

# Research on Police and Prosecution Law in Bergen

GERT JOHAN KJELBY\*

---

## 1. Introduction

The current issue of Bergen Journal of Criminal Law and Criminal Justice includes articles from Inger Marie Sunde and John Reidar Nilsen. Both articles are results of the activities in the project 'Police and Prosecution Law' at the Faculty of Law, University of Bergen. The articles illustrate the broad scope of the project, spanning from new legal problems due to modern technology to the development of the fundamental legal basis for the exercise of police authority.

The research project 'Police and Prosecution Law' is now concluded after a project period of five years (1 March 2017 to 28 February 2022). The project's second and final conference was held in Bergen 24-25 March 2022, with over 100 participants mainly from the Police and Prosecution service in Norway.<sup>1</sup>

The project has been funded by Trond Mohn Foundation,<sup>2</sup> the Faculty of Law and the National Police Directorate. It has been led by Professor Gert Johan Kjelby and has during the years involved several researchers; Dr. philos Ragnar L. Auglend, Professor Henry J. Mæland, Professor Asbjørn Strandbakken, Professor Knut Einar Skodvin and police prosecutor/researcher Ingvild Greve; two PhD candidates: John Reidar Nilsen and Torild Helene Myrli; two master students (70 ETCS credits): Lise Marit Nyerrød and Malin Skogstad Aaen. Professor Johan Boucht (University of Oslo) and Professor Inger Marie Sunde (PHS - Norwegian Police University College) have been affiliated professors.

\* The author is professor (PhD) at the Faculty of Law, University of Bergen. He is a former public prosecutor and the leader of the research project 'Police and Prosecution Law' (2017–2022).

1 See the project website: <https://www.uib.no/politiogpatalerett>. All web-references were last accessed at 15 October 2022.

2 Trond Mohn stiftelse, former Bergens Forskningsstiftelse, see: <https://mohnfoundation.no/en/thematic-initiatives/legal-research/>.

The project has been supported by an advisory board consisting of Professor Dan Frände (Faculty of Law, University of Helsinki), Associate professor Lena Landström (Department of Law and Police Education Unit at Umeå University) and senior prosecutor, PhD Runar Torgersen (The Director of Public Prosecutions Office).

## 2. Background

Police and prosecution law has for many years held a strong position at the Faculty of Law in Bergen. Since 1977 law students have been offered a postgraduate course in police law, which also included several aspects of prosecution law. This course was initiated and led by former senior prosecutor, Professor Sverre Tønnesen (1933 - 1979). From 1990 to 2018 Professor Henry J. Mæland led the course, from 1993 with invaluable assistance from Ragnar L. Auglend as the principal lecturer.<sup>3</sup>

From 1998 the law students have also been offered a separate course in prosecution law; the area of the law that comprises legal principles and statutory and non-statutory legal rules of particular importance to the public prosecuting authority's role and tasks in criminal proceedings.<sup>4</sup>

Police law and prosecution law are in close connection. This is mainly because of what is called the 'two-track system' of the police legal basis and the police's subordination to the other executive powers. The Norwegian Police Authority covers two distinct areas; firstly, the tasks and functions in connection with operational police work, especially the duty to uphold public order and security in the public domain, and to prevent crime and other violations of public order. This part of the police work is regulated by the Police Act 1995. In this capacity the police is subordinated to the executive powers, e.g., Ministry of Justice and National Police Directorate. Secondly, the police (officers) have tasks and functions in connection with criminal investigation and proceedings, through their conduct of the criminal investigation measures.

In Norway the first level of the prosecution service – the chief of police and his police

---

3 Ragnar L. Auglend (1949-2020) was at that time a city court judge, but he had already held several positions in the Police and had in 1988 and 1991 written most of the comprehensive preparatory work and the proposal for a new Police Instruction (1988) and a Police Act (1991). Later, Auglend became the Chief of Police in Bergen (2005-2011). From 2011-2019 Auglend was a researcher at the faculty, and a significant contributor to the building of a strong and robust academic environment in police and prosecution law.

4 The status of police and prosecution law at the Faculty of Law is further elaborated by Kjelby, 'Politi- og påtalerett som akademiske fag ved Det juridiske fakultet i Bergen' [Police and prosecution law as an academic discipline at the Faculty of Law in Bergen] in Giertsen et al. (eds.) *Rett i vest* Festskrift til 50-årsjubileet for juristutdanningen ved Universitetet i Bergen (Fagbokforlaget, 2019) pp. 379-393.

prosecutors – are integrated in the police organisation. The police prosecutors are lawyers, and they decide whether criminal investigation and prosecution should be initiated, limited or terminated. They also monitor, supervise and – if needed – instruct the police investigation. The police prosecutors are in the front line of the criminal process. The prosecutor's essential role in criminal proceedings is derived from its power over the police during investigation and derives, first of all, from its exclusive power to institute investigation, to instruct the police during the investigation and the prosecutors discretionary powers to decide if a case should be prosecuted or not ('the opportunity principle'). Both based on the caseload and the number of cases and the scope of the police prosecutor's competence to decide which cases to pursue, the prosecutors' desk is 'the centre of criminal process'.<sup>3</sup> The police investigation and the prosecution of criminal cases are regulated in the Criminal Procedure Act and in this capacity the police are subordinated only to the prosecution service, independent from politics, the government, and other branches of the executive powers.

An important milestone for the academic environment at the faculty was the comprehensive textbook 'Police Law' by Ragnar L. Auglend, Henry J. Mæland and Knut Røsandhaug. The first edition was published in 1998, second edition in 2004 and the third edition in 2016.<sup>4</sup> This book covers legal rules concerning the organisation of the Norwegian police service, the objectives and tasks of the police, police officers' rights, duties and protection, the rules governing when and how the police can intervene, the police's duty to assist other public authorities, the police's duties in road traffic cases and immigration control, the police's 'purely' administrative tasks, such as acting as passport authority, issuing weapons permits etc., the rules concerning control of the police, and agreements and rules governing international police cooperation. The book filled a huge gap in the legal literature, and it has since the first edition in 1998 been the standard work in Norwegian police law, for academics, students, and practitioners.

This academic police and prosecution law environment, combined with the strong criminal law and criminal procedure environment, have since 2010 contributed to provide the faculty with several externally funded research projects. Made possible by a generous gift from Trond Mohn and the Bergen Research Foundation (now Trond Mohn Foundation), the project 'Functionality of the criminal justice system' was initiated and implemented in the period 2011-2018.<sup>5</sup> The project 'Police and

3 Kjelby, 'Påtalemyndighetens skrivebord er strafferettspleiens sentrum' [The prosecutors' desk is the centre of the criminal process] in: Sæther et al. (eds.), *Straff og frihet: Til vern om den liberale rettsstat* Festskrift til Tor-Aksel Busch (Gyldendal 2019) pp. 415-426.

4 Auglend and Mæland, *Politirett* 3. utgave [Police Law 3d Edition] (Gyldendal Juridisk 2016).

5 See further Gröning and Frøseth, Functionality of the Criminal Justice System: A research programme in Bergen 2011 – 2018, *Bergen Journal of Criminal Law & Criminal Justice*, Vol 6 No 2 (2018) pp. 188–194.

Prosecution Law' follows in the footsteps of – and builds directly on – some of the results from the Functionality-project's focus on police and prosecution law, especially the two doctoral theses from this project.<sup>6</sup>

The project 'Police and Prosecution Law' covers the two above-mentioned distinct areas of police authority: The tasks in connection with operational police work, and the police and prosecuting authority's tasks in connection with criminal investigation and proceedings. The project has been concentrated on topics in areas where the police and prosecuting services are facing new challenges that have yet to be legally clarified and where new research-based knowledge is needed, addressing fundamental questions such as: the function of the principle of legal authority as the foundation of the rule of law; the relationship and legal boundaries between different authorities' tasks, whether the police and prosecuting authority's tasks and the legal framework need to be clarified and/or redefined in order to meet practical needs, and how our obligations under international law can and should be implemented and operationalised in both the police's and the prosecuting authority's activities.

### 3. The project's primary aims and purpose

The project's primary aims and purpose were to fill knowledge gaps in legal science and to strengthen and further develop research on police and prosecution law and the academic environment at the faculty. To ensure this, the project aimed to recruit particularly competent persons to do research on the core tasks of the police and prosecuting authority, carrying forward the results and the research expertise gained during the project 'The Functionality of the Criminal Law System', facilitating new recruitment by offering research fellowship in police/prosecution law, and by supervising students writing master theses on these areas of the law.

Another important aim for the project was to develop new and update existing legal literature and textbooks on police and prosecution law. Also, the project aimed to strengthen the cooperation with the discipline of administration and organisational science at the University of Bergen and the police law research communities at the Norwegian Police University College, the University of Oslo and abroad.

---

6 The PhD thesis: Kjelby, *Mellom rett og plikt til straffefølgning. Den relative etterforsknings- og påtaleplikts rettslige rammer og rettslige utvikling i norsk straffeprosess* [Between the right and the duty to prosecute. The legal framework and legal development of the principle of discretionary prosecution in Norwegian criminal procedure] (Cappelen Damm 2013) and Dr. philos thesis: Auglend, *Handleplikt, kommandomyndighet og lydighetsplikt i operativt politiarbeid* [The duty to act, the command authority and the duty of obedience in operational police work] (Gyldendal 2016).

#### 4. Research-output

The project has achieved most of its research aims. By September 2022, a total of 38 publications have been produced in the project (updated editions not included). This includes seven books; one PhD dissertation, two textbooks and several systematic presentations on legal topics that have not been explored in the legal literature.<sup>7</sup> Some additional articles from the project are on file (for editorial and/or peer review).

The project has been organised in thematical sub-projects. The police (but to some extent also the prosecutors) exercise of authority is rarely subject to judicial control by the courts. All the sub-projects therefore adopted a 'agency perspective', rather than the traditional 'judicial perspective' that has dominated research on the police and prosecuting authority.

In the sub-project 'The role of the police in crises and war', the late Dr. philos. Ragnar L. Auglend published his book 'Politiet i krig og ved okkupasjon' [The police in times of war and occupation] in 2018.<sup>8</sup> Guest researcher, senior adviser in the Ministry of Justice, Arild Aaserød, contributed with two monographs in 2018 on the Police and prosecutorial authority of the Norwegian Coast Gard and legal issues regarding the Norwegian Rescue Services.<sup>9</sup>

Professor II on the project, Johan Boucht published a follow-up article in August 2021 on the Rescue- and Emergency Services (firefighters and ambulance personnel) legal obligation to assist the police, e.g. in situations of ongoing lethal violence (the so-called 'PLIVO').<sup>10</sup> In a forthcoming article Professor Knut Einar Skodvin investigates the legal framework for the division of competence and duty to act between the police and the armed forces in unclear and challenging situations, such as large-scale terrorist attacks, hybrid situations and major cyber-attacks.

A second sub-project was linked to John Reidar Nilsen's doctoral thesis. Nilsen's PhD thesis explores the constitutional limitations for the exercise of police authority.

---

7 For a complete list of publications see the projects homepage: <https://www.uib.no/politiogpatalerett/109862/publikasjoner>.

8 Auglend, *Politiet i krig og ved okkupasjon* [The Police in times of War and Occupation] (Gyldendal 2018).

9 Aaserød, *Kystvaktens politi- og påtalemyndighet* [Police and prosecutorial authority of the Norwegian Coast Gard] (Gyldendal 2018) and Aaserød, *Rettslige problemstillinger i redningstjenesten* [Legal Issues regarding the Norwegian Rescue Services] (Gyldendal 2018).

10 Boucht, *Nødetatenes bistandsplikt overfor politiet* [The Rescue- and Emergency Services obligation to assist the police] *Kritisk juss nr. 3/2021* pp. 109-140.

His thesis was submitted in October 2020 and published in 2022.<sup>11</sup> Nilsen's aim was to clarify the relationship between national rules at different levels and how the current statutory regulations relate to Norway's obligations under international law, particularly the European Convention on Human Rights. Nilsen's attention is directed to the principle of legality in a police law context, together with specific human rights provisions in the Constitution.

Nilsen has also published critical articles on the legal basis, and limits of the police measures, in crime prevention and work-related crime.<sup>12</sup> Researcher and police prosecutor Ingvild Greve followed up with an article on the police prosecutor's role in interdisciplinary cooperation on combating work-related crime.<sup>13</sup> Greve's article supports another third subproject on 'Information collection, information sharing and interdisciplinary cooperation on combating crime.'

As mentioned, it has been an highly important aim for this project to contribute to new textbooks, and to provide updated versions of the existing textbooks. The 'Police Law' third edition from 2016, is mainly a result from the Police Law subproject of the aforementioned 'Functionality-project'. But within the subproject on the Role and Functions of the Prosecutor, the project leader has written a comprehensive textbook on prosecution law.<sup>14</sup> Researcher, currently PhD candidate Malin Skogstad Aaen has also contributed to the research on prosecution law and has recently published a revised version of her master thesis (70 ECTS) from the project: 'The prosecutors' duty to objectivity.'<sup>15</sup>

Outside the thematic boundaries of the sub-projects, the project members and guest researchers on the project have contributed with systematic presentations on legal topics that are previously more or less uncovered in the Norwegian legal literature.

---

11 Nilsen, *Politirett og rettsstat - Sentrale menneskerettslige skranke for den polisiære myndighetsutøvelsen* [Police law and the rule of law - human rights as limits for the exercise of police authority] (Gyldendal 2022).

12 Nilsen, 'Politiets kriminalitetsforebyggende arbeid – gode intensjoner, men svakt rettslig fundert' [Police measures in crime prevention – good intentions, but weak legal basis] *Spesialenheten for politisaker - Årsrapport 2020* pp. 9-12 and Nilsen, 'Politiets bekjempelse av arbeidslivskriminalitet – en praksis uten rettslig forankring?' [The police's fight against work-related crime - a practice without legal basis?] *Tidsskrift for strafferett nr. 4/2018* pp. 348-361.

13 Greve, 'Noen rettslige utfordringer ved det tverretatlige arbeidet i a-krimsentrene – med særlig vekt på påtalemyndighetens rolle og ansvar' [Legal challenges in police prosecutor's role in interdisciplinary cooperation on combating work-related crime] *Tidsskrift for strafferett nr. 2/2021* pp. 119-139.

14 Kjelby, *Påtalerett 2.* utgave [Prosecution law, 2nd Edition] (Cappelen Damm 2019) 1st Edition in 2017, and a upcoming third edition in spring 2023.

15 Aaen, 'Påtalemyndighetens objektivitetsplikt' [The prosecutors duty to objectivity] *Tidsskrift for strafferett nr. 3/2022* pp. 189-213.

In 2019 guest researcher and senior prosecutor at the General Prosecutors office, Anne Grøstad wrote a long-awaited book on international cooperation in criminal cases.<sup>16</sup> Important articles highly relevant for the police and prosecution services have been published in books in honour of our distinct colleges and others; Dr. philos. Ragnar Auglend,<sup>17</sup> Professor emeritus Henry J. Mæland,<sup>18</sup> former Supreme Court Judge and Professor in Bergen, Magnus Matningsdal<sup>19</sup> and former Director of Public Prosecutions, Tor-Aksel Busch.<sup>20</sup>

- 
- 16 Grøstad, *Internasjonalt strafferettslig samarbeid* [International cooperation in criminal cases] (Cappelen Damm 2020).
- 17 See *Tidsskrift for Strafferett nr. 4/2018* - Police Law Issue in honour of Ragnar L. Auglend: Kjelby, Politiets advarsler – OPS, don't do it again! [Police warnings] pp. 285–300, Mæland, Menneskerettighetsdomstolens sensur av politiets håndtering av demonstrasjoner [The European Court of Human Rights' censorship on how the police handles demonstrations] pp. 301–315, Boucht, Politirettslig fare – særlig ved ordensforstyrrelser [The concept of “danger” in police law - especially in the event of disorderly conduct] pp. 327–347 and Nilsen, Politiets bekjempelse av arbeidslivskriminalitet – en praksis uten rettslig forankring? [The police's fight against work-related crime - a practice without legal basis?] pp. 348–361.
- 18 See Matningsdal og Strandbakken (eds.), *Integritet og ære* Festskrift til Henry John Mæland på 70-årsdagen 3. september (Gyldendal 2019): Strandbakken, Påtalemyndighetens meddelelser til offentligheten [Public statements from the prosecution in criminal cases] pp. 311–329, Nilsen, Forholdet mellom domstolen som rettergangspoliti og politiets ansvar for orden- og sikkerhetstiltak i anledning avvikling av rettsmøter [The courts and the duties of the police to uphold order and security in court proceedings] pp. 510–543 and Kjelby, Beviskravet for påtalemyndighetens beslutning om tiltale. Relativisering av beviskravet i lys av EMK og Armani Da Silva mot Storbritannia fra 2016? [The evidential threshold for the decision to prosecute. Relativisation of the evidentiary requirement considering the ECHR and Armani Da Silva v. the United Kingdom 2016?] pp. 244–265.
- 19 See Bergsjø et al. (eds.), *Med ære og samvittighet* Festskrift til Magnus Matningsdal (Gyldendal 2021): Nilsen og Sperr, Straffeloven § 18 – nødverge som polisiær kompetansenorm [Penal Code § 18 – self-defence as legal norm for exercising of police power] pp. 292–315, Strandbakken, DNA-registrering og retten til privatliv etter EMK artikkel 8 [Registration of DNA and the right to privacy in ECHR article 8] pp. 316–340, Boucht, Utviklingslinjer ved inndragning av utbytte fra straffbar handling [Developments in the confiscation of proceeds of crime] pp. 56–72, and Kjelby, Bevisførsel om innholdet i uttalelser fra vitner og mistenkte avgitt ‘på ste-det’ [Bringing evidence to the courts on the content of “on the spot”-statements from witnesses and suspects] pp. 226–252.
- 20 See Sæther et al. (eds.), *Straff og frihet: Til vern om den liberale rettsstat* Festskrift til Tor-Aksel Busch (Gyldendal 2019): Strandbakken, Retten til bistand av forsvarer ved politiavhør. En kritisk vurdering av Rt. 2015 s. 844 og forslaget til ny straffeprosesslov [The right to assistance of a defence counsel during a police interrogation. A critical assessment of Rt. 2015 p. 844 and the proposal for a new Criminal Procedure Act] pp. 559–577 and Mæland, Arbeidet som setteriksadvokat under tiden til Tor-Aksel Busch [The role and function as Ad hoc General Prosecutor] pp. 467–475. See also note 5, above.

## 5. Overview of other results and achievements

With reference to the project's other aims and purpose, the project has achieved most of its ambitions. Recruiting highly skilled persons to academia is a difficult task, especially if one seeks to recruit persons from the Police and Prosecution Authority. But the project has nevertheless achieved some of its recruitment ambitions. The project leader has – during the project period – advanced to a permanent position as professor. Nilsen is now an associate professor II at the faculty (in addition to his researcher-position funded by the Norwegian Police Directorate).

The project members have supervised several master students, including two students on the faculty's postgraduate course 'Master Thesis' (70 ECTS). Researcher and former master student with grant from the project, Malin Skogstad Aaen, is now a PhD candidate at the faculty's PhD-program.

The cooperation with Norwegian Police University College (PHS) and the University of Oslo (UiO) have been strengthened, especially through professor II positions for Inger Marie Sunde (PHS) and Johan Boucht (University of Oslo). Our relations to CORA, Faculty of Law and Copenhagen University are good, and the project has hosted two guest researchers/PhD candidates from Copenhagen.

The project has prioritised activities towards our stakeholders, by providing lectures on conferences, workshops, at educational arenas (PHS – Norwegian Police University College) and regional or national meetings for police and prosecutors. This includes arranging and hosting the two conferences in 2018 and 2022, with 90-115 participants. These conferences have been highly valued by the participants/our stakeholders.<sup>21</sup>

## 6. Outlook

Research on police and prosecution law will commence. The project leader and Professor emeritus Tor-Geir Myhrer (PHS) edits a forthcoming 25 year-anniversary extensive anthology, celebrating the first edition of the textbook on Police Law in 1998, by the former project members Ragnar L. Auglend and Henry J. Mæland. This collection of articles will be published in June 2023 (Universitetsforlaget).

---

21 The 2018 conference 'On the boundaries of police and prosecution law,' see further: <https://www.uib.no/politiogpatalerett/118362/i-politi-og-p%C3%A5talerettens-grenseland>.



The project has done some research on legal history,<sup>22</sup> but greater things are to come. The Faculty of Law in Bergen has also been given responsibility for developing a third externally funded research project on police law; ‘The legal history of Norwegian Police 1686 – 2016’. This project is funded by the Norwegian Police Directorate and the University of Bergen, with contribution from the Norwegian Police University College, the University of Oslo and the Norwegian Centre for Holocaust and Minority Studies.<sup>23</sup> The project is headed by Professor in political science, Anne Lise Fimreite, Professor in criminal law and criminal procedure, Gert Johan Kjelby, and Professor in legal history, Jørn Øyrehagen Sunde, with Professor in history, Yngve Flo, as special project advisor. The primary aim of the project is to systematically research and publish three volumes on the legal history of the Norwegian police from 1686 to the latest police reform in 2016, including a lengthy introductory chapter on Norwegian police in the Middle Ages. While emphasis is on the *legal* history of the Norwegian police, it is a cross disciplinary project.

The Police and Prosecution Law project’s long-term aim to provide a solid foundation for a strong and ambitious research community within the fields of police and prosecution law, seems to be fulfilled. The master students in Bergen will for years to come be offered postgraduate courses in ‘Police law’ (20 ECTS) and ‘Prosecution Law’ (10 ECTS), and the benefits of research-based lectures and updated textbooks and literature. Hopefully our graduate students – as the future lawyers in the police and prosecution service – will be better skilled to perform the crucial and pressing task of effective legal supervision and control over the use of police and prosecution powers.

---

22 See, among others, Nilsens article in this issue and Kjelby, Doms- og foreleggskompetansen i politisakene. Særlig om politimestrenes ‘dømmende Myndighed i ringe Bødemaalsager’ og foreleggstinstituttets fremvekst [‘Judgements and penal orders issued by the police - Developments in the Norwegian history of police and prosecution law’] in: Heivoll og Flaatten (eds.), *Rettslige overgangsformer: politi- og kriminalrett i nordisk rettsutvikling. Oslo Studies in Legal History nr. 15/2017* pp. 243-283.

23 See further <https://www.uib.no/en/jur/143108/legal-history-norwegian-police-and-policing>.