) 15 Kun Kuk Journal of Social Science 75.

Parker, Donald F. and Thomas A. DeCotiis, 'Organizational Determinants of Job Stress' (1983) 32(2) Organ Behav Hum Perform 160.

Parloff, Roger, 'False Confessions' (1993) Am Law.

Pellechia, Marianne G., 'Trends in Science Coverage: A Content Analysis of Three US Newspapers' (1997) 6(1) Public Understanding of Science 49.

People's Solidarity for Participatory Democracy, *Political Prosecutors* (PSPD, Seoul 2009).

Sir Cyril Phillips, 'The Royal Commission on Criminal Procedure: Report' HMSO (Cmnd 8092, London)

Pizzi, William T., 'Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform' (1993) 54 Ohio St.LJ 1325.

Pizzi, William T. and Luca Marafioti, 'New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation' (1992) 17 Yale J.Int'l L. 1.

Presidential Committee on Human Rights, *A Survey on the Infringement on Human Rights During the Investigation* (PCHR, Seoul 2003).

Presidential Committee on Planning Policies, *Judicial Reform: For Developed and Democratic Criminal Justice System* (Presidential Office, Seoul 2008).

Presidential Committee on the Judicial Reform, 'Committee Report (IV): From 14th to 27th Conference' PCJR (Seoul January 2005)

Presidential Committee on the Judicial Reform, 'Committee Report (III): From 1st to 13th Conference' PCJR (Seoul May 2004)

Raeder, Myrna, 'What Does Innocence Have to Do with it? A Commentary on Wrongful Convictions and Rationality' (2003) Mich St L Rev 1315.

Ramsey, Carolyn B., 'The Discretionary Power of" Public" Prosecutors in Historical Perspective' (2002) 39(4) Am Crim Law Rev 1309.

Rankin, Anne, 'The Effect of Pretrial Detention' (1964) 39 NYUL Rev. 641.

Recasens, Amadeu, 'The Control of Police Powers' (2000) 8(3) European Journal on Criminal Policy and Research 247.

Reckewerth, Sven, 'The Role of the Prosecution in German Criminal Procedure' (1998) 7 Tilburg Foreign L.Rev. 65.

Reiss, Albert J., 'Public Prosecutors and Criminal Prosecution in the United States of America' (1975) 20 Juridical Review, I.

Richman, Daniel C., 'Old Chief v. United States: Stipulating Away Prosecutorial Accountability' (1997) 83 Va.L.Rev. 939.

Richman, Daniel C. and others, 'Panel Discussion: The Expanding Prosecutorial Role from Trial Counsel to Investigator and Administrator' (1999) 26 Fordham Urban Law J 679.

Rizzo, John R., R. J. House and Sidney I. Lirtzman, 'Role Conflict and Ambiguity in Complex Organizations' (1970) 15(2) Adm Sci Q 150.

Rizzolli, Matteo, 'Why Public Prosecutors Cannot Appeal Acquittals' (2008) JEL Classifications K4 Working Paper Series.

Roach, Kent, 'Four Models of the Criminal Process' (1998) 89 Journal of Criminal Law and Criminology 671.

Roberts, John, 'The Possibilities of Accountability' (1991) 16(4) Accounting, Organizations and Society 355.

Roberts, Paul and Adrian A. S. Zuckerman, *Criminal Evidence* (Oxford University Press, 2004).

Robinson, Cyril D. and Richard Scaglion, 'The Origin And Evolution Of The Police Function In Society: Notes Toward A Theory' (1987) 21(1) Law and Society Review 109-152.

Rodrigues, Corinne D., 'Civil Democracy, Perceived Risk, and Insecurity in Brazil: An Extension of the Systemic Social Control Model' (2006) 605(1) Ann Am Acad Pol Soc Sci 242.

Roots, Roger I., 'When Laws Backfire' (2004) 47(11) Am Behav Sci 1376.

Ross, Jacqueline, 'Do Rules of Evidence Apply (Only) in the Courtroom? Deceptive Interrogation in the United States and Germany' (2008) 28(3) Oxford Journal of Legal Studies 443.

Ross, Sheldon M., *Introductory Statistics* (3rd edn Academic Press, London; New York 2010).

Ross, Susan Dente, 'Secrecy's Assault on the Constitutional Right to Open Trials' (2004) 40(2) Idaho Law Review 351.

Royal, Robert F. and Steven R. Schutt, *The Gentle Art of Interviewing and Interrogation: A Professional Manual and Guide* (Prentice-Hall, 1976).

Walter G. Runciman, 'The Royal Commission on Criminal Justice: Report' HMSO (Cm 2263, London)

Safer, Martin A. and others, 'Tunnel Memory for Traumatic Events' (1998) 12(2) Applied Cognitive Psychology.

Sanders, Andrew, 'Can Coercive Powers be Effectively Controlled or Regulated?: The Case for Anchored Pluralism' in Cape, Ed and Richard Young (eds), *Regulating Policing: The Police and Criminal Evidence Act 1984 Past, Present and Future* (Hart Pub., Oxford; Portland, Oregon 2008).

Sanders, Andrew and Richard Young, *Criminal Justice* (3rd edn Oxford University Press, Oxford 2007).

Sanders, Andrew, Richard Young and Mandy Burton, *Criminal Justice* (4th edn Oxford University Press, Oxford 2010).

Schaubroeck, John, John L. Cotton and Kenneth R. Jennings, 'Antecedents and Consequences of Role Stress: A Covariance Structure Analysis' (1989) 10(1) J Organ Behav 35.

Schoenfeld, Heather, 'Violated Trust: Conceptualizing Prosecutorial Misconduct' (2005) 21(3) J Contemp Crim Justice 250.

Schwartz, Murray L., 'Zeal of the Civil Advocate' (1983) Law & Social Inquiry 543.

Schwarzer, William W. and Russell R. Wheeler, 'On the Federalization of the Administration of Civil and Criminal Justice' (1994) 23 Stetson L.Rev. 651.

Seo, Bo Hak, 'The Reasonable Allocation of Investigative Powers between the Police and Prosecutors' in Supreme Prosecutors' Office and National Police Agency (eds), *Public Hearing for Allocating Investigative Powers in Korea* (SPO; NPA, Seoul 2005).

Seo, Bo Hak, 'Political Independence and Checks on the Public Prosecutor's Powers' (2004) Next 9.

Seo, Bo Hak, 'The Reasonable Allocation of Investigative Power' (2002) 8(4) Korean Journal of Constitutional Law 177-210.

Sharpe, Sybil D., 'The Human Rights Act 1998: Part 3: Article 6 and the Disclosure of Evidence in Criminal Trials' (1999) Crim L R 273-286.

Shim, Hee Gi, 'USAMGIK Ordinance No. 176 and Criminal Procedure Reform of 1948' (1995) 16 Legal History Journal 117.

Shin, Dong-Woon, 'The Reform of the Korean Legal System and the Revision of the Law of Evidence' (2006) 47(1) Seoul Law Journal 107-132.

Shin, Dong-Woon, 'An Historical Study on the Competence of Criminal Investigation between the Police and Prosecution' (2001) 42(1) Seoul Law Journal 178-230.

Shin, Dong-Woon, 'An Analysis of the Korean Criminal Procedure during the Japanese Occupation' in *Korean Legal History Review* (Parkyoungsa, Seoul 1991).

Shin, Dong-Woon, 'The Reform of the Korean Public Prosecution' (1988) 29(2) Seoul Law Journal 39.

Shin, Dong-Woon, 'An Analysis of the Korean Criminal Procedure: Focusing on the Establishment of the Act' (1987) 69 Seoul Law Journal 144.

Shin, Gi-Wook and Michael Edson Robinson, *Colonial Modernity in Korea* (Harvard East Asian monographs, Harvard University Asia Center: Distributed by Harvard University Press, Cambridge, Mass. 1999).

Singh, Kultar, *Quantitative Social Research Methods* (Sage Publications Pvt. Ltd, 2007).

Smith, Abbe, 'Can You Be a Good Person and a Good Prosecutor' (2000) 14 Georgetown Journal of Legal Ethics 355.

Smith, David J., 'Case Construction and the Goals of Criminal Process' (1997) 37(3) Br J Criminol 319.

Soldwedel, Arne F., 'Testing Japan's Convictions: The Lay Judge System and the Rights of Criminal Defendants' 41 Vanderbilt Journal of Transnational Law 1417.

Son, Dong Kwon, 'A Trial based on the Statements in Court and the Reform of the Pre-Trial Investigation' (2008) 30 Journal of Korean Public Safety and Criminal Justice [*Kongan Hangjung Hakhoebo*] 80.

Spector, Paul E., *Job Satisfaction: Application, Assessment, Cause, and Consequences* (Sage Publications, Inc, 1997).

Spencer, John R., 'The English system' in Delmas-Marty, Mireille and John R. Spencer (eds), *European Criminal Procedures* (Cambridge University Press, 2002).

Staberock, Gerald, 'A Rule of Law Agenda for Central Asia' (2005) 2(1) Essex Human Rights Review.

Steele, Walter W. Jr, 'Unethical Prosecutors and Inadequate Discipline' (1984) 38 SMU Law Review 965.

Storch, Jerome E. and Robert Panzarella, 'Police Stress: State-Trait Anxiety in relation to Occupational and Personal Stressors' (1996) 24(2) Journal of Criminal Justice 99.

Studebaker, Christina A. and others, 'Assessing Pretrial Publicity Effects: Integrating Content Analytic Results' (2000) 24(3) Law Hum Behav 317.

Sullivan, M. P. and Inter-university Consortium for Political and Social Research, *Perceptions of Symbols in Foreign Policy: Data from the Vietnam Case* (Inter-University Consortium for Political Research Ann Arbor, MI, 1973).

Sullivan, Thomas P., 'Electronic Recording of Custodial Interrogations: Everybody Wins' (2005) 95(3) Journal of Criminal Law and Criminology 1127.

Sullivan, Thomas P., 'Police Experiences with Recording Custodial Interrogations' (2004) 88(3) Judicature 132.

Sung, Hung-En, 'Democracy and Criminal Justice in Cross-National Perspective: From Crime Control to Due Process' (2006) 605(1) Ann. Am. Acad. Pol. Soc. Sci. 311.

Swart, Bert and James Young, 'The European Convention on Human Rights and Criminal Justice in the Netherlands and the United Kingdom' in Fennell, Phil, Christopher Harding and Jorg Nico (eds), *Criminal Justice in Europe: A Comparative Study* (Oxford University Press, 1995).

Tadros, Victor and Stephen Tierney, 'The Presumption of Innocence and the Human Rights Act' (2004) 67(3) Modern Law Review 402.

Takayanagi, Kenzo, 'A Century of Innovation: The Development of Japanese Law, 1868-1961' in Von Mehren, Arthur Taylor (ed), *Law in Japan. The Legal Order in a Changing Society* (Harvard University Press, Cambridge, Mass 1963).

Tamura, Yasutoshi, 'Prosecutorial Immunity in Criminal Proceedings in Japan: A Comparative Study' (1993) 1 Willamette Bull.Int'l L.& Pol'y 45.

Tanaka, Hideo and Malcolm D. H. Smith, *The Japanese Legal System: Introductory Cases and Materials* (University of Tokyo Press; distributor, ISBS, Tokyo; Forest Grove, Or. 1976).

Tate, C. Neal and Stacia L. Haynie, 'Authoritarianism and the Functions of Courts: A Time Series Analysis of the Philippine Supreme Court, 1961-1987' (1993) 27(4) Law & Society Review 707.

Taylor, Alyssa and Craig Bennell, 'Operational and Organizational Police Stress in an Ontario Police Department: A Descriptive Study' (2006) 4(4) The Canadian Journal of Police & Security Services 223.

Teas, R. Kenneth, 'Supervisory Behavior, Role Stress, and the Job Satisfaction of Industrial Salespeople' (1983) 20(1) J Market Res 84.

Teas, R. Kenneth, 'An Empirical Test of Models of Salespersons, Job Expectancy and Instrumentality Perceptions' (1981) 18(2) J Market Res 209.

Terrill, Richard J., *World Criminal Justice Systems: A Survey* (5th edn Anderson Pub. Co., Cincinnati, OH 2002).

The Director's Guidance on Charging: Guidance to Police Officers and Crown Prosecutors Issued by the Director of Public Prosecutions under S37A of the Police and Criminal Evidence Act 1984

The National Assembly Committee on Legislation and Judiciary, *A Theoretical Study of the Reform of the Prosecution Service* (KNA, Seoul 2010).

Tyler, Tom R., 'Procedural Justice, Legitimacy, and the Effective Rule of Law' (2003) 30 Crime & Just. 283.

Uglow, Steve, *Evidence: Text and Materials* (2nd edn Sweet & Maxwell, London 2006).

Uglow, Steve, *Criminal Justice* (2nd edn Sweet & Maxwell, London 2002).

Uglow, Steve, 'Independent Prosecutions' (1984) 11 Journal of Law and Society 233.

Ungar, Mark, *Elusive Reform: Democracy and the Rule of Law in Latin America* (Lynne Rienner Pub, 2002).

Uviller, H. Richard, 'The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Dispute' (1999) 68 Fordham L.Rev. 1695.

Vagg, Peter R. and Charles D. Spielberger, 'The Job Stress Survey: Assessing Perceived Severity and Frequency of Occurrence of Generic Sources of Stress in the Workplace' (1999) 4 J Occup Health Psychol 288.

Van Aaken, Anne, Lars P. Feld and Stefan Voigt, 'Power over Prosecutors Corrupts Politicians: Cross Country Evidence Using a New Indicator' (2008) CESifo Working Paper No. 2245.

Van Aaken, Anne, Eli Salzberger and Stefan Voigt, 'The Prosecution of Public Figures and the Separation of Powers. Confusion within the Executive Branch–A Conceptual Framework' (2004) 15(3) Constitutional Political Economy 261.

Van Alstyne, W. Scott Jr., 'The District Attorney-A Historical Puzzle' (1952) Wis.L.Rev. 125.

Van Dijk, P. and others (eds), *Theory and Practice of the European Convention on Human Rights* (4th edn Intersentia, Oxford 2006).

Verrest, Pieter, 'French Public Prosecution Service' (2000) 8 European Journal of Crime, Criminal Law and Criminal Justice 210.

Vogler, Richard, 'Reform Trends in Criminal Justice: Spain, France and England & Wales' (2005) 4 Wash.U.Global Stud.L.Rev. 631.

Volcansek, Mary L., 'Judicial Role in Italy: Independence, Impartiality and Legitimacy' (1989) 73 Judicature 322.

Vorenberg, James, 'Decent Restraint of Prosecutorial Power' (1980) 94 Harv L Rev 1521.

Vouin, Robert, 'The Role of the Prosecutor in French Criminal Trials' (1970) The American Journal of Comparative Law 483.

Vouin, Robert, 'The Protection of the Accused in French Criminal Procedure' (1956) 5(01) International and Comparative Law Quarterly 1.

Wade, Marianne, 'The Power to Decide - Prosecutorial Control, Diversion and Punishment in European Criminal Justice Systems Today' in Jehle, Jörg-Martin and Marianne Wade (eds), *Coping with Overloaded Criminal Justice Systems: The Rise of Prosecutorial Power Across Europe* (Springer, Berlin; Heidelberg 2006).

Wade, Marianne and others, 'When the Line is Crossed... Paths to Control and Sanction Behaviour Necessitating a State Reaction' (2008) 14(2) European Journal on Criminal Policy and Research 101.

Wade, Marianne, Bruno Aubusson de Cavarlay and Josef Zila, 'Tinker, Tailor, Policy-maker..... The Wider Context of Prosecution Service Work' (2008) 14 Eur J Crim Policy Res 181.

Wade, Marianne, Paul Smit and Bruno Aubusson de Cavarlay, 'Prosecution Role Where Courts Decide Cases' (2008) 14(2-3) European Journal on Criminal Policy and Research 11.

Walker, Clive and Starmer, Kier (eds), *Miscarriages of Justice: A Review of Justice in Error* (Oxford University Press 1999)

Walther, Susanne, 'The Position and Structure of the Prosecutor's Office in the United States' (2000) 8 European Journal of Crime, Criminal Law and Criminal Justice 283.

Walton, Douglas, 'The Interrogation as a Type of Dialogue' (2003) 35(12) Journal of pragmatics 1771.

Wason, Peter C. and Philip N. Johnson-Laird, *Psychology of Reasoning: Structure and Content* (Harvard Univ Pr, 1972).

Weber, Robert P., *Basic Content Analysis* (Sage, 1990).

Weisberg, Bernard, 'Police Interrogation of Arrested Persons: A Skeptical View' (1961) 52(1) The Journal of Criminal Law, Criminology, and Police Science 21.

West, James M. and Edward J. Baker, 'The Constitutional Reforms in South Korea 1987: Electoral Processes and Judicial Independence' (1988) 1 Harv.Hum.Rts.YB 135.

West, Mark D., 'Prosecution Review Commissions: Japan's Answer to the Problem of Prosecutorial Discretion' (1992) Columbia Law Rev 684.

Westling, Wayne T., 'Something is Rotten in the Interrogation Room: Let's Try Video Oversight' (2000) 34 J Marshall L Rev 537.

White, Robin M., 'Investigators and Prosecutors or, Desperately Seeking Scotland: Re-formulation of the 'Philips Principle'' (2006) 69(2) Modern Law Review 143.

White, Welsh S., 'False Confessions and the Constitution: Safeguards against Untrustworthy Confessions' (1997) 32 Harvard Civil Rights-Civil Liberties Law Review 105.

Williams, Glanville, 'Letting off the Guilty and Prosecuting the Innocent' (1985) Crim L R 115.

Williams, James W., 'Interrogating Justice: A Critical Analysis of the Police Interrogation and Its Role in the Criminal Justice Process' (2000) 42(2) Can J Criminol 209.

Winterdyk, John, Philip Reichel and Harry Dammer (eds), *A Guided Reader to Research in Comparative Criminology/Criminal Justice* (Universitatsverlag Dr. N. Brockmeyer, 2009).

Worboys, P., 'Convicting the Right Person on the Right Evidence' (1985) Crim L R 764.

Yang, Mun Seok and Dong Jun Kim, *The Research on the Actual Condition of the Newspaper Industry* (Korea Press Commission, Seoul 2008).

Yu, Il Jun, 'An Analysis of the Relationship between the Prosecutor's Recommendation for a Sentence and the Judgments' (1994) 18 Korean Journal of Criminal Justice [*Hyungsajungchaikyeongu*] 227.

Xu, Xiaoge, 'Asian Values Revisited: In the Context of Intercultural News Communication' (1998) 25(1) Media Asia 37

Zacharias, Fred C., 'Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice' (1991) 44 Vand.L.Rev. 45.

Zacharias, Fred C. and Bruce A. Green, 'Uniqueness of Federal Prosecutors' (1999) 88 Georgetown Law J 207.

Zhang, Yan Bing and others, 'Harmony, Hierarchy and Conservatism: A Cross-Cultural Comparison of Confucian Values in China, Korea, Japan, and Taiwan' (2005) 22(1/4) Communication Research Reports 109.

Zhao, Jihong, Quint Thurman and Ni He, 'Sources of Job Satisfaction among Police Officers: A Test of Demographic and Work Environment Models' (1999) 16(1) Justice Q 153.

Zhu, Yunhan (ed), *How East Asians View Democracy* (Columbia University Press, New York; Chichester 2008)