

ACCOUNTABLE USE OF RESOURCES IN PROSECUTION

Linn Hammergren

May 2017

Preliminary explanations

- Accountable use – here as optimizing quantity/quality of organizational outputs (cases investigated, disposed, to trial, etc.)
- Cover 3 types of resources: personnel; additional resources for operations, investigation/adjudication; and defense attorneys (because in Serbia, PPOs assign, monitor, and pay them)
- Linked to financial accountability, but will try to avoid (not always successfully)
- Accountability works best where same agency determines resource use, quantity, costs – if part decided elsewhere, limits accountability
- **Format: have included questions for discussion; audience decides whether want to leave till end or discuss as we move along**

Why an Issue?

- Justice is a right, but has costs – someone, the public treasury or the parties, must pay (even for alternative measures, like ADR)
- Crime rates rise, if relatively low in Europe. (Compare to W. Hemisphere, especially Central America.)
- Public more attentive and demanding even if don't know who to blame
- More effective police – more arrests = more defendants/suspects. Pressure on the rest of the criminal justice chain.
- Standards rise – fair trial, defendant's (and victim's) rights, criteria for indictment/conviction
- New kinds of evidence, inevitably more costly
- Meanwhile, budgets limited by competing priorities and austerity measures.

Note: quantities and costs of resources for justice operations are issues everywhere

- Several European countries (most notably England) reduce funds for legal aid (and/or raise qualifications for eligibility).
- US criticized for requiring poor defendants to pay court fees/bail or go to jail
- In the US as well, asset forfeiture presents perverse incentives (and abuses) when seized assets are used to finance police and prosecutors.
- UK (2014), CPS withdrew drug case complaint because of “excessive “costs for defense.
- So, what is used, for what purposes and at what cost, are issues not only in Serbia.

Issues critical for Serbia's prosecutors because CCP transfers more functions than funding from courts

- Items affected: fees for witnesses, various kinds of scientific evidence, prisoner transport. Slow payments cause delays
- Also, sufficiency of human resources?
- Prosecutors handle mandatory defense attorneys – a separate category, but affects budgets and timeliness
- Arrears for services costly to government. When vendors sue and win, receive principal, fines and interests.
- Infrastructure (housed with courts) still adequate for new functions?
- Why did Serbia make choices with possibly negative impacts – financially, but also on delaying trials, altering the quality of investigations? **Leave discussion for later**

Will discuss situation in Serbia, but also how issues with similar resources treated elsewhere

- How much to spend on and how to finance a criminal justice system in present era?
- Who decides amounts/functions and distribution among agencies?
- In transition to prosecutorial investigation, how to apportion resource responsibilities among the various parts (including the defendant and victim in a criminal case)?
- Who determines amount and costs of services from third parties (ordinary witnesses, expert witnesses, legal aid, scientific tests and so on)?
- Question to those from other countries as well – discuss now or later

Human resources: prosecutors and support staff

- Issue in many countries when numbers and locations of both (as well as salaries) set by law or by another agency (MOJ, MOF?)
 - Issue: many laws/decisions use outmoded calculations of real needs (before IT revolution, new demands, and fiscal crunch)
 - With or without these limitations, how can real needs, best use of personnel be determined?
- One suggestion, CWS, may help even out the disparities, but cannot change underlying assumptions/practices
 - If laws permit, can readjust human resource (or case) distribution
 - CWS does little for HR mixes (especially staff/prosecutor ratios)
 - Doesn't address uses of HR (division of work with staff) unless identify and copy more productive offices

Positive changes in Serbia and elsewhere

- Shift selection, payment and supervision of support staff to prosecution agency – an improvement for quality and incentives?
- However, still need to explore
 - How to adjust/escape legally mandated resource distributions whether of prosecutors or staff
 - Alternative uses of human resources, different mixes and combinations in performing work.
- Question for audience: are these issues in your country? If so, how addressed?

Personnel is not only numbers; training, equipment, and certain staff additions also count

- Training and equipment (IT particularly) can augment output of existing staff, but only if well designed
- Use of contracted employees, interns and “volunteers” to fill gaps
 - More common in courts, but may occur for prosecutors
 - When CWS done, often not included
 - Practice usually not regulated; can lead to abuses. **Should it be allowed?**
- Finally, personnel involved in ADR, transactions and similar alternative dispositions
 - Are they prosecutors or police?
 - Are/should there be specialized staff (possibly in separate mediation centers)? If not, how are ordinary staff trained?
 - **Question for audience: how handled in your country?**

Additional investigative and trial resources

- Ordinary witnesses, expert witnesses, scientific evidence (witness protection?)
- Presumably whoever is responsible, costs can limit what is done
 - Despite some instances of “excessive evidence” being required, budgets do not seem to limit even if as in Serbia, yield arrears.
 - Question for audience – are there cases where they pose limits?
 - Question for audience – are there checks to prevent excesses?
- Different situations for investigation and trials regarding who decides and who pays
- Other operational costs – materials, transport, anything else?
- Question for audience: situation in your country and is it problematic?

Investigation: Police may take lead and pay for the most part

- Common law countries, most investigation by police w/o much prosecutorial involvement although may enter early for important cases
- In continental Europe, phrase “prosecutor will supervise investigation” still gives large role to police (often, with little supervision for routine cases)
- If prosecutor requests additional investigation, exercises supervision or is asked by defense to include exculpatory evidence -- who decides/pays?
- Government labs/experts usually absorb own costs, but is this always true?
- Witness protection and treatment of victims – who manages/pays?
- Civil law -- development of case file/dossier for judge (and defense?); does this require more resources (Serbia’s “mini-trials” perhaps found elsewhere)?
- A little like health care – issue of what is enough and who decides
- **Question for audience: are these problems in your country?**

Trials

- Common law, parties pay for witnesses, experts, other evidence (although for both prosecutor and public defenders may come out of another budget –local government, court fund or legal services commission for defenders).
- Civil law – judge’s greater role in deciding on witnesses and evidence; if these are “court witnesses” does the court budget cover them?
- Expert and other fees– are these set and if so, by whom? (US system one example for experts)
- Prisoner transport – who provides/pays?
- Question for audience: who is responsible for these trial costs in your country and if prosecution, does available funding pose constraints?

How does principle of legality affect investigations?

- In common law, opportunity (prosecutorial discretion) prevails, meaning cases may be dropped (before or after investigation) for several reasons. Less to cut costs, than to ensure resources are placed for greatest impact.
- In civil law countries, discretion is often restricted (or officially not allowed)
 - Shift to “principle of expediency”?
 - Also, transactions, ADR, deferred prosecution (sometimes called opportunity or expediency) increasingly allowed in many countries
 - Even without discretion, prosecutors give more attention to some cases—let others slide.
- **Questions for discussion**
 - How do prosecutors in your country deal with lower priority cases?
 - Who defines priorities and is this ever a problem vis-à-vis superiors?

Problem in many transitional and developing countries – the plaintiff who won't give up

- Pursuing a non-existent crime or trying to “criminalize” a civil matter (e.g. debt)
- Unusual in W. Europe, developed common law countries, **although representatives here may want to comment.**
- Clearly a waste of human and other resources, but judges may not concur even if private prosecution allowed
- **Question for audience: does this occur in your country? If not, why not? If so, how handled?**

Public defenders – several systems. Raised here because in Serbia attributed to prosecutor's office

- US and Latin America (following US practice), public defenders' offices with salaried staff
 - In US often separate entity although federal public defenders office under Administrative Office of Federal Courts
 - In Latin America, varies – MOJ (Peru), Judiciary (Costa Rica), quasi-independent (Colombia)
- In Europe, two principal arrangements
 - Court appointed lawyers – Bar or justice agency may list those eligible
 - Subsidies to clients who may then hire attorneys with amount provided
- Today common to use mixed methods.

While any system may work, each has drawbacks in practice

- PDOs better supervision, but often underfunded and overloaded with cases (US situation and in parts of Latin America)
- Court (or in Serbia, Prosecution) appointed attorneys, less supervision, even of appointments. If work for set fees may underperform; if use billable hours may overcharge unless tightly monitored by supervising agency. Monitoring also requires staff time and other resources
- Subsidies to client may be insufficient and lead to overcharging for extras
- Set fees and billable hours (at a set fee) should be realistic. Sometimes too low (Romania according to bar associations) or too high (Ecuador's \$400 a case)
- In short, less the choice than its detailed execution

Summary: Criminal justice is an institutional chain, but resource accountability varies by legal system

- With or without “opportunity”, all complaints cannot be treated equally. Some will disappear intentionally or for lack of attention
- Although “decisions” on resources occur throughout the chain, prosecutors are critical in moving processes forward
- Set resource levels often fall behind current needs; where defined by one agency and used by another, accountability is complicated
- Every link in the chain wants “more,” but under current conditions, the “pie” is unlikely to grow; hence, “optimizing optimization” requires joint planning

Beyond resource accountability – prosecutor's performance accountability and its deficit

- Term from two US authors – but as worldwide phenomenon
 - Although key actor in criminal justice chain, prosecutor least understood by public
- US – (state) prosecutors singularly independent (as opposed to police, judges) but also face distrust, criticism, and if elected, public pressure
- In civil law countries – questioning of prosecutors' judicial status, impartiality, equality of arms (with defense), and direction of accountability
- For all – how to assess performance, of individuals and of organization?

External accountability, to public, other branches of government

- Ultimately, crime “dissuasion” (reduction?) as the aim; immediately, cases disposed, which ones and by what means
- Resource uses count, but only as a means to an end.
- External audience never 100% satisfied, but some ways to improve
 - Communication policy and public outreach
 - Statistical reports to demonstrate advances and challenges
 - Community prosecution – first US, but now some use in Europe
 - More support to victims
 - Improved internal accountability (knowledge/oversight of “those in the trenches”)

Internally accountability -- results from offices and individuals, based only on immediate performance

- Achilles heel in all systems – poor information may be cause, but also organizational structure and question of what to monitor
- Where executive controls, threat of political intervention (US federal system?) But also traditional civil law with MOJ in charge.
- Other civil law answers –rule compliance; inflexible, but rarely adequately monitored
- Some innovative approaches
 - Better CMIS and better use/analysis of contents
 - Budgeting by results? Some examples from W. Europe
 - Not rules, but clearer policies/guidelines/training on use of discretion
 - Evaluation systems that value alternative dispositions where appropriate
- Question to audience: how/what is your system doing?

Thank you for your attention and now more questions for discussion

- We can first return to some questions raised in the presentation, if someone has more thoughts there
- Or if anyone has additional questions, now is the time to raise them
- And if not, here are some final themes
 - Generally, E. Europe has more prosecutors (and judges)/pop than the West – do you think the greater numbers are warranted? Why?
 - Assuming acquiring “more” personnel will be difficult, what other factors could ease the workload? (IT, training, staff redistribution, new work practices, legal change?)
 - Do governments give more attention to judicial than prosecutorial needs? Why or why not?
 - Some prosecution agencies (like Serbia) are responsible for activities (e.g. defense, prisoner transport) normally covered by others. Should this be changed? How?
 - Aside from HR, are prosecutors hindered by limits on other resources? Which ones?
 - Would greater control over budget use and admin. staff help?