

6 Framing Prosecutor–Police Relations in Europe – A Concept Paper

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I think it is of the first importance that policemen should be kept strictly to their functions as policemen, as persons to apprehend and have the custody of the prisoners, and not as persons who are to mix themselves up in the conduct of a prosecution, whereby they acquire a bias infinitely stronger than that which, under any circumstances, naturally attach itself to their evidence.

(Sir Alexander Cockburn, Attorney General of England, in his evidence to the Criminal Law Commissioners considering the role of police as prosecutors (1845))

Introduction

Despite Sir Alexander Coburn’s protestations, the responsibility for prosecuting almost all criminal cases in England resided with Chief Constables¹ for 140 years after his evidence to the Criminal Law Commissioners in 1845. Meanwhile, in Scotland during those years, there were legally trained prosecutors, called procurator-fiscals, who not only had exclusive responsibility for making prosecutorial decisions and for conducting all prosecutions in court, but also had authority to supervise and direct the police in their criminal investigations (Moody and Tombs, 1982). During this same period, in almost all continental European countries, police had virtually no formal role at all either in decisions whether prosecutions should be launched, or in the actual conduct of those prosecutions that were. As in Scotland, legally trained prosecutors played a key role in performing these prosecutorial functions, but both they and the police (usually specifically dedicated “judicial police”) were supervised and directed in the performance of their investigative and prosecutorial responsibilities by investigating magistrates (in France, for instance, called “*juges d’instruction*”).

These are but three examples illustrating how the respective roles of police, legally trained prosecutors and magistrates, and the formal relationships between them in the criminal prosecution process, have varied among European jurisdictions. Yet there has been little scholarship that has explained how and why these very different police–prosecutor relationships developed in different jurisdictions, virtually no comparative empirical research on their implications for the efficacy and outcomes of criminal prosecutions, and very little historical

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1 scholarship on when and why these relationships changed within individual
2 jurisdictions.

3 In this chapter, we set out some ideas about how comparative empirical
4 research into the variations in police–prosecutor relationships in European juris-
5 dictions might be structured, and how data about them might be analysed. The
6 purpose and possible benefit of such research, we believe, would be to ascertain
7 whether some forms of this relationship might be more effective than others in
8 achieving the supposed objectives of prosecution processes, and to what extent
9 different forms of the relationship reflect different priorities among competing
10 objectives.

11 **The Relevance of Procedural Contexts**

12 Most European countries have one of two different kinds of legal system – a
13 civil law or “inquisitorial” system (henceforth referred to as civil law jurisdic-
14 tions), or a common law or “adversarial/accusatorial” system (henceforth
15 referred to as common law jurisdictions). In a few European countries, for
16 example Malta, their foundational legal system has been adapted somewhat to
17 include features of the other system. The great majority of continental European
18 countries, however, are civil law jurisdictions; a relatively small minority of
19 European countries (notably the United Kingdom, the Republic of Ireland,
20 Cyprus, and Gibraltar) are common law jurisdictions.

21 In all these countries the criminal prosecution process is generally recognised
22 as having four consecutive phases – an investigative phase, a prosecutorial
23 phase, an adjudicative phase,² and (in the event of a conviction) a sentencing and
24 corrections phase. In this chapter, we focus on the first and second, pre-trial,
25 investigative and prosecutorial phases. These two phases typically include a
26 number of consecutive elements: a complaint or accusation of the commission of
27 a criminal offence; an official investigation into the complaint or accusation, cul-
28 minating in a report; a decision as to whether criminal charges will be laid, and
29 if so who will be charged and with what offences; and decisions about various
30 other pre-trial matters such as whether a person who has been charged will be
31 detained or released pending trial and if released, conditions that may be attached,
32 whether some kind of legal aid will be made available to the accused, etc.

33 The investigative function is essentially forensic (find the facts) and relies
34 mainly on technical expertise and coercive powers, but also requires some legal
35 knowledge/understanding (knowing what facts could be relevant, criteria of
36 admissibility as evidence, etc.). The prosecutorial function (deciding whether to
37 prosecute, whom to prosecute, what charges to pursue, how and in what court to
38 initiate a prosecution, managing witnesses, etc.) – involves more normative
39 “public interest” considerations (e.g. what cases to prioritise and why), requires
40 a high level of legal knowledge (knowing what evidence is admissible and is
41 sufficient to found a successful prosecution, how to present the case effectively
42 in court, what witnesses to call etc.), and requires a more balanced review of
43 the available evidence, including evidence that might exculpate the accused
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(sometimes referred to in common law jurisdictions as the “minister of justice” concept). The extent of *discretion* that is afforded to officials in exercising these functions varies greatly from one jurisdiction to another, and in particular between civil law and common law jurisdictions. In civil law jurisdictions, a “principle of legality”, whereby prosecutions must be initiated when minimum evidential requirements are satisfied, has traditionally been applied to these decisions, although the exercise of discretion with respect to these decisions has increasingly been recognised as acceptable in some civil law jurisdictions. In common law jurisdictions, discretion is the accepted norm, one result of which has been that some form of pre-trial “plea bargaining” has increasingly become the norm in these jurisdictions, with a radical impact on the prosecution process.

In every jurisdiction, the responsibility for these various pre-trial decisions is allocated in some way between police, legally qualified prosecutors, and judicial officers such as magistrates. In broad terms, the allocation of responsibilities between these three kinds of officials and the relationships between them, vary significantly between civil law “inquisitorial” jurisdictions and common law “accusatorial/adversarial” jurisdictions. Traditionally, in civil law jurisdictions, supervision and control over both criminal investigations and pre-trial prosecutorial decisions rests ultimately with investigating magistrates, and police and prosecutors are accountable to such magistrates for the performance of their respective roles in the process. By contrast, in most common law jurisdictions, police, prosecutors and magistrates occupy separate and relatively independent positions, and each enjoys considerable autonomy in performing their respective investigative, prosecutorial and adjudicative roles in the criminal prosecution process. This general description of the respective roles and responsibilities in civil law and common law jurisdictions is an oversimplification, however, because the allocation of responsibilities and the relationships between the police prosecutors and magistrates vary not only between civil and common law jurisdictions, but also between different countries within each of these two kinds of jurisdictions (as, for instance, between England and Scotland, and between France and Italy). Thus, in most common law jurisdictions police combine investigative and prosecutorial responsibilities in the overwhelming majority of “less serious” offences, with only the small minority of the “more serious” cases being prosecuted by legally trained independent prosecutors. Only in a few common law jurisdictions (such as the United States, Canada and Scotland) are the majority of all criminal cases prosecuted by independent legally trained prosecutors. Similar variations can be found among civil law jurisdictions. Thus, in a few civil law jurisdictions, magistrates are not involved in supervising and controlling the police or prosecutors in performing their pre-trial investigative and prosecutorial responsibilities. While in France prosecutors are administratively located within the magistracy (and during their careers may switch between prosecutor and magistrate roles) (Hodgson, 2005), in Italy prosecutors enjoy a wide measure of independence, and are not subject to supervision by investigating magistrates (Di Federico, 2005). This allocation of responsibilities between police, prosecutors and magistrates has been the subject of substantial policy and

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1 academic debate in many European countries in recent decades (see e.g. Mathias,
2 2002).

3 In this chapter, we focus particularly on the allocations of these responsibilities
4 between police and legally qualified prosecutors (henceforth prosecutors), as pre-
5 scribed in law as well as occurs in practice, the consequent relationships between
6 police and prosecutors in fulfilling these responsibilities, and to what extent there
7 is some judicial oversight of the exercise of them. We consider whether, and to
8 what extent, these allocations are determined by the fundamental nature of the
9 legal system (civil law or common law) of each jurisdiction, and/or other factors,
10 and what rationales have been advanced for these allocations in each system. We
11 also consider how these allocations have changed over time in individual jurisdic-
12 tions, and the apparent reasons and rationales for such changes. In doing so, we do
13 not report the findings of comparative empirical research (which has not yet been
14 done); we propose a conceptual framework within which to undertake such sys-
15 tematic cross-jurisdictional comparative empirical research.

17 **A Brief Comment on the Extant Literature**

18 There are several published English-language articles and books on police–pro-
19 secutor relations. Most discuss the situation in single countries or jurisdictions,
20 most are based on the situation in the USA, and many of these are now quite
21 outdated (see e.g. Feeley and Lazerson, 1973; McIntyre 1975; Buchanan, 1989;
22 Rowe, 2016). By comparison, the literature on police–prosecutor relations in
23 Europe is relatively small. As with the American literature, most of it discusses
24 the relationship in a single jurisdiction (see e.g. McGloin, 2006; White, 2006;
25 Jansson in this book), although some articles compare two or more countries
26 (e.g. Goldstein and Marcus, 1977; Mathias, 2002; Jasch, 2004; Braum, 2012).
27 Analysis is mostly of the formal legal provisions and policies governing this
28 relationship, rather than based on empirical research (Hodgson, 2001 is an
29 exception). One notable exception in this respect is EuroJustice’s report on
30 survey research commissioned by the Dutch Board of Prosecutors-general, under
31 the leadership of Professor Peter Tak of Nijmegen University, which includes
32 country reports on the police–prosecutor relationship in 25 EU member states.
33 While this report is very helpful in demonstrating how this relationship varies
34 from one European country to another, it does not include comparative analysis
35 of the implications and effects of these variations, the rationales behind them, or
36 how, when and why they have changed over time. It is this more fine-grained
37 empirical research that we are arguing needs to be done now.

40 **The Importance of Prosecutor–Police Relations in the** 41 **Prosecution Process**

42 We theorise that the importance of understanding the allocation of responsibil-
43 ities between police and prosecutor in the criminal prosecution process, and
44 consequent prosecutor–police relations in exercising these responsibilities, is
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that they reflect, to varying degrees, the extent to which key values associated with prosecution processes are prioritised and upheld. We suggest seven such key values, which are:

- a Impartiality (and avoiding “tunnel vision”)
- b Independence (especially from political control)/separation of powers
- c Equity (similar cases treated similarly)
- d Efficiency/cost effectiveness
- e Expertise/competence (allocation of responsibilities to those best qualified to exercise them)
- f Checks and balances (“two heads better than one”)
- g Effective political/public accountability

The key question that needs to be explored is how different allocations of responsibility between police and prosecutors reflect, and are intended to reflect, in law *and* in practice, the relative importance ascribed to these key values. We propose a three-level analysis in which a value is identified as apparently of high, medium or low priority in these arrangements.

By way of example, we suggest the following indicators of these variables:

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|----------------------|---------------|---|
| Impartiality: | High | • complete separation of prosecutor and police functions (prosecutors do not supervise police investigations, and police do not decide whether a prosecution should be initiated) |
| | Medium | • partial separation of prosecutor and police functions (prosecutors supervise some, but not all police investigations, and police may make prosecutorial decisions in some cases) |
| | Low | • no clear separation of prosecutor and police functions (investigative and prosecutorial functions are combined in the same agency (e.g. police prosecutors) or prosecutors supervise all police investigations) |
| Independence: | High | • complete separation of prosecutor and police functions |
| | | • police and prosecutors governed by judiciary/magistrates, not politicians |
| | Medium | • partial separation of prosecutor and police functions |
| | | • police and prosecutors governed by judiciary/magistrates and politicians |
| | Low | • no clear separation of prosecutor and police functions |
| | | • police and prosecutors governed by politicians, not judiciary/magistrates |

1	Equity:	High	• police and prosecutors both organised nationally
2			• police and prosecutors governed by principle of legality
3			
4		Medium	• police organised locally, prosecutors nationally
5			• police and prosecutors exercise discretion subject to guidelines
6		Low	• police and prosecutors both organised locally
7			• police and prosecutors exercise largely unfettered discretion
8			
9	Efficiency/cost effectiveness:	High	• no clear separation of prosecutor and police functions
10			
11			Medium
12			
13		Low	• complete separation of prosecutor and police functions
14			
15	Expertise/ competence:	High	• complete separation of prosecutor and police functions
16			
17			Medium
18			
19		Low	• no clear separation of prosecutor and police functions
20			
21	Checks and balances:	High	• complete separation of prosecutor and police functions
22			
23			Medium
24			
25		Low	• no clear separation of prosecutor and police functions
26			
27	Political/public accountability:	High	• police and prosecutors accountable to politicians
28			
29			Medium
30			
31		Low	• police and prosecutors not accountable to politicians
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By “partial separation of prosecutor and police functions” we envisage two kinds of situation: (1) allocation of responsibilities between police and prosecutors varies according to the seriousness of the offence (e.g. police prosecute less serious offences, prosecutors prosecute more serious offences); (2) police are required to consult with prosecutors, but are not subject to direction by them, in specified types of cases (e.g. before deciding on what charges to lay in high-profile or especially complex cases).

Institutional Characteristics and Key Values

It will be noted that we have posited that the extent to which police and prosecutors are organised nationally or locally reflects the priorities placed on the key values that we have identified; for example, by way of ensuring equity in investigatory and prosecutorial decision-making – that is, whether uniformity and consistency, or local variability, is prioritised. Our supposition is that central organisation favours equity more than local organisation, but that the implications of local organisation may be mediated through the implementation of central policy that is effectively required to be adhered to in local decision-making. Also, “medium” priority for equity may be reflected if either the police, or more significantly prosecutors, are organised nationally, while the other is not (a situation that currently exists, for instance, in England and Wales).

In measuring relevant institutional characteristics, we suggest that the following factors need to be considered:

a The police**i How organised**

- centrally or locally
- division of functions

a all functions within a single organisational hierarchy

b separation of functions (e.g. general vs. investigative, responsible to different authorities – “judicial police”)

ii Administrative location/accountability

- part of the national executive, responsible to a minister
- part of local administration, responsible to a local authority (e.g. Police and Crime Commissioner, mayor, or other local police governing authority)
- a blend of both

iii Functions

- purely investigative
- investigative and prosecutorial
- investigative and prosecutorial in some (usually less serious) cases, but purely investigative in others (usually more serious cases)

iv Independence

- from political direction/control
- from judicial direction/control
- from direction/control by prosecutors
- subject to direction/control/supervision by all or any of (a) politicians, (b) magistrates, (c) prosecutors

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1 **b Prosecutors**

2 i How organised

- 3
4 – centrally or locally
5 – single organisation or multiple organisations (some specialised,
6 e.g. the Serious Fraud Office in the UK)

7 ii Administrative location/accountability

- 8
9 – part of the national executive, responsible to a minister
10 – part of local administration, responsible to a local authority
11 – a blend of both
12 – part of judicial arm of government, responsible to judiciary/
13 magistracy
14 – some blend of both

15 iii Functions

- 16
17 – purely prosecutorial
18 – investigative as well as prosecutorial (undertake investigations
19 themselves or supervise/direct investigations by others, such as
20 police)
21 – investigative and prosecutorial in some (usually more serious)
22 cases, but purely prosecutorial in others (usually less serious cases)

23 iv Independence

- 24
25 – from political direction/control
26 – from judicial direction/control
27 – from direction/control by more senior prosecutors
28 – subject to some direction/control/supervision by all or any of
29 (a) politicians, (b) magistrates, (c) more senior prosecutors

30 **c Magistrates**

31 Functions

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33 – Purely judicial, with no investigative responsibilities other than
34 issuing warrants etc. for certain investigative functions (arrest and
35 detention, search and seizure, surveillance, wiretapping, etc.)
36 – Judicial, investigative and prosecutorial responsibilities
37 – Undertake investigations themselves
38 – Supervise or control investigations by (a) police and/or
39 (b) prosecutors
40 – Ultimately responsible, or not, for prosecutorial decisions
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Addressing the Allocation of Responsibilities

In order to understand how responsibilities are allocated between these three officials, at a minimum the following questions will need to be addressed:

- 1 Who decides whether an investigation will be undertaken?
- 2 Who has control over the process of the investigation, and how it will be undertaken?
- 3 Does the investigator have to consult with the prosecutor (or investigating magistrate) during the investigation? Or is this at the investigator's discretion?
- 4 When the investigation is considered by the investigator to be completed, what happens next?
 - Does the investigator decide whether the case will proceed to prosecution, and if so what charges will be laid?
 - Or does the investigator turn the file over to someone else (e.g. an investigating magistrate or a prosecutor)? If so, does the investigator have discretion whether to do so or not, or is the investigator required to in all cases?
- 5 If there is negotiation over what charges will be laid (e.g. plea bargaining), who is typically responsible for these negotiations, who participates in them, and who has the authority to approve the final agreement?
- 6 Who ultimately decides whether a prosecution will go ahead or not? If yes, who conducts the prosecution (serves as the prosecutor in court)?
- 7 Do the answers to these questions vary according to (a) whether it is a serious offence or a not so serious one? and/or (b) where decisions are made (e.g. in a city or in a rural area?).
- 8 Have the answers to these questions changed in any significant way during the last 30 years? If so, how, and what developments have caused the allocation of responsibilities to change in the way that they have? What rationales have been expressed for these changes?

These questions will need to be used as a guide to interpreting the documentary materials (legislation, policy documents, court rulings, etc.), as well as a basis for interviews with practitioners.

Considering and Understanding Change

As we noted earlier, significant changes in the allocations of responsibilities between police and prosecutors, and in the consequent relations between them, have occurred in many jurisdictions over the years. By way of example, over the last 40 years significant changes in this respect have occurred in England and Wales. Prior to the mid-1980s, both investigative and prosecutorial responsibilities were accorded to the police, under the direction of local Chief Constables,

1 in all but a few of the most serious or high profile cases (in which the national
 2 Director of Public Prosecutions or the Attorney General was involved). Chief
 3 Constables retained lawyers in private practice to represent them as prosecutors
 4 in court. In 1985, however, following the recommendations of a royal commis-
 5 sion of inquiry, a new national prosecutorial institution, the Crown Prosecution
 6 Service (CPS), modelled on the prosecution service in one of the Canadian prov-
 7 inces, was introduced by the *Prosecution of Offences Act*. Staffed by legally
 8 trained prosecutors, the CPS now took over responsibility for prosecutorial, but
 9 not investigative, decisions in all cases. Since then, and in light of experience
 10 with the new arrangements, prosecutorial responsibility with respect to some less
 11 serious offences has been handed back to the (regionally organised) police. Julia
 12 Jansson (Chapter 5 in this book) has documented some quite similar develop-
 13 ments in the recent history of prosecutions in Finland, and we are aware that
 14 similar changes have occurred in other European countries. We should discover,
 15 through comparative research, whether there is any discernible general trend in
 16 Europe in this respect.

17 We need to understand the reasons for such changes as these, the rationales
 18 invoked to justify them, and the extent to which they reflect changes in the prior-
 19 ities that are accorded to the various key values that we have identified (for
 20 instance a higher value is placed on efficiency), or other (e.g. political or eco-
 21 nomic) factors. Two factors that may be of importance in this respect in Europe,
 22 are: (1) the influence of the *European Convention on Human Rights*, and its
 23 enforcement through the European Court of Human Rights; and (2) the move
 24 towards increasing “harmonisation” of law enforcement and justice in Europe in
 25 the face of the increasingly transnational character of certain kinds of crime and
 26 the relaxation of border controls (Schengen Agreement). Key developments with
 27 respect to the second of these have been the establishment of Europol as a trans-
 28 national police institution, and recent moves to establish a European Prosecutor.
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30 **Conclusion**

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 32 In this chapter, we have tried to go beyond the extant literature in exploring how
 33 we might develop a more fine-grained understanding of how police and prosecu-
 34 tors work with each other in the criminal prosecution process, and how constitu-
 35 tional, legal, institutional, organisational and political factors structure and
 36 influence such relationships in practice in European jurisdictions. We have
 37 argued that it will be instructive not only to understand these relationships as
 38 they are in theory and in practice in different jurisdictions now, but also how and
 39 why they have changed over time in so many jurisdictions, and what arguments
 40 have been made for these changes. Most specifically, we have argued that these
 41 relationships may reflect different ideas about the values and objectives that the
 42 police–prosecutor relationship is intended to reflect and achieve, and which,
 43 among a number of competing values and objectives in this respect, should be
 44 accorded priority. Perhaps, if in-depth research on these matters can be under-
 45 taken in multiple jurisdictions in which these priorities appear to differ, we may

be able to discern some “best practices” in this relationship that could optimise the achievement of all the potentially competing objectives. This may contribute to the utility of “borrowings” between different legal systems (in particular between inquisitorial and accusatorial models of the criminal prosecution process), which have become increasingly common in the late twentieth and early twenty-first centuries, to improve performance not only in domestic jurisdictions, but also in the emerging international criminal prosecution institutions.

Notes

- 1 Chief Constables retained private practising lawyers, referred to as prosecuting solicitors, to conduct prosecutions on their behalf in more difficult cases.
- 2 This phase includes, in some cases, one or more appeals as well as a trial, and in some jurisdictions may also include various kinds of pre-trial processes presided over by judges or magistrates.

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