

# RESOURCE MATERIAL SERIES No. 38



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**RESOURCE MATERIAL**  
**SERIES No. 38**

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## Introductory Note

The editor is pleased to present No. 38 in the Resource Material Series including materials from the 84th International Seminar and the 85th International Training Course.

Part I contains materials produced during the 84th International Seminar on "Policy Perspectives on Contemporary Problems in Crime Prevention and Criminal Justice Administration" which began on 29 January and ended on 3 March 1990.

Section 1 of Part I consists of papers contributed by six visiting experts.

Mr. Hetti Gamage Dharmadasa, Commissioner of Prisons, Prison Headquarters, Sri Lanka, in his paper entitled "The Problem of Imprisonment, Overcrowding of Prisons - The Search for Solutions" analyzes the causes of overcrowding in prisons and examines various possible solutions to the problem.

Dr. Hira Singh, Director of the National Institute of Social Defence, Ministry of Welfare, India, in his paper entitled "Juvenile Justice System in India," examines the causes of juvenile delinquency in the socio-cultural and economic context, and introduces systems and measures designed to safeguard and protect the rights and interest of juveniles.

Dr. Gerhard O. W. Mueller, Distinguished Professor, School of Criminal Justice, Rutgers Campus at Newark, the State University of New Jersey, the United States of America, in his paper entitled "United Nations Norms and Guidelines in Crime Prevention and Criminal Justice," explains the aims and backgrounds of United Nations principles, guidelines, norms and standards which were created to ensure the protection of human rights, fair administration of criminal justice as well as the prevention of crime.

Dr. Peter Morré, Federal Public Prosecutor at the Federal Court of Justice, Federal Republic of Germany, in his paper entitled "The Office of the Federal Prosecutor General in West Germany—with Special Regard to Combatting Terrorist Activities," introduces legal principles and organization of public prosecution in West Germany and explains the roles and functions of the Office of the Federal Prosecutor General in combatting terrorist activities.

Mr. David S. Gandy, Deputy Director of Public Prosecutions and Chief Executive of the Crown Prosecution Service, the United Kingdom, in his paper entitled "Tackling Crime in the 1990s," analyzes recent crime situations and introduces various schemes and measures designed to tackle crime in England and Wales.

Dr. B. J. George Jr., Professor, New York Law School, the United States

of America, in his paper entitled "Federal and State Legislation against Organized Crime in the United States," introduces recent American federal and state legislative instruments directed at the control of the problems of organized crime and racketeering.

Section 2 contains papers submitted by five participants of the 84th International Seminar, and Section 3 contains the Report of the Seminar.

Part II presents materials produced during the 85th International Training Course on "Wider Use and More Effective Implementation of Non-custodial Measures for Offenders" which commenced on 9 April and ended on 30 June 1990.

Section 1 of Part II consists of papers presented by six visiting experts.

Dr. Matti Joutsen, Director, Helsinki Institute for Crime Prevention and Control Affiliated with the United Nations (HEUNI), in his paper entitled "Expanding the Use of Non-custodial Measures," explores and proposes various measures to effectively expand the use of non-custodial sanctions for offenders as appropriate alternatives to imprisonment.

Mr. Joseph Acakpo-Satchivi, Secretariat of the Economic and Social Council (ECOSOC), the United Nations, in his paper entitled "The Economic and Social Council," introduces the composition, function and powers of the Economic and Social Council of the United Nations as well as its subsidiary machinery and efforts to reform and revitalize it.

Dr. Gilbert Lewis Ingram, Assistant Director, Correctional Programmes Division, Federal Bureau of Prisons, Department of Justice, the United States of America, in his paper entitled "Offender Accountability in the United States with Custodial and Non-custodial Measures," describes many intermediate sanctions available today in the United States including community service, shock incarceration, restitution and intensive probation supervision, and goes on to examine correctional treatment programmes in federal correctional facilities.

Dr. Curt Taylor Griffiths, Professor, School of Criminology, Simon Fraser University, Canada, in his paper entitled "The Use of Community Sanctions and Programmes: Critical Issues, Lessons Learned and an Agenda for Change," examines issues and controversies over the effectiveness of community sanctions and programmes in protecting society and assisting offenders. He further explores various ways of improving community sanctions by incorporating community participation as well as the involvement of offenders themselves.

Dr. Femi Odekunle, Director, United Nations African Regional Institute for the Prevention of Crime and the Treatment of Offenders (UNAFRI), in his paper entitled "Towards Compensation for Victims of Organized Crime in Developing African Countries," discusses the necessity and feasibility of



implementing the scheme of compensating the victims of crime into the criminal justice systems of developing countries.

Mr. Niwet Comephong, Deputy Chief Justice, Court of Appeals Region 1, Thailand, in his paper entitled "Use of Non-custodial Measures for Offenders in Thailand," introduces alternative measures to pre-trial detention as well as a scheme of diverting criminals from the formal justice process at the pre-trial stage in Thailand.

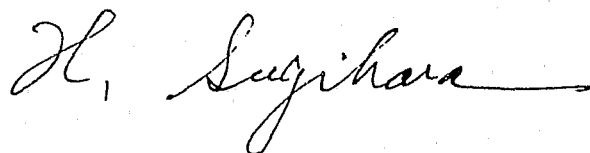
Section 2 contains papers submitted by three participants of the 85th International Training Course, and Section 3 contains the Report of the Course.

The editor deeply regrets that the lack of sufficient space precluded the publishing of all the papers submitted by the participants of the Course. The editor would like to add that, due to lack of time, necessary editorial changes had to be made without referring the manuscript back to their authors. The editor requests their indulgence and understanding of this necessity which was required to meet editorial deadlines.

In concluding the Introductory Note, the editor would like to pay tribute to the contribution of the Japan International Co-operation Agency (JICA) for providing indispensable and unwavering support for UNAFEI courses and seminars from which these materials were produced. The editor also would like to express his gratitude and appreciation to all who so willingly assisted in the publication of this volume by attending to typing, printing, proofreading and in various other ways.

The editor also would like to take this opportunity to express his deepest appreciation to the continued financial and other support rendered by the Asia Crime Prevention Foundation (ACPF) for various UNAFEI projects including the publication of this Resource Material Series.

December 1990

A handwritten signature in cursive script, reading "Hiroyasu Sugihara". The signature is written in dark ink on a light background.

*Hiroyasu Sugihara*

Editor  
Director of UNAFEI

## **PART I**

**Materials Produced during  
the 84th International Seminar on  
“Policy Perspectives on Contemporary  
Problems in Crime Prevention and  
Criminal Justice Administration”**

## SECTION 1: EXPERTS' PAPERS

## The Problem of Imprisonment, Overcrowding of Prisons— The Search for Solutions

by *Hetti Gamage Dharmadasa*\*

### Background

The criminal justice systems of almost all nations in the world have used imprisonment as the primary method of punishment, especially during the last two centuries. In many societies imprisonment has become an essential evil. In the beginning it was pure and simple incarceration keeping the offender completely away from society and punishing him. Non one cared for those imprisoned. A description of the conditions in English prisons towards the end of the 18th century shows the general attitude that prevailed during that period.

"Many of the goals of the time were still private property and keepers paid large sums of money for the right to exploit prisoners in their charge. There were abuses, of course—horrible to modern minds—but in an age of abuses they went unquestioned, almost unnoticed. When the fevers and poxes bred in filthy overcrowded cells invaded the court houses, a cry for sanitary goals would go up. In 1750 a Lord Mayor, two judges and several counsel and jurymen died as a result of a particularly virulent outbreak of jail-fever at the Old Baily prison, and orders were given for a thorough cleansing of the prison and for prisoners to be washed before appearing in court. Such reforms were the only ones contemplated by the powers of the 18th century; only in so far as its life was threatened by jail fevers did authority show

an interest in jails."

Criticisms leveled against the whole concept of imprisonment are many. The critics would say that it is much easier for the law enforcement officer, the judge and the society to incarcerate an offender than to keep him in society. They say that society enjoys a deceptive sense of security by putting the offender out of circulation. It is a false sense of security because almost every offender sent to prison will return to society some day more angry, more revengeful, socially handicapped, less employable and therefore less capable of resocializing. It is said that many negative and adverse influences on individuals that are unavoidable in the prison setting cannot be countered by the many rehabilitative and treatment efforts. One of the special committees appointed to examine the prison system in Canada (1977) had reported that society has spent millions of dollars to create and maintain the proven failure of prisons. They said incarceration has failed in its two essential purposes: correcting the offender and providing permanent protection to society.

Many countries have built large penal institutions—the "Mega institutions" holding more than a thousand inmates. In such surroundings inmates become faceless people, living out routine and meaningless lives.

In many countries recidivism rates are notoriously high. Therefore the criticism that penal institutions do succeed in punishing but do not deter has emerged. Prisons are effective in changing the convicted offender, but the change is more likely to be negative than positive.

---

\* Commissioner of Prisons, Prison Headquarters, Sri Lanka

With all these adverse criticisms against prisons and imprisonment, prison sentences still remain the core of the penal systems in many parts of the world. Either through the false belief that prison sentences deter crime or due to a lack of other suitable alternatives, judges and magistrates in many developing countries sentence offenders to jails.

Prison overcrowding is a pressing problem that criminal justice administrations in many countries, both in the developing and the developed world, are facing today. In several countries in Asia, South America and Africa, overcrowding of prisons has reached critical levels making it impossible to adhere to the United Nations Standard Minimum Rules regarding accommodation, i.e. "All accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard be paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation" (rule 10). In many developing countries, single cell accommodations with such facilities are an impossibility when compared with the numbers of prisoners.

Overcrowding in prisons in some of these countries is not merely a numerical or a spatial problem, it is a problem of gross inadequacy of essential basic facilities such as water for washing, sanitary, medical and recreational facilities. Insufficient staff to control and supervise the large number of prisoners is another serious problem. Such is the case in all the major prisons in Sri Lanka.

#### *Causes for Overcrowding*

There are many causes for the overcrowding of prisons and they may differ from country to country or from time to time within the same country. A closer scrutiny will reveal that many countries still carry prison sentences for far too many offences. As mentioned before legal systems in many of these countries over emphasize imprisonment as the most powerful weapon against crime. Far

too many offenders are also sent to prison for short terms of imprisonment. For example in Sri Lanka, out of a total of 13,355 persons convicted and admitted to prisons in 1987, 8,169 were persons sentenced to less than six months. This is 61.16% of the total (I have taken the figures for 1987 here as the figures for 1988 and 1989 do not represent the true picture. This is due to the fact that police and courts were unable to function in the normal manner due to an escalation in subversive activities during these two years).

Another reason for the increase in the prison population is the large number of offenders admitted to prisons for non payment of fines. In Sri Lanka the number of persons sentenced to imprisonment for default payment of fines in 1987 was 10,470 or 78.39% of a total of 13,355. These are persons whom the courts initially thought did not deserve a prison sentence.

Another major cause for prison overcrowding is the large number of remand prisoners admitted to prisons. In Sri Lanka, for every single convicted prisoner there are more than five remand prisoners admitted to prisons. In the year 1987 there were 59,452 remand prisoners admitted to prisons as opposed to the 13,355 convicted prisoners.

Several reasons are attributed to the excessive numbers of remand prisoners in jails. Delays in bringing the offenders to trial, trials which last for long periods of time (more commonly known as laws delays), inadequate use of bail provisions, and excessive bail orders are some of the contributory factors to the overcrowding of remand prisons. In Sri Lankan prisons, it is common to find large number of persons wasting their lives in remand prisons because of their inability to furnish the bail ordered by the courts. There are also many instances where those on remand are either too ignorant or too poor to retain counsel or to make applications for bail. This is true in many other developing countries as well. It is also not uncommon to observe the police using the remanding of suspects as a punitive measure, in fact abus-

## PROBLEM OF IMPRISONMENT

ing their legal authority. In Sri Lanka we have observed the remanding of ticketless travellers, petty thieves, vagrants, drunkards, prostitutes and drug addicts. These minor offenders could easily have been dealt with otherwise without resorting to remand.

Lack of sufficient and suitable prison facilities is another major cause for overcrowding of existing prisons. For obvious reasons many of the developing countries have not constructed any new prison facilities. In Sri Lanka almost all the closed prisons are over a hundred years old. Built during the latter part of the 19th century when the population of the country was less than three million, these prisons cannot meet the demands of the present day (the present population is 16.2 million). Construction of modern prisons is an expensive proposition to most Third World countries. Emphasis is on the economic and social development of the county. Even if desired and accepted in principle, construction of new prisons would be a very low priority. In most Third World countries, politicians decide on priorities. They would support the building of schools, hospitals, factories, etc., which would be more appealing to the general public and in the end help them to win elections or stay in power. Consequently the prison administrators are compelled to manage with what they have.

With the rapidly changing economic, social and political conditions and growing populations, increased migration from rural to urban areas, weakened community ties, and tension between communities and tribes, crime too has increased in most developing countries. Better and widespread policing facilities and the use of modern technology have increased the detection of crime resulting in more convictions and large numbers of people being admitted to prisons. However, the accommodation facilities in prisons have not kept pace to absorb the increased intake. Here I do not advocate the building of more and more new prisons to solve the problem of prison overcrowding; but where

it is necessary, new facilities have to be provided.

### *Effects of Overcrowding*

Increasing prison populations and prison overcrowding are factors that create difficulties in the observance of the Standard Minimum Rules for the treatment of prisoners in many countries as mentioned earlier. In Sri Lanka every possible effort is being made to administer the prisons in keeping with these standard minimum rules. The major obstacle to our efforts is the severe overcrowding, especially in the case of remand prisoners. It has caused severe strain on the essential services and accommodation facilities. Overcrowding also disrupts the rehabilitation programmes creating problems for prison administration in providing a well planned and coordinated treatment package. Overcrowded prisons provide explosive settings where minor issues could escalate into major problems. In November 1988 a major riot took place in the main Colombo Prison which housed over 3,000 prisoners but with a capacity to hold only 1,800. Encouraged by the weakened security situation in the country due to subversive activities, prisoners rioted setting fire to several buildings and causing severe damage, though there was no direct attack on the staff. Though the cause for the riot was not the overcrowding, the overcrowded situation contributed in a very significant way towards the escalation of the riot.

Apart from the difficulties and problems created for the penal administration, prison overcrowding severely affects the lives of those inmates held in overcrowded conditions. Forms of classification and segregation become impossible in such situations. Very often, hardened criminals and mild offenders, convicted and unconvicted, long- and short-term offenders have to be housed in the same institution providing ample opportunity for contamination. They also become breeding grounds for future hardened criminals.

In Sri Lanka, overcrowding of remand prisoners became so grave that sections of prisons meant exclusively for convicted offenders had to be given over to house remand prisoners. Such overcrowded conditions not only create adverse situations for inmates but also for prison officers. Maintaining discipline becomes difficult with a low inmate officer ratio. Such situations bring down the moral of the prison officer and his position becomes insecure. Under these conditions the deterioration of staff-inmate relationships becomes inevitable, hampering any form of correctional work.

*In Search of Solutions*

The solutions to the problem of overcrowding of prisons can not be found within the penal administration alone. It is a problem that has its roots in government policy, courts, police and prosecutorial practices and penal institutions. Therefore, solutions to the problem have to be sought through an integrated approach. It is very relevant to mention here two of the recommendations made in the "Report of the Inter-regional preparatory meeting for the Eighth United Nations Congress under topic 11 'criminal justice policies in relation to problems of imprisonment, other penal sanctions and alternative measures.'"

Heading 1 Management and Training.

- (a) Within their respective legal frameworks, structuring the management of each part of the criminal justice system in such a way as to develop an appropriate information base and coherent policies, and ensuring that the impact of decisions in one part of the criminal justice system be considered in the light of their effects on the other parts;
- (b) Considering decisions within one part of the criminal justice system in the light of the goals not only of that part of the criminal justice system, but also in the light of their effects on other parts.

Greater effectiveness in the criminal justice system could be achieved by an integrated approach without resorting to heavy expenditure to achieve the same result. However, in practice the situation found in most countries is that each agency works in watertight compartments, isolated from each other. The agencies are often unconcerned about the possible consequences of their activities on the other agencies or on the entire system. In Sri Lanka the main agencies such as police, prisons and probation come under three separate ministries while the courts function independently under the judicial service commission. There is very little or no coordination existing between the different agencies though they work to achieve closely interrelated objectives. As a result, the problems faced by one agency becomes its exclusive responsibility. Therefore, the problem of overcrowding of prisons became the exclusive problem of the correctional administration. Having realized the roles the other agencies can play in reducing the prison population such as the police expediting the investigations and courts expediting the trial process and utilization of non-custodial methods in a greater measure, work shops, seminars and conferences have been conducted involving the different agencies through the initiation of the Department of Prisons and the Ministry of Justice. It would be significant to mention in this regard the two joint seminars conducted by UN-AFEI in 1981 and 1987 on the topics of Integrated Approach to Criminal Justice Administration and Towards an Effective Criminal Justice Administration. Through these seminars and conferences, respective agencies have been sensitized to the necessity of sharing the same objectives and also to viewing the responsibility of their own agencies in not only reducing the overcrowding of prisons but also regarding the success or failure of the system as a whole.

Though a special system or procedure had not been developed for the coordination between the agencies there is now a greater re-

alization of the need for such coordination by the agencies. Some degree of coordination has been achieved through the appointment of *ad-hoc* committees on general and specific issues.

### **Diversions from the Criminal Justice System**

Conscientiously and judiciously implemented diversion procedures could in some proportion reduce imprisonment justification for diversion from the criminal justice include arguments that the existing system has failed to achieve reformation in large numbers of cases, the heavy cost in maintaining prisoners, community interests and of course prison overcrowding.

The absolute lack of tolerance for every kind of deviance in our societies has not only caused much unnecessary strain on police and courts, it has also resulted in many "offenders" having been sentenced to prison who need not have been sent there. Though processed through the criminal justice system, their deviance hardly constitutes any serious criminality. While the overburdened criminal justice systems, especially in Third World countries, are bursting under the heavy weight of these "marginal criminals," the public is complaining about delays in justice, overcrowded prisons, curtailment of rights and loss of liberty. This is mainly due to the fact that our systems have a general tendency to rely too heavily on the law and legal process for the solution of our social problems. The assignment of a variety of human conduct to the criminal law and its processes have resulted in a problem of over-criminalization. In recent years there has been a noticeable interest in reducing the load on criminal and civil courts by removing certain categories of social deviance and disputes entirely from the judicial process.

Realising the importance of diverting certain categories of disputes and offences from the courts, the Sri Lankan government introduced mediation through the Mediation

Boards Act No. 72 of 1988. Under this act certain civil disputes where the value of the subject matter is less than Rs. 25,000 and certain criminal offences are compulsorily submitted for mediation (for details please see annexed note on mediation boards).

The mediation boards will consist of a mediator from among persons resident in the area and also public officers nominated by the government. The duty of the mediation board is to attempt the settlement of disputes or offences submitted to them by endeavouring to bring the disputants to an amicable settlement. The procedure before a mediation board will necessarily be informal and as far removed as possible from the atmosphere of a court of law. Parties to the dispute or complaint are required to attend in person without legal representatives. When a settlement is reached, the terms of the settlement will be reduced to writing and will form the basis of the agreement.

Preliminary steps have already been taken to establish the mediation boards in several areas and it is fervently hoped that it will contribute in some significant manner to reducing imprisonment.

### **Decriminalization and Diversion to Non-penal Institutions**

In developed as well as in developing countries there is strong pressure from certain segments of the society to decriminalize abortion, homosexuality, vagrancy, drunkardness, etc. In fact, certain countries have already done so. Such decriminalization would in some measure cause a reduction in imprisonment. Action also must be taken to divert mentally disturbed persons, alcoholics and drug addicts from prisons to non penal treatment centres. In Sri Lanka in recent years the admission of drug offenders to prison has increased tremendously as shown in the following figure.

Year	Number Admitted	Percentage
1984	1,777	13.7
1985	3,207	24.2
1986	3,722	25.5
1987	3,642	27.5

More than 95% of these drug offenders were drug addicts who could in one way be described as victims of drug addiction. There is general agreement among those concerned that prison sentences do not serve any purpose for these non-criminal drug addicts. Instead a community-based programme founded upon the consent and cooperation of the addict would be more beneficial to the addict as well as the community. Having considered the problem of drug addicts in prison, the Ministry of Justice in Sri Lanka is now taking steps to establish treatment centers for drug addicts following the lead given by the countries in the region such as Singapore and Malaysia.

### Measures to Reduce Remand Prison Population

Studies done in the area of remand prisoners have recommended several measures to reduce the remanding of offenders. One such measure is the introduction of legislation to encourage the use of summons in lieu of arrest and detention. This would include the enumeration of minor offences for which a police officer would be required to issue summons in lieu of arrest or detention of an accused under certain condition such as a) that security of the society is not at risk b) that the offender is not required for further investigation c) that the offender is identified and he has a fixed abode d) that he has not violated summons before, etc.

Some recommendations even go as far as giving the discretionary authority for police officers to issue summons in lieu of arrest and detention in all cases where the officer has reason to believe that the accused will

respond to the summons and does not represent a threat to himself or others.

Legal provision also must be made for the magistrates and judges to issue summons in lieu of arrest warrants in all cases where the magistrate or the judge has reason to believe that the accused will respond to a summons. A requirement must be made that a judicial officer issuing a warrant of detention states his reasons for doing so in writing. Though some developed countries already have this provision there is no such requirement in Sri Lanka, and this is the situation in many other countries. Implementation of such procedures will require that the judicial officer has a certain amount of basic information so that he can make an intelligent choice between the alternatives.

Limiting the use of pre-trial detention would certainly result in a reduction in the overcrowding of remand prisons. However, the success of such practices can only be accomplished through the full commitment and cooperation of appropriate law enforcement agencies.

Measures also have to be taken to speed up police prosecutions and court trial procedures. As I have mentioned earlier, major causes for the overcrowding of remand prisons are the inordinate delays in the prosecution procedure and trial procedure. Many experts who have studied this problem have suggested setting up mandatory time limits for the completion of investigation and prosecution where such regulations are not available. They also suggest setting time limits regarding the period a suspected or accused person could be kept on remand.

The increased use of release on personal bonds by magistrates and liberalising the bail facilities have also been suggested as solutions for reduction in remand populations. In Sri Lanka it is common to find large numbers of remand prisoners languishing in jails even after they have been ordered bail by the courts because of their inability to furnish the bail. When ordering bail, judges and magistrates should consider not only the gravity



## PROBLEM OF IMPRISONMENT

of the offence but also the offenders ability to furnish the bail.

Sri Lanka has drafted a bill in this regard with the dual purpose of reducing the overcrowding of remand prisons and granting relief to those persons held in custody for their inability to furnish bail. When established as law, this act would enable the release of certain categories of remand prisoners upon their executing a bond without sureties for their appearance in court. These would include remand prisoners (with certain exceptions) who:

- a) are granted bail by a competent court, but continue to remain in prison more than one month for their inability to furnish such bail.
- b) are under remand custody for a period of three months and no court proceedings have been initiated against them.
- c) are under remand for a period exceeding one year and trials against them have not been commenced.

This act will also have made mandatory provisions for the magistrates to visit the prisons situated within their judicial divisions at least once in every month.

When the provisions of this law are made applicable it is expected that the remand population will be reduced by 5 to 10 %.

In most Third World countries many remand prisoners spend time in jail due to utter ignorance of legal procedures and their inability to retain counsel (a survey conducted in the Sri Lankan prisons revealed that more than 50% of prisoners were illiterate though the literacy rate in the country is about 84%). In such circumstances arrangements must be made to educate the remand prisoners of their right to bail, etc. Facilities for free legal aid too, must be made available. A proper and well conducted legal aid system can help considerably to reduce remand populations. Very unfortunately only a few of the Third World countries have a properly organized and well conducted legal

aid systems. In Sri Lanka the functioning of the legal aid commission is retarded due to lack of financial resources and committed layers.

### Measures to Reduce the Convicted Prison Population

#### *Modification of Penal Sanctions*

Mention was made earlier in this paper that many countries carry prison sentences for far too many offences. Most developing countries still operate on penal codes introduced by their colonial masters more than half a century ago. It is time that legislators in these countries give serious thought in revising or modifying their penal codes or even introducing new ones. Some countries have already done so. It is significant to note the statement made by the Cuban Interior Minister Jose Abrantes when the modified penal code was presented in April 1988. In the process of this modification several offences have been depenalised and in many other instances fines have replaced the prison sentences. The Minister said:

“I think we have to make our people reflect on all these questions and persuade and convince them that this rectification implies a change of attitudes, a consistent and profound political and ideological work, a change in the repressive notion and tendency to look for solutions to all the problems, mistakes, violations and law breaking through police intervention and courts.”

Removal of prison sentences for certain offences in the penal codes and other laws and replacing them with fines or other suitable alternative punishments will cause a drop in imprisonment by a considerable degree. It is necessary in this regard, to create a public opinion and a political climate that will not perceive the use of imprisonment as the primary penal sanction appropriate for less serious offenders.

Many countries do not have provisions for offenders to receive credit for the time spent on remand. Sometimes offenders have to spend more time on remand than the actual length of the sentence. If the laws in these countries are changed enabling the offenders to receive credit for the period spent in remand thereby reducing the time served for the actual sentence, they would serve less time in prison. It would also mean that prisoners receiving short prison sentences of a few weeks or months would have served sufficient time in remand that they could be released after conviction. Those persons sentenced to short terms would not benefit by any further imprisonment. They have already been sufficiently punished by having been imprisoned on remand.

*Community Corrections as an Alternative to Imprisonment*

Public and professional expectations of corrections have brought about a considerable transformation in the means and ends during the last several years. These progressive expectations have led to an awareness that corrections must be linked to the community in every phase of operation. Community-based corrections are considered the most promising means of reforming prisoners' behavior to meet the standards of modern developed societies.

There is a clear need in the field of community corrections for a systematic and orderly development having due regard for local conditions and local needs. In developing such a system it is necessary to ensure by way of policy that no individual who does not absolutely require incarceration for the protection of others, is confined in an institution and that no individual is subjected to more supervision or control than required. In many countries imprisonment of offenders has been practiced because alternative programmes and understanding offender needs have been lacking or inadequate. This situation has to be changed by development of systematic plan for creation of varied

community-based programmes that will respond to the needs of the offender and the interest of the community. The significance of community-based corrections can be assessed from three different aspects, (a) humanitarian (b) restorative and (c) managerial.

Humanitarian Aspects

- (a) Allows offender to maintain relationships with family and worthy friends.
- (b) Avoids the adverse effects of imprisonment.
- (c) Offenders are able to retain their employment.

Restorative Aspects

- (a) The likelihood of offenders accepting the proper standards of society (norms) is greater if the treatment experience gives them a place in regular community life.
- (b) Community correctional experiences give the offenders a sense of purpose and promotes their self-involvement in the change process.
- (c) Community programmes offer a closer and intimate staff-client relationship than in the "warehouse" prison.
- (d) The difficulty the offender finds in the re-entry process is avoided.
- (e) In prisons, inmates learn from an abnormal society—whilst community programmes afford the opportunity to adjust to a free life in the community.
- (f) The world changes while a long sentence is being served in prisons. Premature release such as parole mitigates the impact of such change.

Managerial Aspects

- (a) Reduces the problem of prison overcrowding.
- (b) Saves costs on construction and maintenance of prisons.
- (c) Saves costs on correctional personnel.
- (d) Saves costs on inmate maintenance—food, clothing, etc.
- (e) Saves costs on social support for dependent families.

## PROBLEM OF IMPRISONMENT

There has been the argument that the managerial aspect is the most significant of these three aspects. To face the increasing overcrowding in prisons, many countries are being forced to undertake costly building programmes. Such facilities are increasingly expensive to erect and operate. Therefore, the need for a less costly, effective system of community correction.

### *Traditional Alternatives and New Developments*

Today Probation, Parole and Community Service could be described as traditional alternatives to imprisonment. They are widely used in many developed as well as developing countries.

#### Probation

Probation is considered the most promising process of all community based treatment methods. It could be defined as the application of modern scientific casework to specially selected offenders who are placed by the courts under the personal supervision and guidance of a probation officer with the aim of offering permanent social rehabilitation.

The extent to which probation can be used could be seen from the examples set by the United States of America and Japan. In both these countries more than 50 percent of the offenders sentenced to correctional treatment are placed on probation. However, in some countries probation is still unknown. In others it exists only in law, and has seldom been used. In Sri Lanka probation has been in existence since 1944, but is heavily under utilized. Of all offenders sentenced to correctional treatment, less than 10% are placed on probation. The use of probation must be expanded not only because it helps to reduce the prison populations but because it is still viewed as the brightest hope for corrections.

#### New Forms of Probations

The Intensive Probation Supervision or

IPS and home confinement of home detention are new forms of Probation developed in recent years. Intensive Probation Supervision is considered the strictest form of probation supervision. The main element of this programme is the very high level of client contact. In some states in America where the programme is operating, a minimum of 20 contacts per month including nights and weekends are required at the initial stages being lowered down to 10 at the later stages. More than half of these contacts must be face to face. A curfew is imposed to limit a probationer's movement outside his residence other than during working hours. Probationers have to perform compulsory community service and when necessary, be given random tests for drugs.

#### Home Detention

Home Detention is a more restrictive alternative than Intensive Probation Supervision. Probationers under this program are restricted to their homes except for work and other limited activities. In some jurisdictions IPS and Home Detention programmes are used in combination for wider category of offenders. Such Home Detention Programmes fall into two broad categories, (a) the Front End Programmes and (b) the Back End Programmes.

The Front End Programme is one which provides for direct sentencing to Home Detention in lieu of a prison sentence. The Front End model is also used as an alternative to remand custody. Some states in Australia such as South Australia have made such provisions for Home Detention for persons awaiting trial. The Back End Programme serves as an early release mechanism for those serving prison sentences.

Other alternative probation programmes introduced in recent times are "Diversion Centre" and Probation Detention Centres. Under the Diversion Centre Programme a probationer resides at such a centre for a specific number of days (120) participating in educational and counselling programmes. Pro-

bation Detention Centers are mainly used to keep the probation failures.

Some jurisdictions in the United States such as Georgia have claimed high rates of success in reducing imprisonment since the introduction of these schemes. Georgia claims that in 1980 prior to these sentencing alternatives were introduced the probation rate for felonies was about 60% and in 1989 reached a rate of approximately 70% by placing more offenders under probation programmes instead of imprisonment.

#### Community Service as an Alternative to Imprisonment

Community service by order of the court, though a comparatively new concept, is currently practiced in several countries. As an alternative to a prison sentence, courts may order an offender who has been convicted of an offence punishable with imprisonment to carry out a community task for a number of hours stipulated by the court within a certain period of time. The number of hours under normal circumstances is not less than 40 hours and not more than 240 hours. The period within which the task has to be completed is 12 months. The offender who has been placed on community service can be returned to court if he fails to carry out his work commitment. He may then be dealt with in any way that was open to the court when the order was originally made.

Community service by the offender was introduced in Sri Lanka in 1985. However, it has not made any significant impact as an alternative to imprisonment as is evident from the large number of offenders sentenced to prison for short terms and the small number of community service orders made up to date.

#### Parole or Release on Licence

Parole is an early release mechanism used widely in many countries. The basic philosophy of parole is that a prisoner should not be held any longer than necessary as it is detrimental to his reformation and also an

unnecessary expense to the state. Parole as a correctional measure is a procedure whereby a prisoner is released from an institution, at a time considered appropriate by a parole board, prior to the completion of his full sentence so that he may serve the balance of the sentence at large in society. The offender is also subject to the condition that he will be returned to prison if he fails to comply with the conditions governing his release.

Parole is essentially a correctional process designed to facilitate the re-integration of the offender into the community under the guidance of a parole supervisor. There are certain essential requirements that must be met if parole is to be a successful tool of correctional work, the most essential of them being the careful selection of a parole board. Members of the board should be free from political and administrative pressures showing diversity of training and capable of making almost semi-judicial decisions. If the parole board is not carefully selected the whole system will be jeopardised by the abuse of parole laws and the release of unsuitable prisoners.

Success of the scheme also depends on the careful selection of the parolee and proper and adequate supervision. However, supervision should neither be so close that it becomes a nuisance to the offender nor so lax that it becomes useless. Proper and adequate supervision could be achieved by properly trained parole officers. The field parole officer has to play the role of a guide, philosopher and friend to the parolee.

Support of the public is also an important requirement. The attitude of the community is very necessary for the parolee to make a proper adjustment in a free society.

The community should be willing to receive him and help him to re-establish himself. To achieve this end public must be educated on the advantages of parole. The concept of parole has great potential not only as a tool in the correctional process but also as a method of reducing the prison population and the frustrations of unnecessary

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prolonged imprisonment.

The equivalent of parole in Sri Lanka is the release of prisoners on Licence which was started in 1970. As of this date more than 1,200 prisoners have been released under this scheme and there have been only 38 violations.

### Electronic Monitoring of Offenders

Electronic Monitoring of offenders is the application of high technology in the supervision of offenders in the community. There are many different terms used for this technique such as telemetrics, telemonitoring, electronic surveillance etc. The system is most effectively used in "Home Detention" or "House Arrest." There are several ways offenders under Home Detention can be monitored electronically. The most popular methods are:

- (a) by a computer which automatically dials the offender's telephone and receives identification either by the offender's voice or by an electronic signal
- (b) by a system which involves the offender wearing a bracelet or an anklet which sends radio signals to a receiver attached to the offender's telephone which then relays to a central computer at a monitoring office.

Electronic monitoring is often used in situations that require that offender to remain in the residence except for approved absences for employment or other activities.

The Wall Street Journal has described electronic monitoring as the "hottest new technology in crime control" and criminologists have predicted it to be the "dominant means of probation and parole supervision within the next 20 years."

While its potential benefits are real and significant the use of electronic monitoring has been heavily criticized in some quarters. It is said that the case of the electronic monitoring machine, is to a great extent the

probation officer. In place of direct, human face-to-face contact, the offender receives remote telemetric impersonal monitoring. In other words, we are mechanizing what had been a human service profession. The move towards technological supervision with an emphasis on monitoring and control functions, threatens to undermine the status of probation as a profession.

Adopting electronic monitoring programmes would also result in the movement away from the rehabilitation rationales in corrections. The purpose of intervention with the offender is conceptualized as one of control and surveillance giving little thought to the offender's needs or difficulties that may have given rise to his past criminal behavior.

### Conclusion

One of the main areas of concern and achievements of correctional reformers in the latter half of the 20th century has been to keep convicted offenders out of prison and other like penal institutions. Penal reformers advocated the development and extensive use of non-institutional means of dealing with offenders for a variety of reasons. The development of and expansion of probation and parole services is an example of this movement. Other such developments are the introduction of various laws enabling the courts to give offenders more time to pay fines, community service orders, and suspended sentences. The main aim of these reforms has been the prevention of imprisonment to the greatest possible degree.

However, the impact of these developments have still not been felt in many criminal jurisdictions in the world. This is amply evident by the large numbers that are sentenced to penal institutions in many countries and the consequent problem of prison overcrowding.

Policy makers and authorities involved in the process must not only develop and introduce alternatives to imprisonment, suitable

to their respective countries, but also ensure their implementation by sufficiently educating the criminal justice practitioners and the public of the value and importance of such alternatives. The success depends on the acceptance of the policy by the people and the total commitment of all the segments of the criminal justice system.

However a word of caution must be given in conclusion. The problem of overcrowding of prisons must not be replaced by an overloaded system of community correction, particularly an overloaded probation system. Looking for the solutions to the problem of overcrowding of prisons through probation and the increasing public demand for retribution and a risk free society will lead to the development of a more punitive model of community corrections—destroying its very foundation.

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## Juvenile Justice System in India

by Hira Singh \*

1. The problem of juvenile delinquency needs to be examined from the viewpoints of the prevailing cultural norms, the perception of the type of juvenile behaviour to be taken cognizance of and the manner in which it manifests itself in a particular country. In fact, a priority concern towards the welfare of children as a vital issue of human resource development comes within the meaning of juvenile delinquency even such behavioural patterns as would not be termed as deviant when related to adults. Further, it is widely observed that juvenile delinquency is, more often than not, a culmination of various adverse experiences that the child had to pass through. In most of the cases, social deviance among children is found to have been preceded by several other problems like abandonment, destitution, neglect, truancy, vagrancy, etc. This aspect, however, does not establish that poverty *per se* is a cause of the problem. Children of the poor do not necessarily commit crimes nor are those of the rich always law-abiding. But the fact remains that poverty does restrict a segment of child population from having an equal sharing of socio-cultural and economic opportunities for growth and development. Such children are rendered vulnerable to social maladjustment and their eventual induction into criminogenic culture. It is, therefore, imperative that the system to prevent and control delinquency cater to the entire range of problems of child destitution, neglect and deprivation. Obviously, such a strategy has to be built within the framework of social

justice for all children, not only to promote and safeguard their general well-being but also to protect the rights they are entitled to by law, authority and custom.

2. The Indian society is characterised by a wide range of socio-cultural and economic conditions. The traditional social structure has been woven around the institutions of the family, the community and cultural bonds. These institutions have hitherto been providing a protective umbrella and security to children in any situation of distress, calamity or crisis. There is, however, a definite change discernible in the structure of the family and the community, especially in the wake of socio-economic transition that the country is presently passing through. The process of change has been accelerated with the ideological and technological developments of the modern age. In urban areas, while the joint family system is yielding in favour of the nuclear family, community life is also being redefined in terms of economic interest rather than familial ties. Indeed, an unprecedented pace of industrialisation and consequential urbanisation has been a major factor in the transformation of the social structure and cultural milieu that the children are growing in. The accent on economic growth generated through the successive development plans has led to various far-reaching changes in population structure, social mobility and communication. A large number of people are migrating from rural areas to urban centres, mainly in search of gainful vocations and betterment of living standards. Most of these migrants, especially in the lower strata, have to struggle hard to find a place of dignity and worth in the urban community. The trend is often associated with the loosening of their family and

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community ties, in which women and children are the worst victims. Therefore, in order to correct such disruptive tendencies, the development approach is being progressively geared towards the removal of poverty and unemployment in rural areas and the expansion of educational, training and industrial base for the people within their natural environment.

3. Despite the divergence of socio-cultural and economic realities, the family still serves as the most effective instrument of care, control and stability for the child. As the principal agency for human resource development and transmission of values, the family continues to enjoy a strong support among various sections of the society. Accordingly, besides planned efforts for the alleviation of poverty, economic disparities and social imbalances that weaken the family to withstand the pressures of modern life, comprehensive programmes are being initiated by the Government under various sectors such as housing, health, education, labour, community development, etc. The housing schemes in urban areas are being specifically designed to cater to the entirety of the needs of a happy family and community living. The population control programmes are being devised as an integral aspect of family welfare. The new education policy stresses, *inter alia*, upon the inculcation of moral, ethical and social values. Industrial workers are being assured of adequate facilities for health, education, and welfare of their families. More importantly, the welfare of Scheduled Castes and Scheduled Tribes forms a major component of the social development strategy. Side by side, separate departments have been set up by the Government to promote the welfare of women, children and youth through a variety of sectoral and intersectoral approaches. These steps are intended to ultimately contribute to safeguarding and protecting the rights and interests of children in various socio-cultural and economic strata, as a pre-requisite for delinquency prevention.

4. The concept of juvenile delinquency is distinguished from adult criminality not merely in terms of a wide range of juvenile behavioural patterns as considered deviant but also in relation to the specific categories of children dealt with as delinquents under the legal framework. The perception of the problem differs from place to place and, within the same place, from time to time, in keeping with the variations in the socio-cultural and economic milieu. In a traditional society where much of the problem continues to be pulled back by the informal social control mechanisms it is difficult to make an accurate assessment of the incidence and magnitude of juvenile delinquency. While a number of research studies have discussed the problem primarily as an urban phenomenon, its rural dimension still remains largely unknown. However, a closer look at the delinquency patterns over the years brings to the fore some interesting features. While most of these children are victims of situational compulsions, there appears to exist a similarity in motivation, rationality and gravity of acts between delinquents from upper strata and the marginal age-group of 16 to 21 years and their adult counterparts. In the higher age groups: rate of juvenile delinquency appears to keep pace with that of adult criminality, with many of these children often emulating adult role models, sometimes as members of the heterogeneous gangs, even indulging in crimes involving violence, sex and moral turpitude. With rapid changes in socio-economic life, accompanied by a growing affluence, an unprecedented stress on materialistic culture, and a rapid increase in social mobility and the resultant weakening of the traditional means of social control which regulated the behaviour of the child, such forms of juvenile delinquency are bound to assume a serious trend in the years to come. This, in turn, is likely to further centralise the authority for the management of socially deviant children under state patronage with a much greater reliance on the enforcement of law.



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5. The role of the State in this sphere emanates from the Constitutional and legal provisions, as spelt out in various political, administrative and executive decisions taken to plan and to regulate the services. The Constitution of India, under Article 15 (3), enables the State to make special provisions for women and children. Article 39 specifically lays down that the State shall direct its policy towards securing "that the health and strength of workers, men and women, and the tender age of children are not abused and the citizens are not forced by economic necessity to enter avocations unsuited to their age or strength" and "that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment." The National Policy for Children, adopted by the Government of India in 1974, reinforces the spirit behind the constitutional safeguards by proclaiming that "the nation's children are a supremely important asset. Their nurture and solicitude are our responsibility." The national policy clearly lays down that "children who are socially handicapped, who have become delinquent or have been forced to take to begging or are otherwise in distress, shall be provided facilities for education, training and rehabilitation and will be helped to become useful citizens." Consequently, a number of measures have been devised by the Government to progressively realise the principles underlying such policy declarations. In this respect, the enactment of the Juvenile Justice Act, 1986 has paved the way for the development of an enlightened system for the prevention and control of juvenile delinquency, within the overall framework of social welfare.

6. The Juvenile Justice Act envisages a comprehensive scheme for the care, protection, treatment, development and rehabilitation of neglected or delinquent juveniles and for the adjudication of certain matters relat-

ing to, and disposition of, delinquent juveniles. The main objectives of the Act are:

- 1) to lay down a uniform legal framework for juvenile justice in the country so as to ensure that no child under any circumstance is lodged in jail or police lock-up. This is being ensured by establishing Juvenile Welfare Boards and Juvenile Courts;
- 2) to provide for a specialised approach towards the prevention and treatment of juvenile delinquency in its full range, in keeping with the developmental needs of the child found in any situation of social maladjustment;
- 3) to spell out the machinery and infrastructure required for the care, protection, treatment, development and rehabilitation of various categories of children coming within the purview of the juvenile justice system. This is proposed to be achieved by establishing observation homes, juvenile homes for neglected juveniles and special homes for delinquent juveniles;
- 4) to establish norms and standards for the administration of juvenile justice in terms of investigation and prosecution, adjudication and disposition, and care, treatment and rehabilitation;
- 5) to develop appropriate linkages and coordination between the formal system of juvenile justice and voluntary agencies engaged in the welfare of neglected or socially maladjusted children and to specifically define the areas of their responsibilities and roles;
- 6) to constitute special offences in relation to juveniles and to provide for punishments therefore; and
- 7) to bring the operation of the juvenile justice system in the country in conformity with the United Nations Standard Minimum Rules for the Administration of Juvenile Justice.

7. With its enforcement on 2 October 1987, the Juvenile Justice Act, 1986, has replaced the traditional mechanisms for dealing with children in conflict with law under the Children Acts in various States and Union Territories. The Act propounds a new concept of juvenile justice within the true meaning of social justice as enshrined in the Constitution of India. It symbolises a candid national response to the changing socio-cultural and economic conditions that affect juveniles in terms of their basic human rights to live and mature as wholesome individuals. Besides a thorough restructuring of the juvenile correctional system, the Act contemplates a vigorous use of the inherent potentials of the family and the community to deal with the problems of erring juveniles within the mainstream of social life. The enunciated approach towards the rehabilitation of the socially maladjusted juveniles is based on an individualised care, re-education and training as essential means of their reintegration into the society. The new system undoubtedly places an onerous responsibility on the State to mobilise all possible resources of the family, the community and social organisations in tackling the problem of juvenile social maladjustment in its full range.

8. The progressive features of the Juvenile Justice Act, 1986, as compared to the provisions of the earlier Children Acts, are described below:

- 1) the definition of "neglected juvenile" has been construed more precisely so as to ensure that only juveniles who are likely to be abused, exploited and inducted into criminogenic life and are in need of legal support to be weaned away from such situations are processed through the law.
- 2) A neglected child may be brought before the competent authority not only by a police officer but also by any other person or organisation authorised for the purpose. This provision should enable social workers and voluntary welfare or-

ganisations to increasingly accept the responsibility of the referral of neglected juveniles to appropriate care.

- 3) Apart from prohibiting the confinement of the juvenile in a police lock-up or jail, his contact with the police has been reduced to the minimum. During the pendency of the case before the competent authority a provision has been made for the placement of the juvenile with any person or voluntary institution as considered fit.
- 4) It is now specifically provided that an inquiry regarding a juvenile under this Act shall be held expeditiously and shall ordinarily be completed within a period of three months from the date of its commencement, unless, for special reasons to be recorded in writing, the competent authority otherwise directs.
- 5) The Act provides for a differential approach in the processing of the neglected juvenile vis-a-vis the delinquent. While neglected children would be produced before the Juvenile Welfare Board, the delinquents are to be dealt with by the Juvenile Court. No person will be appointed as a member of the Board or a magistrate in the Juvenile Court unless he or she has special knowledge of child psychology and child welfare.
- 6) The Juvenile Welfare Board and the Juvenile Court have been empowered for the transferability of cases brought before them on the basis of the necessary screening. An important feature relates to the classification and separation of delinquent juveniles on the basis of their age and nature of offences committed by them.
- 7) Among the various circumstances to be taken into consideration in making an order under the Act, the state of physical and mental health of the juvenile and his welfare interests have to be ascertained as an additional requirement.
- 8) The Act lays down a wide range of dis-

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positional alternatives open to the competent authority, with preference to family/community-based placement. The neglected juvenile will be sent to a juvenile home only if his care with a parent, guardian or fit person/institution is not found conducive. For juvenile delinquents also, institutional care will be resorted to as the last measure, only if his restoration to parent, release after advice/admonition, placement on probation, care under fit person/fit institution or discharge on fine is not considered appropriate.

- 9) Even when the juvenile is sent to a juvenile home or a special home, there is a definite provision for his conditional discharge or transfer to a fit person or a fit institution. This approach would provide for a considerable amount of flexibility in the treatment of the juvenile in keeping with his behavioural development and responsiveness to therapeutic services.
- 10) Observation Homes are contemplated for the temporary reception of juveniles during the pendency of an enquiry when their placement with parents, guardians, or places of safety has not been feasible. Any institution other than an observation home established or maintained by the government may be recognised as an observation home. Every observation home is required not only to provide for the juvenile, facilities for accommodation, maintenance, medical examination and treatment but also for useful occupation.
- 11) For neglected juveniles in need of institutional treatment, juvenile homes are required to be established or maintained by the government or voluntary institutions to be certified as such. Such juvenile homes will not only provide for the juvenile, facilities for accommodation, maintenance, education, vocational training and rehabilitation but would also ensure the development of his character and abilities as well as the necessary training for protecting himself against moral danger or exploitation.
- 12) Similarly, for delinquent juveniles, special homes are required to be set up or voluntary institutions certified as such. Special homes have to offer suitable facilities for accommodation, maintenance, education, vocational training and rehabilitation as well as for the development of their character and ability and reformatory training, so as to ensure an all-rounded growth and development of their individual personality.
- 13) The Act contains a comprehensive provision regarding the establishment or recognition of aftercare organisations for taking care of juveniles discharged from juvenile homes or special homes and for the purpose of enabling them to lead an honest, industrious and useful life. Specific rules are to be formulated for the relevant scheme as also for the nature and standards of organisations.
- 14) Offences in respect of juveniles have been redefined in keeping with the newly-emerging problems faced by them, with more stringent penalties than laid hitherto. For instance, employing juveniles for begging is liable to be punished by imprisonment for a term which may extend to three years along with a fine. The same applies to those who provide intoxicating liquor or narcotic drugs or psychotropic substances to juveniles or for the exploitation of juvenile employees.
- 15) More significantly, a new provision has been made to the effect that where an act or omission constitutes an offence punishable under this Act, and also under any other Central and State Act, then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment only under such Act as provides for punishment which is greater in degree.
- 16) Consequent upon the enactment of the

Narcotic Drugs and Psychotropic Substances Act, 1985, providing, *inter alia*, for the establishment and notification of treatment centres for drug addicts, a provision has been made for the transfer of juveniles addicted to drugs to such treatment centres, as is the case of juveniles of unsound mind and those suffering from leprosy.

- 17) A new provision has been incorporated for the creation of a fund to be exclusively utilised for the welfare and rehabilitation of juveniles dealt with under this Act. Such a fund may be raised from voluntary donations, contributions or subscriptions made by individuals or organisations. This surely opens up a definite avenue of generating public support and participation in building up an effective system of juvenile justice.
- 18) The Act requires the State Governments to constitute advisory boards to advise on matters relating to the establishment and maintenance of homes, mobilisation of resources, provision of facilities for education, training and rehabilitation of neglected and delinquent juveniles and coordination among various official and non-official agencies concerned. At the institutional level, non-official visitors are required to be appointed for each home. These provisions seek to enlist an enlightened public opinion and to make an optimum use of various sectors of socio-economic welfare in the development of the juvenile justice system.

9. Research studies have abundantly shown that community-based programmes for the prevention and control of juvenile delinquency are much more advantageous than institutional care under the framework of law. Non-institutional modes and modalities of corrective action are certainly more profitable, both economically and socially, in ensuring an optimum use of the scarce resources of developing countries. These are less expensive in terms of per capita expen-

diture as against the cost of institutionalisation. The children thus handled are considerably saved from the stigma of incarceration and their possible contamination by hardened offenders. When treated in the community, they are not only spared of the adverse effects of institutional confinement but are also more likely to grow and develop as fuller individuals. A child treated through community-based correction is certainly at a greater stake for social conformity than the one subjected to penal detention and labelled as a delinquent. It is therefore being widely accepted that the interests of the society as well as the child are served best when he is reclaimed without being alienated from his natural environment of parental love and emotional support. In this regard, while emphasising the role of the family, the school and the neighbourhood, a purposeful blending of the formal systems with the community-based welfare approaches is being articulated at various national forums.

10. Apparently, the preventive strategies for delinquency control have to rely heavily on efforts to ensure social justice to all children and young persons in promoting their interests and general well-being. In the broader perspective, the overall policy must fall in tune with the United Nations Declaration of the Rights of the Child which aptly envisages, besides their physical well-being, the moral, social and cultural development of all children. In this context, the programmes for the prevention and control of juvenile delinquency in various countries have to evolve in consonance with their cultural settings, social conditions and stages of economic development. Such an approach has to make a vigorous use of the traditionally operative informal controls in meeting the needs of maladjusted children, with state intervention being limited to situations which really require the support of law. In this process, the formal devices would be necessary to focus on the accused and the adjudicated, dealing, of course, with such conditions as are directly conducive to delin-

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quent behaviour. At the same time, it needs to be remembered that besides concerted efforts to resolve its intra-system conflicts, the formal system has to closely interact with other facets of social welfare in catering to the entire range of problems of the socially handicapped and endangered children. For this purpose, training of personnel within the system as also of those with whom they are concerned, has to be given a high priority. There is a definite need to develop the whole system as part of the national development plans, so as to make it more efficacious and functional in dealing with a diversity of the problems that lead children to social maladjustment, deviance and crime.

11. In this connection, what is most needed is the development of an integrated approach towards the prevention and treatment of delinquency, on the basis of a comprehensive planning as part of the process of social development, with full policy options ranging from the management of juvenile maladjustment within the family to the institutional treatment of the hardened and the habitual, being readily available. In this respect, while institutional programmes may have to be appropriately rationalised to concentrate on children and youngsters who could not be treated within the community, in keeping with a set of well-defined minimum standards, non-institutional alternatives also need to be placed on a sound footing so as to establish their credentials to function, if not more, at least as efficiently as institutional treatment. There is no denying the fact that as long as social justice does not reach all children in need of care and protection, and conditions in the community do not improve to ensure for every one an equal opportunity to fulfil his talent, institutional care may have to serve as the main recourse. Such a situation would inevitably call for a purposeful linkage of institutional devices with

community-based approaches, of professional services with voluntary welfare efforts, and of state interventions with the informal collective initiatives of the people themselves.

12. In this context, the Juvenile Justice Act, 1986, represents a blue-print for a qualitative improvement in the erstwhile approach under the Children Acts so as to bring it in conformity with the principles of a fair, equitable and just treatment of neglected or delinquent juveniles. The new law implies a thorough restructuring of the traditional system and the creation of an additional infrastructure in consonance with the specified norms. The enforcement of this Act has already set a concerted drive in motion for a vigorous mobilisation of human and material resources both in the public and voluntary sectors. Apart from earmarking sufficient funds for juvenile justice services under the Central and State Plans, appropriate linkages are being established between the formal system and the community-based welfare agencies. With a view to bridging the gap between the cherished principles and actual practices, the Government of India has already prepared a well-rounded scheme for the prevention and control of juvenile social maladjustment under the Seventh Five Year Plan. The scheme aims at extending the coverage of the juvenile justice system all over the country by upgrading the level of existing services as well as by purposefully drawing upon the welfare resources in other sectors of socio-economic development. In providing for a differential approach towards neglected vis-a-vis delinquent juveniles, the scheme intends to enhance the role of the family, the school and the public at large. A variety of non-institutional programmes such as adoption, foster care, sponsorship, probation, etc., are proposed to be developed under the scheme.

**Services under the Juvenile Justice Act**  
(Based on information received during 1986-87)

Sl.	States/U.Ts.	Total Dis- tricts	Dis- tricts Cover- ed	Juve- nile Courts	Juve- nile Wel- fare Boards	Ob- serva- tion Homes	Spe- cial Homes	Juve- nile Homes	Fit Per- sons/ Insti- tutions	After Care Insti- tutions	Total Col. 7 to 11	Total Capa- city of the Insti- tutions
1	2	3	4	5	6	7	8	9	10	11	12	13
1.	Andhra Pradesh	23	23	5	—	7	5	—	—	1	13	1,615
2.	Assam	17	2	—	1	1	1	26	—	—	28(T)	200
3.	Bihar	38	38	—	—	16	2	1	—	2	21	940
4.	Gujarat	18	18	21	—	24	6	—	33	1	64	1,755
5.	Haryana	12	12	—	1	1	1	1	—	1	4	222
6.	Himachal Pradesh	12	12	1	—	—	1	1	—	—	2	75
7.	Jammu & Kashmir	14	13	12	—	—	1	—	—	—	1(T)	N.A.
8.	Karnataka	20	20	54	—	22	17	—	2	3	44	2,935
9.	Kerala	14	14	11	—	11	1	4	—	7	23	2,025
10.	Madhya Pradesh	45	45	23	—	24	7	20	—	1	52	2,575
11.	Maharashtra	30	30	40	—	38	24	—	99	19	180	17,010
12.	Manipur	8	8	—	—	1	—	1	—	—	2	100
13.	Meghalaya	5	5	—	—	—	—	22	—	—	22	748
14.	Nagaland	7	—	—	—	(Act not yet enforced)		—	—	—	—	—
15.	Orissa	13	13	—	—	2	(Combined as Remand Spl. Schools)			—	2	90
16.	Punjab	12	12	2	—	8	1	1	—	2	12	570
17.	Rajasthan	27	27	9	9	11	1	3	—	—	15	475
18.	Sikkim	4	—	(Act not yet enforced)		—	—	—	—	—	—	—
19.	Tamil Nadu	20	20	—	—	14	20	—	—	3	37	3,536
20.	Tripura	3	—	—	—	—	—	—	—	—	—	—
21.	Uttar Pradesh	57	57	31	—	53	11	—	—	—	64	3,290
22.	West Bengal	17	17	1	1	5	14	—	—	3	22	1,405

(To be Continued)

Sl.	States/U.Ts.	Total Districts	Districts Covered	Juvenile Courts	Juvenile Welfare Boards	Observation Homes	Special Homes	Juvenile Homes	Fit Persons/Institutions	After Care Institutions	Total Col. 7 to 11	Total Capacity of the Institutions
1	2	3	4	5	6	7	8	9	10	11	12	13
23.	Andaman & Nicobar Islands	2	2	—	1	—	—	—	—	—	—	—
24.	Arunachal Pradesh(P)	9	—	—	—	—	—	—	—	—	—	—
25.	Chandigarh	1	—	—	—	—	—	—	—	—	—	—
26.	Dadra & Nagar Haveli	1	—	—	—	—	—	—	—	—	—	—
27.	Delhi	6	6	1	1	4	1	8	—	2	15	1,540
28.	Goa, Daman & Diu (P)	3	3	1	1	(1 Multipurpose Institution)		—	—	—	1	125
29.	Lakshadweep	1	—	—	—	—	—	—	—	—	—	—
30.	Mizoram (P)	3	3	—	3	1	—	—	—	—	1	20
31.	Pondicherry	4	4	1	1	(1 Multipurpose Institution)		—	—	—	1	100
Total		446	404	213	19	245	116	90	134	45	626	41,351

Note: (T) The exact capacity of 27 Institutions not readily available. (Assam 26 & J&K 1).

(P) Arunachal Pradesh, Goa and Mizoram which were Union Territories earlier have attained Statehood.

## United Nations Norms and Guidelines in Crime Prevention and Criminal Justice

by Gerhard O.W. Mueller\*

### The Globalization of Life and Crime

There was a time when towns and countries were self-sufficient. But for most of the world that was long ago. Imperceptibly at first, more rapidly during the twentieth century, the people of the world have experienced the phenomenon of globalization. They have become globally interdependent. The label in the shirt you are wearing likely will say "Made in Korea," your shoes are likely to have been "Made in Italy," with leather from Argentina or Yugoslavia. The radio alarm which awakens you every morning may well have been "Made in Hong Kong." Your socks are likely to have been "Made in China." The television set which brings you entertainment from the Columbia Pictures Studios in Hollywood, U.S.A., probably was made in Taiwan, and Columbia Pictures are now owned by the Sony Company of Japan. American fast food restaurants beckon you in every major town in the world.

Globalization of life, of information exchange, entertainment, trade and commerce accelerated incredibly during the 1980's. Let me demonstrate this with a few figures showing the involvement of my own country, the U.S.A.:

The number of purchases and sales of American securities by foreigners increased from 198 Billion in 1980 to 3,314.8

Billion in 1987;

American purchases and sales of foreign stocks and bonds increased from 53 Billion in 1980 to 595.1 Billion in 1987;

Foreign assets in the United States increased from 40.9 Billion in 1980 to 1,536 Billion in 1987.

A month ago New Yorkers woke up to read in their papers that twenty percent of Manhattan's commercial real estate is owned by foreigners. On the same day they learned that what humankind collectively does to the environment affects the lives and health of all of us, through global warming.

Should it surprise us that crime is no exception to the phenomenon of globalization? Much of crime in America, in Europe, and in Latin America is a direct or indirect result of the global drug trade, fostered by world-wide international money transfers (money laundering), the extensive illegal trade in arms and the vast sums earned illegally by corrupt businesses, officials, and governments. We have reached the point where virtually every crime, anywhere in the world, is an international criminological event.

No wonder, then, that increasingly the nations of the world have been willing to cooperate with each other in responding to the global threat of crime. This cooperation has taken many forms. It is my task to discuss one of these forms, namely the pooling of experience and information about how to deal with crime successfully, yet humanely, by the formulation of universal standards, norms, principles and guidelines, which are then at the disposition of all countries, for use in legislation and practice, in order to cope

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successfully with the crime phenomenon. It has been an exciting experience to create standards where there had been none before, and to gather, exchange and pool experience data from all over the world for the benefit of all humankind.

**The Hierarchy of U.N. Instruments  
for Crime Prevention and  
Criminal Justice:  
Those of Fundamental Significance**

I have depicted the various United Nations principles, guidelines, norms and standards on a chart, in order to demonstrate the extent of their coverage over the whole sphere of criminal justice (see Annex). Let us begin by noting that there are certain *fundamental human rights* in criminal justice of greater significance than any of the norms and standards. These are to be found, above all, in the Universal Declaration of Human Rights, of 10 December 1948 (G.A. Res. 217 A (iii)), articles 7 through 11. Included are the equal protection clause (Art. 7), the provision guaranteeing judicial remedies for violations of fundamental rights (Art. 8), the guarantee of freedom from arbitrary arrest, detention or exile (Art. 9), the right to a fair and public trial before an independent and impartial tribunal for the determination of all rights and obligations and of any criminal charges (Art. 10), the presumptions of innocence until proven guilty in a public trial which affords all necessary defense guarantees (Art. 11.1), and the protection against *ex post facto* laws (Art. 11.2).

These are the broadest, most far reaching fundamental premises of criminal justice. In order to give them more specificity, and to render them capable of international and national enforcement and implementation, two further steps had to be taken: the principles had to be included in an international covenant with the (potential) force of international and national law. Second, they had to receive detailed explanation and elaboration—as well as supplementation—

by specific norms and guidelines, covering specific subjects. The first step was taken with the international covenant in Civil and Political Rights (G.A. Res. 2700A (xxi) of 16 December 1966, in force since 23 March, 1976). Included in the International Covenant are provisions on the liberty and security of person, including freedom from arbitrary arrest or deprivation of liberty (Art. 9.1.), the right to be informed of criminal charges at the time of arrest (Art. 9.2.), the right to a prompt judicial hearing, speedy trial or release, the restriction of pre-trial custody to exceptional situations (Art. 9.3.), the availability of remedies in the nature of habeas corpus (Art. 9.4), the right to compensation in cases of unlawful arrest or detention (Art. 9.5), the entitlement of detained persons to humanity and respect (Art. 10.1), the principle of segregation of detainees from convicts (Art. 10.2.a), and of juvenile and adult detainees, as well as the right of juveniles to a speedy trial (Art. 10.2.b), the pronouncement of the goal of imprisonment or reformation and social rehabilitation, and of appropriate treatment of juvenile offenders (Art. 10.3), the prohibition of imprisonment for debt (Art. 11), equality before the law, the right to a fair hearing before a competent, independent, impartial tribunal, from which the public and the press can be excluded only in exceptional and specific situations (*ordre public*, morals, national security, or the interests of private lives of parties) (Art. 14.1), and the presumption of innocence (Art. 14.2). There follows a detailed list of trial rights, including the right to be informed of the charges (Art. 14.3 a), time for defense preparation and communication with defence counsel of one's choosing (Art. 14.3 b), the right to a speedy trial, to presence at trial, the right to counsel—including free counsel for the indigent (Art. 14.3. d), the right to produce and subpoena witnesses (Art. 14.3. e), the right to a free interpreter when needed (Art. 14.3 f), and the privilege against self-incrimination. Appropriate proceedings in juvenile court are guaranteed

(Art. 14.4). The Covenant likewise grants the right to an appeal (Art. 14.5), compensation in case of a conviction of an innocent person (Art. 14.6), protection against double jeopardy (Art. 14.7), the prohibition of ex post facto laws (Art. 15), and the protection of privacy (Art. 17).

**The Network of U.N. Standards,  
Norms and Guidelines for  
Crime Prevention  
and Criminal Justice**

These, then, are the basic rights which under the Covenant, criminal justice systems must respect, with the force of law in countries which have ratified the Covenant, and the moral force of universal agreement everywhere. But the criminal justice guarantees of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights by themselves do not assure a humane and effective criminal justice system for the peoples of the world. That required the drafting and adoption of a whole network of norms and guidelines, covering the various sectors and tasks of criminal justice systems. The process of drafting and adopting these commenced in 1955, and today, by 1990, includes over 30 such instruments. The chronological sequence of drafting them was neither logical nor systematic. Rather, Member States turned their attention to specific criminal justice issues when their significance was perceived. Thus, it was during the decade following the end of World War II, with the memories of brutal detention and prison conditions fresh in mind, that the world community completed the first set of world standards: The United Nations Standard Minimum Rules for the Treatment of Prisoners (1955, ECOSOC Res. 663 C (xxiv) of 31 July 1957), accompanied by the Recommendations on the Selection and Training of Personnel for Penal and Correctional Institutions. In the mid-1970s widespread police abuses led to a discussion of torture and sim-

ilar abusive practices, leading to the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (G.A. Res. 3452 (xxx) of 9 December 1975), and the subsequent Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (G.A. Res. 39/46 of 10 December 1984, in force 26 June 1987).

As professionals began to view criminal justice as a system during the decade 1975 to 1985, the U.N. Committee on Crime Prevention and Control was strengthened and enlarged to 27 members, and invested with the additional task of developing further instruments aimed at the improvement of the criminal justice system (see chart). By today, there exists a virtual network of such instruments extending to the areas of:

- Crime Prevention,
- Law Enforcement,
- Prevention of Cruelty and Concern for Victims,
- Criminal Procedure,
- Corrections,
- Capital Punishment, and
- Juvenile Justice.

**Origin and Status of the Instruments**

The various standards and guidelines bear different titles, such as:

- “General Principles,”
- “Code,”
- “Standard Minimum Rules,”
- “Declaration,”
- “Procedures,”
- “Principles,”
- “Guidelines,”
- “Recommendations,” etc.

The drafting and adopting bodies wished to express thereby the differential weights which should be attributed to them. “Recommendations” obviously carry less weight

than "codes," though all of them carry the force of universally right and proper choices for dealing with the issues in question. It is clear that once a set of standards has been incorporated in a convention, it has the force of law for those countries acceding to it (e.g., the Convention against Torture, etc.).

As the table indicates, not all of the standards and guidelines have been completed and adopted by the appropriate bodies. Some are still in "Draft" form, e.g., the Draft Guidelines for the Prevention of Juvenile Delinquency, (the Guidelines of Rijad), and various Draft Model Agreements and Treaties.

For the most part, the standards and guidelines were requested by the Economic and Social Council, or the General Assembly. Usually—but not invariably—they have been drafted by committees (more recently by the Committee on Crime Prevention and Control), from time to time at meetings convened by and at the regional United Nations Institutes for the Prevention Crime and the Treatment of Offenders (UNAFEI playing a particularly leading role!), were then debated and (usually) finalized by the U.N. Congress for the Prevention of Crime and the Treatment of Offenders, and then ratified (sometimes with amendments) by the Economic and Social Council, all of them serviced by the Crime Prevention and Criminal Justice Branch of the Secretariat. Some of the more important instruments were ultimately adopted (or even drafted) by the General Assembly (through its Third Committee). In virtually all cases the Crime Prevention and Criminal Justice Branch worked in close cooperation with the United Nations Centre for Human Rights, and when an instrument was moving toward international law status, with the Codification Division of the Office of Legal Affairs, reporting to the International Law Commission and the Sixth Committee of the General Assembly.

The relations between the officer of these various units, and the various bodies of the United Nations, have generally been excellent. Indeed, the quinquennial United Na-

tions Congresses for the Prevention of Crime and the Treatment of Offenders, as the focal point of the process leading to the formation and adoption of standards and guidelines, have gained the reputation of highly professional bodies working detached from political controversy, even during the years of the cold war. Politicization of issues pertaining to the humane and effective administration of justice would have made it impossible to adopt as substantial a network of instruments. This harmony has been fostered from the beginning by the various non-governmental professional organizations in consultative status with the Economic and Social Council, foremost among them, the International Association of Penal Law, the International Society of Criminology, the International Society for Social Defense, and the International Penal and Penitentiary Foundation.

#### **Uniformity vs. Cultural Diversity and Economic Development**

The most difficult aspect of drafting the various standards and guidelines was that of achieving the balance between universal uniformity and cultural diversity. There obviously is a need to guarantee all human beings the same fundamental recognitions simply because they all are human beings. Moreover, uniformity is necessary when comparability of data and procedures at issue, e.g., with respect to gathering criminal justice statistics for purposes of preparing the quinquennial United Nations Surveys of Crime and Criminal Justice, or with respect to ensuring international cooperation, e.g., for the transfer of prisoners, mutual assistance in criminal matters, and similar issues.

Yet the drafters always have had to keep in mind the cultural traditions of Member States, and starkly contrasting levels of economic development. Important lessons had to be learned in this regard. Thus, when the very first set of standards was developed, the majority of Member States were highly de-

veloped, and the experts of these countries envisaged living conditions for prisoners which could be achieved only in developed countries. As for independent, formerly colonial, developing societies, most of the conditions called for by the Standard Minimum Rules had not even been achieved for the general population, e.g., as to nutrition, hygiene, housing, medical care, etc. But all the more recent instruments "are flexible enough to allow for adjustments to changing needs and specific socio-economic and cultural circumstances, as well as to national requirements and priorities." (*Guiding principles for crime prevention and criminal justice in the context of development and a new international economic order*, Note by the Secretariat A/CONF. 121/19, of 15 April 1985).

The more recent recognition of the interrelationship between socio-economic development and the aims and functioning of the criminal justice system, the incorporation of that interrelationship in various norms and guidelines, mark another advance. As so aptly put in the Guiding Principles for Crime Prevention and Criminal Justice in the Context of Development and a New International Economic Order, adopted by the Seventh Congress, Art. 3:

"Human development objectives including the prevention of crime, should be one of the main aims of the establishment of a new international economic order. In this context, policies for crime prevention and criminal justice should take into account the structural causes, including socio-economic causes, of injustice, of which criminality is often but a symptom."

#### *Standards for Crime Prevention*

The contemporary phase in the development of overall standards for crime prevention may be said to have commenced with the Caracas Declaration of 1980 (Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders) endorsed by General Assembly resolution 35/171 of 15 December 1980. This Declara-

tion set the stage for the development and adoption of the Guiding Principles for Crime Prevention and Criminal Justice in the Context of Development and a New International Economic Order, by the Seventh Congress (Milan, Italy, 1985). The Guiding Principles are a vital blue print for national crime prevention strategies, to which all governments would be well advised to pay the closest attention. It incorporates the best experiences and consensus of all governments and is, thus, a codification of world experiences and aspirations. Its focal point is the emphasis on national crime prevention planning within the overall framework of socio-economic development, stressing the need for international cooperation and mutual assistance. Economic, industrial, corporate and organized crime are highlighted as requiring particular attention. Community participation and traditional forms of social control must be fostered to maintain or achieve low crime levels.

Of a similarly sweeping significance for overall crime prevention and criminal justice efforts is the ECOSOC resolution on Implementation of the U.N. Standards and Guidelines in Crime Prevention and Criminal Justice. It invites and encourages Member States:

- to adopt in national legislation and practice, and to implement fully, the U.N. Standards and Guidelines;
- to increase the level of support to technical advisory services for the effective implementation of the standards and guidelines;
- to promote the observance of the principles contained in the various instruments by all feasible promotional and educational activities;
- Lastly, the Secretary-General is requested to compile all of the standards and guidelines in a single volume so as to make them more readily accessible than they are in their present form —namely often only in reports and resolutions, though some-

times as separate publications of the Department of Public Information.

In my listing of fundamental instruments on Crime Prevention I have also included the 1986 U.N. Manual for the Development of Criminal Justice Statistics. This is the only one among all the standards and guidelines which did not emanate from legislative authority but is "merely" a Secretariat document. Nevertheless, it is the embodiment of the best features, in the experience of the Secretariat, for the development of basic and comparable statistics on crime and criminal justice and, thus, of utmost importance for world-wide efforts at making sense out of crime developments and crime prevention efforts.

#### *Standards for Law Enforcement*

The centerpiece of the standards for law enforcement (policing), is the Code of Conduct for Law Enforcement Officials (G.A. Res. 34/169 of 5 February 1980), on which the drafting was started by the Secretariat in 1974, to be completed by a special working group of the Third Committee of the 34th General Assembly, in 1979. Its eight operative paragraphs cover:

- the fulfillment of law enforcement duties as imposed by law, adherence to highest standards;
- the protection of human dignity and human rights;
- restrictions on the use of force;
- confidentiality of information;
- absolute prohibition of torture;
- protection of the health of persons in custody;
- total opposition to corruption; and
- overall respect for law, and duty to report violations.

This code, like the other instruments, was adopted unanimously, even though, at first, it had been deemed impossible to achieve consensus among so many different ideolog-

ical persuasions extant in law enforcement throughout the world.

The code was followed by Draft Guidelines for the Effective Implementation of the Code of Conduct for Law Enforcement Officials, 1988 and the Draft Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 1988. The Implementation Guidelines seek to assure a more effective national implementation, although it should be observed that the Code of Conduct for Law Enforcement Officials already is one of the most highly regarded and implemented of all the standards. The Draft Basic Principles on the Use of Force and Firearms by Law Enforcement Officials seek to provide greater specificity to Article 3 of the Code, which covers the same subject matter.

#### *Standards for Prevention of Cruelty and Torture and Concern for Victims*

The standards and guidelines included in this column cut across all sectors of the criminal justice system, seeking to make the entire system more humane, by eradicating all vestiges of torture and cruelty still to be found among law enforcement agencies in some countries, and by ensuring justice to victims of crime and of abuse of power (esp. torture).

The first of these instruments (and only the second of all instruments after 1955/7 U.N. Standard Minimum Rules for the Treatment of prisoners) was the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, adopted by the Fifth Congress, and by G.A. Res. 3452 (xxx) of 9 December 1975. This instrument was produced in record time, namely at the Fifth Congress itself, to be accepted by the General Assembly three months later. Its twelve articles outlaw torture in any form and aid governments in eradicating it. Not even war or national emergency permit resort to torture. In 1984 the Declaration became a convention (G.A. Res. 39/46 of 10

December 1984), which went into force on 26 June 1987, thirty days after deposit with the Secretary-General of the twentieth instrument of ratification or accession.

The Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (G.A. Res. 37/194 of 18 December 1982), should be seen as a necessary adjunct to the Declaration and the Convention. Its title is fully explanatory of its purpose.

Lastly, in this category, is the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (G.A. Res. 4034 of 29 November 1985, as recommended by the Seventh U.N. Congress). This instrument guides Member States in rendering their criminal justice systems more attuned to the plights and rights of victims of crime and of criminal justice, by ensuring access to justice and treatment, restitution and compensation, as well as victim assistance. The measures recommended are, for the most part, not very costly, but require courage and compassion.

#### *Standards for Criminal Procedure*

Work on the development of standards and guidelines for criminal procedure commenced in 1977, when an *ad hoc* group of experts drafted the Draft Guidelines on the Expeditions and Equitable Handling of Criminal Cases, which were subsequently debated by the Committee on Crime Prevention and Control (ICN 4/1296). This had been an ambitious undertaking. Perhaps in its effort to achieve uniformity of process—in terms of expediency and equity—it posed too many problems for too many cultures. The instrument, consequently, was not adopted, but it still provides inspiration for good procedural practices, and has inspired several other instruments.

After prolonged debate and much compromise among representatives of various systems, the Seventh Congress, at Milan, draft-

ed, and the General Assembly adopted, the Basic Principles on the Independence of the Judiciary (G.A. Res. 40/23 of 29 November 1985 and 40/146 of 13 December 1985). In its first part it recognizes the independence of the judiciary from political interference—a goal which is only now being achieved in some countries. In its following sections, the Basic Principles deal with such fundamental issues as freedom of expression and association on the part of judges, qualifications for the judiciary, selection and training, conditions of service and tenure, professional secrecy and immunity, and discipline, suspension and removal. Again it must be emphasized, that a surprising world consensus was achieved due to the ever growing spirit of cooperation among nations.

Draft Procedures for the Effective implementation of the Basic Principles on the Independence of the Judiciary have been prepared by the Committee on Crime Prevention and Control and are to be placed for debate before the 8th U.N. Congress, at Havana, Cuba, 1990 (A/CONF. 144/IPM 5, of 11 July, 1988).

A comparable document was prepared on the role of lawyers, namely the Draft Basic Principles on the Role of Lawyers. This Committee document likewise is on its way to the 8th Congress. It covers such items as access to lawyers by criminal defendants, qualifications and training of criminal defense attorneys, guarantees for the functions of lawyers, professional associations, and disciplinary proceedings.

The procedure category, lastly, includes one foreign relations instrument, namely the Draft Model Agreement on Transfer of Proceedings in Criminal Matters, which the 8th Congress will have before it (A/CONF. 144/IPM. 5 of 11 July 1988).

#### *Standards of Corrections*

The field of corrections was not only the first to witness the creation of standards, it has also received the largest number, eight so far. It all began with the drafting of the

United Nations Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress (Geneva 1955) and subsequently endorsed by ECOSOC (ECOSOC Res. 663C (XXIV) of 27 July 1957 and 2076 (LXII) of 13 May 1977). Actually, there had been earlier work on such standards, namely under the auspices of the League of Nations, by the then International Penal and Penitentiary Commission, the work of which was transferred to the United Nations in 1950. To my earlier remarks on the standards Minimum Rules for the Treatment of Prisoners I should add a comment on their comprehensiveness and their humanitarian outlook. Virtually every aspect of the management of people in confinement is covered in considerable detail. Following preliminary observations and rules of general application, the instrument covers the registration of prisoners, separation of categories, accommodations, hygiene, clothing, bedding, food, exercise, sports, medical services, discipline and punishment, instruments of restraint, information to and complaints by prisoners, contact with the outside world, books, religion, retention of property, notification in case of death, illness, transfers, removal of prisoners, institutional personnel and inspections. There follow rules applicable to types of prisoners, namely *prisoners under sentence* (socialization for a law-abiding life upon discharge, classification and individualization, privileges, work, education, recreation, social relations and after-care), as well as *prisoners under arrest or awaiting trial*. A separate Article, *civil prisoners*, would seem to have become obsolete, at least in some countries, with the abolition of imprisonment for debt, by Article II of the International Covenant on Civil and Political Rights. But in 1977 the Economic and Social Council found it necessary to add a new provision (Art. 95) to the Standard Minimum Rules, extending their protection to persons arrested or detained without charge, an unfortunate practice which then was noted to be on the increase.

Together with the Standard Minimum Rules, the First Congress also adopted the Recommendations on the Selection and Training of Personnel for Penal and Correctional Institutions (Annex to the Rules).

Increasing resort to open penal and correctional facilities, beginning in the 1960s, made it necessary to prepare a set of standards for them, namely the Recommendations on Open Penal and Correctional Institutions, 1985. This drafting work led to the convening by UNAFEI of an international meeting of experts, at Fuchu, Tokyo, in 1988, which produced the Draft Standard Minimum Rules for Non-Custodial Measures, known as the Tokyo Rules (E/AC.57/1988/CRP. 2 of 17 August 1988). These are now on their way to the Eighth United Nations Congress, which is expected to adopt them and refer them to the ECOSOC for approval. The value of their rules is greatly enhanced by Commentaries that were added at the Tokyo meeting.

The aim of the Draft Standard Minimum Rules for Non-Custodial Measures is similar or even parallel to those of the Standard Minimum Rules for the Treatment of Prisoners. The most important goal is that of increasing the range and capacity of non-custodial measures, thereby reducing prison populations. The rules aim at the effectiveness of non-custodial measures and, recognizing peculiar human rights hazards which in some of these measures, wish to ensure their fundamental humanity. Thus, the rules provide for extensive legal safeguards. The rules advocate pre-trial dispositions and the avoidance of pre-trial detention, whenever safety concerns permit this. Social inquiry reports, being crucial for non-custodial dispositions, are called for. The list of sentencing dispositions is elaborate and rests on the experience of many developed countries currently experimenting with penal measures short of prison, as well as on the experiences of many developing countries, with long experiences in non-custodial treatment. The rules have detailed provisions on the implementation

and duration of non-custodial measures, the treatment process, recruitment and training of staff, the use of volunteers and the participation of the community, on research, planning, policy formulation and evaluation of programs. Undoubtedly, this is one of the most thorough of the standards of guidelines and is expected to fare well at the Eighth Congress. It is to be hoped, moreover, that their impact on national policies will be significant—as has been the impact of the Standard Minimum Rules for the Treatment of Prisoners, according to the quinquennial national reports to the Secretary-General.

To make the Standard Minimum Rules for the Treatment of Prisoners even more effective, the Economic and Social Council, in 1987, adopted the Procedures for the Effective Implementation of the Standard Minimum Rules for the Treatment of Prisoners (ECOSOC Res. 1984/47 of 25 May 1987). These call for their adoption by systems still falling short of the Rules, their incorporation in national legislation, their availability—as well as the availability of comparable national rules—participation in the quinquennial implementation reports to the Secretary-General, their translation into all languages, technical assistance programs for countries in need of and requesting upgrading of their standards, and the role of *ad hoc* commissions of enquiry and of the Committee on Crime Prevention and Control in implementing the Rules. These requests and recommendations parallel those of other implementation instruments.

The remaining three instruments in the area of corrections may be termed foreign policy instruments. They include the Recommendations on the Treatment of Foreign Prisoners (of the Seventh U.N. Congress), the Model Agreement on the Transfer of Foreign Prisoners [to their home country] (*ibid.*, G.A. Res. 40/32 of 29 May 1985), and the Draft Model Agreement on Transfer of Supervision of Offenders who have been conditionally sentenced or Conditionally Released, which will be placed before the Eighth

Congress (A/CONF. 144/IPM. 5 of 11 July 1988).

#### *Standards on Capital Punishment*

The United Nations has never called for the overall abolition of capital punishment, but all United Nations work on the topic of capital punishment has been conducted with a view toward its eventual abolition. The Economic and Social Council, in 1984, adopted a strong set of safeguards guaranteeing protection of the rights of those facing the death penalty (ECOSOC Res. 1984/50 of 25 May 1984). These call for the restriction of capital punishment to only the most serious crimes, with lethal consequences. They specifically outlaw the execution of persons below 18 years of age, of pregnant women and young mothers, and of mentally ill persons. Unhappily, such restrictions do not yet exist even in one of the most developed countries. The safeguards also specify the various procedural due process guarantees to which persons under sentence of death should be entitled.

The Eighth Congress will also have before it the Draft Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (A/CONF. 144/IMP. 5 of 11 July 1988). These principles, unhappily, are very much needed in an age when revolutionary and counter-revolutionary fervor frequently results in drumhead “justice” in violation of otherwise recognized due process guarantees, and even in mass executions under the guise of law. Ultimately, only when the taking of the lives of criminals will have become totally abhorrent, shall we experience the demise of abusive capital punishment.

#### *Standards on Juvenile Justice*

It is an oddity indeed that even though juvenile delinquency and juvenile justice have been on the agenda of the United Nations Congresses from the outset, it was not until 1985 that the first set of standards for juvenile justice was adopted by the world



body. These were the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (G.A. Res. 40/33 of 29 Nov. 1985). These Rules are called the Beijing Rules, as it was in Beijing, Peoples Republic of China, that the Rules were finalized, after many previous meetings and drafting exercises, including those at Rutgers University, Newark N.J., U.S.A., at ILANUD in San Jose, Costa Rica, and at UN-AFEI, Fuchu, Tokyo, Japan. In 30 Articles the Beijing Rules span the entire framework of a progressive, humane and effective system for dealing with juvenile offenders.

The Rules successfully bridge the gap between two often conflicting premises of juvenile justice: the need to deal with juveniles in a less harsh, more appropriate and more caring manner than with adults, and the often contradictory premise of granting juveniles due process guarantees which prevent erroneous dispositions as effectively as in adult criminal cases. That this was achieved is the more remarkable since in the contemporary world there is a fluid transition of juvenile justice systems from the one pole to the other. Many developing countries are embracing the somewhat more paternalistic "care" model, while other countries—especially in the developed world—are turning away from the care model toward a due process model. The Beijing Rules, thus, are a welcome accommodation for all countries. They have found the balance.

In 1988, following the "Beijing Rules" devoted to juvenile justice, a United Nations interregional group of experts was convened at the Arab Centre for Securities Studies and Training, at Rijad, Saudi Arabia for the drafting of United Nations Guidelines for the Prevention of Juvenile Delinquency ("The Guidelines of Rijad"). These were subsequently endorsed by the Committee on Crime Prevention and Control (A/5.144/IPM. 3 of 11 May 1988), and are now on their way to the Eighth United Nations Congress on the Prevention of Crime and the

Treatment of Offenders. In its three essential parts these Guidelines seek to assure the integration of juveniles in their families (Art. 7-16), the education and training of juveniles (Arts. 17-28), and integration of juveniles into their communities and into society (Arts. 29-37). The Guidelines recommend measures and approaches which have proven successful in all cultures and rest on solid criminological foundations. The Rijad rules, moreover, contain guidelines concerning protection of juveniles from the negative impact of the media (depiction of violence), as well as other provisions aiming at general prevention.

The third set of standards in the field of juvenile justice are the United Nations Draft Rules for the Protection of Juveniles Deprived of their Liberty, first drafted by an inter-N.G.O. Open and Working Party, at Vienna, Austria, in 1988, and now likewise on their way to the Congress (same document number as Rijad Guidelines).

The 102 articles of this impressive document will likewise be placed before the Eighth Congress. These Rules parallel the U.N. Standard Minimum Rules for the Treatment of Prisoners but are, of course, much more directed at the special needs of juveniles. They are a superb example of the use of international experience and of global cooperation. Their detailed discussion would, however, exceed the framework of this overall survey.

### Conclusion

The nations of the world have provided for themselves an impressive, extensive and practical network of standards, norms and guidelines, to deal with the global phenomenon of crime, as it affects all human beings everywhere. The network is not complete. There are many issues and problem areas which need standards resting on the collective experience of humankind. Nor should the existing standards be regarded as immutable. With increasing experiences, and in the face of ever new

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challenges, it will become necessary to revise and to modernize these standards. The task is a never-ending one.

Above all, it is necessary to constantly improve the system of implementing these

standards world-wide, otherwise they will remain little more than pious exhortations. But the vast problem range of implementation falls outside the purview of this paper, and shall be addressed on a future occasion.

## Annex

## Table of U.N. Instruments for Crime Prevention and Criminal Justice

Universal Declaration of Human Rights, Arts. 7, 8, 9, 10, 11  
 International Covenant on Civil and Political Rights, Arts. 9, 10, 11, 14, 15, 17

Crime Prevention	Law Enforcement	Prevention of Cruelty and Concern for Victims	Criminal Procedure	Corrections	Capital Punishment	Juvenile Justice
Guiding Principles for Crime Prevention and Criminal Justice in the Context of Development and a New International Economic Order, 1985	Code of Conduct for Law Enforcement Officials, 1980	Declaration on the Protection of all Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1975	Draft Guidelines on the Expeditious and Equitable Handling of Criminal Cases, 1977	Standard Minimum Rules for the Treatment of Prisoners, 1955, 1957, 1977	Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, 1985	United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (Beijing Rules)
U.N. Manual for the Development of Criminal Justice Statistics, 1986	Draft Guidelines for the Effective Implementation of the Code of Conduct for Law Enforcement Officials, 1988	Convention against Torture, etc., 1987	Basic Principles on the Independence of the Judiciary, 1985	Recommendations on the Selection and Training of Personnel for Penal and Correctional Institutions, 1955	Draft Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions, 1988	U.N. Draft Guidelines for Prevention of Juvenile Delinquency (Riyad Guidelines), 1988
Implementation of U.N. Standards and Guidelines in Crime Prevention and Criminal Justice, 1988	Draft Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 1988	Principles of Medical Ethics, 1982	Draft Procedures for the Effective Implementation of the Basic Principles, 1988	Recommendations on Open Panel and Correctional Institutions, 1985		Draft Standard Minimum Rules for the Protection of Juveniles Deprived of Their Liberty, 1988
		Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985	Draft Basic Principles on the Role of Lawyers, 1988	Procedures for the Effective Implementation of the S.M.R., 1987		
			Draft Bilateral Model Treaty on Mutual Assistance in Criminal Matters, 1988	Draft Model Agreement on Transfer of Supervision of Offenders Who Have Been Conditionally Sentenced or Conditionally Released, 1988		
			Draft Bilateral Model Treaty on Extradition, 1988	Model Agreement on the Transfer of Foreign Prisoners, 1985		
			Draft Model Agreement on Transfer of Proceedings in Criminal Matters, 1988	Recommendations on the Treatment of Foreign Prisoners, 1985		
				Draft Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules), 1988		

## The Office of the Federal Prosecutor General in West Germany —with Special Regard to Combatting Terrorist Activities

by Peter Morré\*

### A. Some General Remarks: Legal principles of Public Prosecution in West Germany

#### 1. Basic Criminal Procedural Rules

##### a. Aim of the Investigative Work

The aim of the investigative work done by the prosecuting service is to establish the facts of the case and to decide on whether and to what extent the public charge should be brought. The latter will happen where the outcome of investigations indicates the likelihood of a conviction by the competent court. Where such a presumption—be this for reasons of fact or of law—does not appear justified, proceedings must be discontinued (sect. 170 subsection. 2 Code of Criminal Procedure). The bringing of the public charge is the necessary prerequisite for any examination of a case by a court of law (the so called “accusation principle,” sect. 151 Code of Criminal Procedure). Once judicial proceedings have been opened, the department of prosecution is no longer allowed to withdraw charges.

##### b. The Principle of “Material Truth”

Consequently the extent of the investigations carried out by the department of prosecution is determined by the principle governing the entire course of criminal proceedings—that the facts have to be fully established *ex officio* (the so-called “instructions” or “examination” principle, sect. 155 subsection. 2

and sect. 244 subsection. 2 Code of Criminal Procedure). In keeping with the requirement of establishing the *material* truth, the prosecuting authority must of its own accord concentrate its inquiries to an equal extent on both incriminating and exonerating circumstances (sect. 160 subsection. 2 Code of Criminal Procedure).

##### c. The “Legality Principle” and Exceptions to It

Action taken by the departments of public prosecution is governed by the “legality principle.” This means that where there are sufficient factual indicators for a prosecutable offence being committed, investigations *must* be started (sect. 152 Code of Criminal Procedure). The public prosecuting service has on principle a monopoly as regards the preferring of charges.

Therefore, in fundamental terms, the legality principle leaves to the public prosecutor no scope for discretion on the question of whether to intervene and start criminal proceedings. However in many sections of the Code of Criminal Procedure we do find exceptions to this. These provisions constitute what is known as the “expediency principle” (in German “Opportunitätsprinzip”).

The main cases are, in short:

- minor offences, if the offender’s guilt is only slight and there is no public interest in prosecution or this can be removed by meeting certain requirements—paying an administrative fine, complying with directives a.s.o. (sections 153, 153a Code of Criminal Procedures);
- unimportant, often incidental offences, if the penalty for it would not carry any sig-

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nificant weight when set alongside the punishment for some other deed (sections 154, 154a Code of Criminal Procedure).

In some of these cases the decision not to prosecute requires the consent of the court.

These possibilities of breaking with the legality principle apply to all departments of public prosecution in West Germany. In addition to this, there are further special provisions applying *only* to the Federal Prosecutor General:

- a) He may at his discretion refrain from prosecuting an offence ranging within his prosecuting competence if the conducting of criminal proceedings would create the danger of serious detriment to the Federal Republic or if other more substantial public interests tell against prosecution (sect. 153d Code of Criminal Procedure).
- b) He may—with the consent of the court—refrain from prosecuting an offence falling within his prosecuting competence if the alleged offender has, after the deed, contributed to avert a danger to the existence or the security of the Federal Republic, or has revealed all his knowledge in connection with the deed (so-called “active regret,” sect. 153e Code of Criminal Procedure).
- c) According to a Special Act of 1989 he may—up to 31 December 1992—with the consent of the Investigating Judge at the Federal Court of Justice refrain from prosecution, if the alleged person, tied to a terrorist association, discloses his knowledge. The result must be that terrorist offences by other persons can be prevented or that terrorist offenders can be seized. Has already a charge been preferred the court is allowed—under the same conditions—not to punish or to mitigate the penalty. Had the collaborating witness himself committed a murder or a manslaughter the penalty may be lowered by the court to a rest of three years imprisonment. Here one must know that according to German penal law the rest of

a prison sentence may be suspended on probation, if already two thirds—under certain conditions half of it—have been served.

#### d. The Public Prosecution and the Police

As a result from all these legal principles just discussed, the prosecution department is called in German legal terms the “master of investigatory proceedings.” Therefore, in the view of the Code of Criminal Procedure, the police, in particular the Criminal Investigation Department, generally takes action on behalf of or in response to a request from the department of public prosecution (sect. 161 following Code of Criminal Procedure). Consequently the prosecuting authority may also issue specific directives for particular investigatory acts to be followed within the proceedings in the single case. The police are obliged to comply with such requests and to carry out the tasks delegated to them (sect. 163 Code of Criminal Procedure).

Of course the police may seize—and are obliged to seize—the initiative where a first and urgent intervention is required. But all this happens in the legal responsibility of the prosecution department too. Therefore the prosecutor has to be informed as soon as possible in order to give him the opportunity to sanction and to give further instructions.

If the police take action either in the form of first and urgent intervention or based on a request by the department of public prosecution they must observe the legality principle as well as the prosecution (sect. 163 subsect. 1 Code of Criminal procedure).

## 2. Basic Service and Organization Rules

### a. Education and Training

Public prosecutors in West Germany have received the same juridical education and have the same juridical qualifications—after university studies, the first, and after a juridical practice, the second (judge) examination—as their colleagues from the judge’s bench. Usually in their late twenties

they start their career within the justice service of one of the West German federal states, the "Lander." There are federal states where one must decide from the beginning of one's education in law whether to enter the prosecutor's or the judge's career or other states where one must make this decision at the end of the latest three further years having changed more or less often between these two branches in various positions. In other federal states, particularly in South Germany, you usually change between the two branches repeatedly until you retire. The salary is equal and the positions you may be promoted to are comparable in both careers.

Professional training for the prosecutor's career has already started—obligatory to all young lawyers—during the juridical practice between the first and second examination. There you have a few months' stage at a public prosecutor's office. Later, after the second examination and having entered the prosecutor's career, you are required to work three years until your lifetime-appointment. During part of this time you have restricted rights of decision and you have to work under the supervision of an older experienced colleague. Usually you receive—after a time when all your decisions have to be supervised and countersigned—at first the right to prefer charges and after a longer second term the right to discontinue proceedings. Until the lifetime-appointment you can be dismissed if you fulfill your duties sufficiently.

#### b. Independence and Instructions

Generally and firstly a public prosecutor is as free in his decisions as a judge. Like a judge he has to be orientated in his decisions along the lines of the material law and the procedural law exclusively. Nevertheless, a public prosecutor is *not* a judge and apart from these basic rules his positions *differs*. Public prosecutors are subjected to the directives and instructions of their superiors (sect. 146 Court Organization Act). Superior to the single public prosecutor are the head of his

prosecution department, the Regional prosecutor General, the (State or Federal) Minister of Justice, superior to the head of a prosecution department are the Regional Prosecutor General and the Minister, superior to the Regional Prosecutor General is the State Minister of Justice. Superior to the Federal Prosecutor General—and to all Federal Prosecutors—is the Federal Minister of Justice (see for all: sect. 147 Court Organization Act). The—State, respectively Federal—Minister of Justice, is responsible to his parliament for all his directives and instructions—mainly of course if these or their consequences imply reasons for criticism.

Roughly speaking the public prosecutor may be directed to decisions only where there is room for more than *one* solution. But it must be considered that all the superiors named above are subjected to the legality principle too! The pleadings at the end of a trial are free. Therefore a public prosecutor cannot be directed to judge facts and evidence against his own conviction or to apply against his own conviction for a determined penalty or for a acquittal.

The head of a prosecution department and the competent Regional Prosecutor General—these eventually instructed by *their* superiors—are allowed however either to substitute the investigating prosecutor by themselves or by another public prosecutor for the further proceedings in the single case (sect. 145 subsect. 1 Court Organization Act). In the office of the Federal Prosecutor General *he* or the Federal Minister of Justice may act in this way in respect to the Federal Prosecutors (sect. 145 subsect. 147 number 1 Court Organization Act). In practice, substitution of another public prosecutor is the usual way of dealing with very serious differences in opinions. If there are different opinions of lesser importance, a discussion helps very often to continue the proceedings.

#### 3. Public Prosecution in a Federation

West Germany is a Federation of federal

states, generally therefore the jurisdiction and its administration are within the competence of the single federal state (art. 20 subsect. 1, art. 92 Basic Constitutional Act). Consequently public prosecutors, whose department is always attached to a determined court of justice (sect. 141 Court Organization Act), are officers of the federal states.

The only exceptions from this regulation are the Federal Prosecutor General and his staff.

## B. The Office of the Federal Prosecutor General

### 1. Position in a Federative Constitutional System

The Federal Court of Justice is a court of the Federation (art. 92, 96 subsect. 1 Basic Constitutional Act). The attached department of prosecution is the Federal Prosecutor General (sect. 142 subsect. 1 number 1 Court Organization Act). He acts for the prosecution within the legal competence of the Federal Courts of Justice—that are, roughly speaking, appeals on points of law against sentences of the Regional Courts and the Regional Appeal Courts, both institutions of the federal states, and certain appeals against court orders from the Regional Appeal Courts and from the Investigating Judges of the Federal Courts of Justice (sect. 135, 142 subsect. 1 number 1 Court Organization Act).

But *furthermore* the Federal Prosecutor General acts as public prosecutor in those cases which exclusively are within the jurisdiction of the Regional Appeal Courts as courts of lower—and here: basic—instance (sect. 120, 142a Court Organization Act). Details in particular will be reported later.

Here should be maintained only that *in so far* the Federal Prosecutor General is attached to certain courts of the federal states. But it should already be stated here that the Federal Prosecutor General is not entitled to instruct the prosecutors of all other prosecution departments on the different levels or

to give them other directives. This would gravely harm the constitutional rights of the federal states. That does not exclude of course that on a colleague level, advice might be given which must not be followed.

This system is unique in West Europe. It means that—firstly—the Federal Prosecutor General does not act as an attorney in appeal cases, but also as an—ordinary—public prosecutor in criminal cases before courts of lower instance. It means—secondly—that the Federal Prosecutor General, as a jurisdictional institution of the federation, acts as well before a federal court as before courts of the federal states.

### 2. General Competences

The general competences of the Federal Prosecutor General range widely:

a. As already reported, he and his staff execute the duties of an attorney of the state in cases of appeal before the Federal Courts of Justice.

b. As already reported the Federal Prosecutor General and his staff act as public prosecutors in cases which are in the basic jurisdiction of the Regional Appeal Courts, institutions of the single federal state and generally appellate courts only (sect. 120, 142a resp. 121 Court Organization Act). These cases are:

a) offences against the *interior* security of the Federal Republic, mainly participation in terrorist associations and acts of terrorist violence, furthermore high treason a.s.o.;

b) offences against the *exterior* security of the Federal Republic, mainly treason and espionage.

c. Finally the Federal Prosecutor General leads the Federal Central Register, which is the nationwide register of convictions, and the Central Register relating to convictions in respect of offences against laws regarding business and trade. Both institutions are settled in Berlin, but are departments of the Office of the Federal Prosecutor General in

Karlsruhe.

3. *Organization and Staff*

a. Departments and Subdepartments

The Office of the Federal Prosecutor General is divided into four departments, three of them in Karlsruhe, the fourth in Berlin. There is always one department competent for:

- cases of appeals on points of law;
- cases of endangering the state (roughly speaking, interior security);
- cases of treason (roughly speaking, exterior security);
- the Federal Central Register.

The first three departments are led each by a Federal Prosecutor as Head of Department, the fourth department is led by a Senior Public Prosecutor at the Federal Court of Justice.

Each department consists of several subdepartments. The partitions in particular base on several and different points of view.

- a) The department for cases of appeals on points of law is divided according to the competence of the different divisions of the federal courts of justice. Generally these are regionally determined competences. At present there are five subdepartments, each of them enclosing one to usually two Federal Prosecutors, one to two Senior Public Prosecutors at the Federal Court of Justice and one to two Assistant Public Prosecutors.
- b) The department for cases of endangering the state is at present the largest department. It is parted as well under regional points of view in respect to bigger terrorist associations as under points of view in respect to the single association or the single group of delinquency. At present there are eight subdepartments, each of them led by one Federal Prosecutor and with further one to three Senior Public Prose-

cutors at the Federal Court of Justice—among them one as deputy head of the subdepartment—and one to three Assistant Public Prosecutors.

- c) The department for cases of treason is divided according to the initial letter of the first alleged person in each case. At present there are four subdepartments with a personnel structure similar to the department of endangering the state.
- d) The Federal Central Register is formally a department of the Office of the Federal Prosecutor General, but in reality is a particular administration under his supervision.

b. The Federal Prosecutor General

The Federal Prosecutor General is appointed by the President of the Federal Republic based on a recommendation by the Federal Minister of Justice and with the consent of the Council of the Federation. The latter is one of the two parliamentary chambers of the Federation and represents the federal states in their whole. In other words, despite the fact that the Federal Prosecutor General is an office of the federation, he may not be appointed against the will of the majority of the federal states (see in particular sect. 148 and 149 Court Organization Act).

The Federal Prosecutor General has of course to meet the formal requirements of every public prosecutor in Germany: the qualification by the first and second (judge) state examination. As for the rest he must not have been a public prosecutor before but could as well have been a judge or a top administration officer or a qualified lawyer.

The Federal Minister of Justice—and thus the Federal Government—is free in his choice and his recommendation. On the other hand, the Federal Prosecutor General is indeed appointed for a lifetime—in practice up to an age of 65—however he is a so-called “political civil servant” (sect. 36 subsect. 1 number 5 Federal Officers Act). That means, that he may be retired in a case of fundamental or permanent disagreement with the Fed-



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eral Minister of Justice—and in practice with the Federal Government. In reality this has never happened in the course of the forty-year-history of the Federal Republic and up to now all Federal Prosecutors General “survived” all governmental changes because of their outstanding qualifications and merits.

### c. The Federal Prosecutors

Also the Federal Prosecutors are appointed by the President of the Federal Republic based on a recommendation by the Federal Minister of Justice and with the consent of the Council of the Federation. They also are appointed on a lifetime basis, but are *not* “political civil servants” (see in particular sect. 148 and 149 Court Organization Act).

Federal Prosecutors are not required to have a usual prosecutor’s career but most of them have. Many of them served as public prosecutor of a federal state, have then been for a time detached Assistant Public Prosecutors at the Federal Prosecutor’s General Office and returned later as Senior Public Prosecutors at the Federal Court of Justice. But a lot of them have come from the senior ranks of the Federal Ministry of Justice, and some of them have come directly from higher positions in the courts or the public prosecution of the federal states.

### d. The Senior Public Prosecutors at the Federal Court of Justice

The Senior Public Prosecutors at the Federal Court of Justice are appointed for a lifetime by the Federal Minister of Justice. Their service career is the same as that of the Federal Prosecutors. Like Federal Prosecutors, they are of course not “political civil servants.” Many of them become Federal Prosecutors later. Both categories belong to the permanent staff of the Federal Prosecutor General, act on his order and represent him before the courts, the police and the public with the same legal effectiveness. The difference is grounded on different internal functions only.

### e. The Assistant Public Prosecutors

By agreement with the federal states the Federal Prosecutor General has occupied the position of Assistant Public Prosecutor for decades. They are Public Prosecutors from the services of the federal states, usually of age 30 to 40, and are detached to the Office of the Federal Prosecutor General for usually three to four years. During this term they are usually occupied for a year in the department for cases of appeals on points of law and for the rest of the time in one of the two departments in the fields of state security. They are led in their work by permanent members of the staff, but after a time they fulfill their duties independently unless internal supervision or countersigning has been generally reserved for certain acts and applications. They represent the Federal Prosecutor General before the courts, the police and the public with the same legal effectiveness as all other members of the staff.

Service in the Office of the Federal Prosecutor General gives more professional qualifications to these colleagues. After their return to their home federal state, further promotion based on this qualification can be expected. Many detached Assistant Public Prosecutors returned later to the Office and became permanent members of the staff of the Federal Prosecutor General.

The number of these detached Assistant Public Prosecutors depends upon the actual burden of the Office of the Federal Prosecutor General. Therefore this number changes up to a maximum of more than twenty.

## C. The Office—Combatting Terrorist Activities

### 1. Prosecuting Competences

#### a. *Original* Competences with Regard to Activities of *German* Terrorist Associations

The main provision of material penal law in regard to terrorism is the punishable participation in a terrorist association (sect. 129a

Code of Criminal Law). Punishable are the founding of, the membership in, the support of or the making of propaganda for an association which is directed in its purposes or activities to commit the crimes of:

- murder, manslaughter or genocide;
- kidnaping and taking of hostages;
- various kinds of arson, blasting by explosives, assault against air transport a.s.o.

In regard to this criminal offence the Federal Prosecutor General has an *original* and *exclusive* prosecuting competence (sect. 120 subsect. 1 number 6, sect. 142a subsect. 1 Court Organization Act). This competence is also given to him, if, *in coincidence* with participation in a terrorist association, other criminal offences are committed. These may be the so-called "catalogue offences" as mentioned before. These may be also other criminal offences as for example forgery—maybe of passports or other personal documents—or the use of forged documents, which is very often the "basic delinquency" by members of terrorist associations to secure their hidden existence and circumstances of living.

a) Original prosecuting competence means, that from the whole of West Germany *all* cases have to be presented to the Federal Prosecutor General by the prosecution departments of the federal states or by the police if there seem to be factual indicators for the offence of participation in a terrorist association. The Office of the Federal Prosecutor General exclusively examines whether the indicators are really sufficient—factually and legally—and decides then to start a formal preliminary investigation or not. Are the indicators not sufficient and is there no chance to make them sufficient after some pre-investigation, but if they lead to suspicion for another offence completely outside the competence of the Federal Prosecutor General, the case will be presented from there to the competent prosecution department of a federal state for further exam-

ination in its own responsibility.

If the case remains in the prosecuting competence of the Federal Prosecutor General, he alone leads the preliminary investigations—like every ordinary public prosecutor in Germany.

b) This competence includes the right to examine the significance of the case. One must know for example that the Office, at the end of the year 1989, will have started about 300 formal preliminary investigations in the course of the year. In another 600 cases the Office, during this year, examined and then refused its original prosecuting competence—without starting formal preliminary investigations; a lot of these cases then have been presented to the prosecution departments of the federal states for further examining within their own competence.

Therefore, to avoid overload of the Office's personnel and material capacities, the Federal Prosecutor General has the right to transfer terrorist cases led in his original prosecuting competence to the Public Prosecutors General at a certain Regional Appeals Court—in other words—to jurisdictional institutions of the federal states. Precondition is the "less significance" of the case (sect. 142a subsect. 2 number 2 Court Organization Act). "Less significance" is an "undetermined term of law" (in German: *unbestimmter Rechtsbegriff*) which is filled out by the Federal Prosecutor General only. This may not be arbitrary and must be lined by general considerations as gravity of the offence compared with other terrorist cases, only local importance or minor injury of the case. Of course the extent of the lines itself may be dependent on the burden of the Office from year to year.

In a case transferred to another prosecution department, this one is furthermore exclusively competent and may not be directed by the Federal Prosecutor General. The latter is however empowered to assume the case again if he later considers the "less significance" has ceased in the view of new fac-

tual or legal circumstances.

b. *Secondary* Competences with Regard to Terrorist Activities

There has been argued since the introduction of sect. 129a Penal Code in autumn 1976 that the sight of terrorism as an offence only committed in the frame of an association is too short. There have always been cases where, despite a terrorist motivation, the preconditions of an association could not be fulfilled or where, despite a terrorist motivation, the membership of the perpetrator in an existing terrorist association could not be stated, finally, where the motivation was not terrorist but went into the direction of mere high treason. Additionally it must not be forgotten that the offence of participation in a terrorist association regards only associations settled on *German* territory wherever its members may act. Thus in the beginning of 1987, the prosecuting competences of the Federal Prosecutor General have been extended into two directions:

- a) to cases of murder, manslaughter, kidnaping, taking of hostages, various kinds of arson, assault against air transport a.s.o. *connected* with the activities of a foreign or not only German terrorist association and being of *special significance* (sect. 120 subsect. 2 number 2, sect. 142a subsect. 1 Court Organization Act).
- b) to cases of murder, manslaughter, taking of hostages, particularly serious arson, blasting by nuclear energy, assault against air transport a.s.o. *if* the deed is determined and fit:
  - to affect the existence or the exterior or interior security of the Federal Republic;
  - or to abolish, to cancel or to undermine basic principles of the Constitution;
  - or to affect the security of the NATO-forces in the Federal Republic or of the Three-Powers-Forces in Berlin;*and if the deed is of special significance* (sect. 120 subsect. 2 number 3 letters a) to c), sect. 142a subsect. 1 Court Organi-

zation Act).

Under both alternatives mentioned before the Federal Prosecutor General may either himself start preliminary investigations or evocate cases being already under investigation from the prosecution department in charge in a federal state. But also under both alternatives the prosecuting competence comes to an end, if the "special significance of the case" has ceased. Then the case has to be transferred to the competent prosecution department of the federal state (sect. 142a subsect. 4 Court Organization Act).

Finally, and apart from this, the Federal Prosecutor General is impowered to prosecute in cases of more political delinquency or in the forefield of terrorist activities, if they are of "special significance" too. Here are cases of interest being thus qualified as, for example:

- participation in a *criminal* association (with the whole range of politically motivated delinquency as object of its purposes or activities);
- certain kinds of hostile propaganda against organs of the constitutional authorities;
- sabotage against the armed and security forces (sect. 74a subsect. 1 numbers 2-4, subsect. 2 in connection with sect. 120 sect. 2 number 1, sect. 142a subsect. 1 and 4 Court Organization Act).

Also within *this* secondary competence the Federal Prosecutor General may either himself start preliminary investigations or evocate cases being already under investigation in the federal state. Also here he has to transfer the case to the competent prosecution department of the federal state, if the "special significance" of the case has ceased (sect. 142a subsect. 4 Court Organization Act).

Thus, in my opinion under the present legal status the prosecuting competences—original as well as secondary—of the Federal Prosecutor General guarantee sufficiently his ability to be the central prosecution de-

partment in the field of terrorism within the Federal Republic.

## 2. *The Practice of Prosecuting*

### a. Investigations

Within his prosecuting competence the Federal Prosecutor General has the same duties and powers as every other prosecution department in Germany. There do not exist any special procedural powers. Thus it is the decision of the Federal Prosecutor alone to start formal preliminary investigations and to finish them either by preferring a charge or—in respect to most cases—discontinuing the proceedings.

What kinds of investigations need to be conducted and what course they should take, has to be decided by the Federal Prosecutor General and his officers on their own responsibility. Here, for example, they may:

- obtain information from all public authorities (sect. 161 sentence 1 Code of Criminal Procedure);
- provisionally arrest an alleged offender or have him arrested (sect. 127 subsect. 2 sentence 1 Code of Criminal Procedure);
- examine or interrogate the alleged offender, furthermore witnesses and experts or have them examined or interrogated by the police (sect. 161a, 163a Code of Criminal Procedure);
- issue a “wanted” notice (sect. 131 Code of Criminal Procedure);
- decide whether to seek the assistance of newspapers and other press media in carrying out a search for suspects;
- order and supervise that all necessary measures in searches for suspects are taken;
- order—and if necessary execute—where delay would hamper the further conducting of proceedings;
  - 1) a search of the home of the alleged offender or of other persons (sect. 102 foll. Code Criminal Procedure),
  - 2) the seizure of exhibits (sect. 98 foll.

Code of Criminal Procedure);

—order,

- 1) the execution of physical examinations (sect. 81a foll. Code of Criminal Procedure),
- 2) the surveillance of telecommunications,
- 3) so-called telephone-tapping—involving the alleged offender or other persons (sect. 100a of Criminal Procedure);

*if* here also delay would hamper the further conducting of proceedings. And finally,

—apply for the issue of a judicial warrant of arrest or a judicial search or seizure warrant or for a judicial upholding of a seizure or measures of telephone tapping.

Many of these measures and most of the usual investigation work may be and will be done by the police—but always, as already mentioned before, on behalf of or in response of a *request* by the prosecutor. The prosecuting competence of the Federal Prosecutor General in regard to terrorism cases covers the whole of West Germany and West Berlin. Therefore the Federal Prosecutor General is free to decide whether requests for investigations in his responsibility,

- the Federal Police (the Federal Office of Criminal Investigations—BKA—),
- or the police of a federal state and there,
  - 1) either the Office of Criminal Investigation of a federal state, a statewide centralized authority,
  - 2) or the police authority of a city or a district.

The decision depends of course on the regional range of importance of the particular case, on the question, how far and in what range centralized police investigations would be necessary, and how the police force in charge is technically equipped.

Compared to the prosecution departments in the federal states, the members of the Federal Prosecutor's General staff, on average,

have less but more extensive cases to investigate. Consequently the single officer must care more for the single case than his colleague in the federal states. Collaboration with the police is much more intensive. In a field where most of the witnesses are more or less close to the terrorist scene, only interrogation by the prosecutor—where generally a witness is obliged to appear and to speak, as opposed to the legal situation before a police officer—the Office executes many of these interrogations. Furthermore it is expected that the prosecutor participates decisively in home searches of importance and in the interrogations of the alleged person before bringing her before the investigating judge for examining the question of issuing a juridical arrest warrant. After terrorist assaults, especially murders, a prosecutor of the Office is with the investigating police team, gives advice and decides, where legal advice and decisions are needed, but sometimes also determines under legal aspects the general direction of the investigations. These examples show the close cooperation which the Office can afford in regard to its manpower capacities but which is expected from it too. But by the way the prosecutor may never forget that he is not a criminalist and that he will be well advised to depend on and to trust in the criminalistic experience, the technical and tactical capacities and the greater nearness to the varieties of life most of his police officers own.

#### b. Preferring Charges and Participation in the Trial

Charges are to be preferred before a court. In the Federal Republic of Germany special courts for terrorism cases do not exist. These cases are to be dealt with by the branches of the regular jurisdictional institutions.

As already mentioned the Federal Prosecutor General is a legal institution of the federation. But there does not exist a first instance federal court in Germany—the Federal Court of Justice in Karlsruhe deals only with appeals on points of law against sen-

tences of certain first instance courts of the federal states. Thus charges have to be preferred before federal state courts. According to the significance both of the cases and the prosecuting authority the Federal Prosecutor General prefers his charges before few *federal state* Regional Appeal Courts, which act in these cases as first instance court filled with five judges with one presiding. They are those federal state Regional Appeal Courts whose districts include the respective state capital (sec. 142a subsection. 1, sect. 120 subsection. 1 and 3 Court Organization Act). Here we have the unique situation that courts of a federal state act as an organ of the federation in their jurisdiction on charges preferred by a prosecutor of the federation (sect. 120 subsection. 6 Court Organization Act, art. 96 subsection. 5 Basic Constitutional Act).

In the course of the trial, the representatives of the Office of the Federal Prosecutor General act before the court as every other German public prosecutor too: they publicly read the charge, participate in questioning and in taking evidence, more requests in regard to procedural questions and further evidence and hold their final pleadings.

After the sentencing, both sides have the right of appeal on points of law. These appeals go to the Federal Court of Justice, a federal court. In the *trial*, representatives of the Office of the Federal Prosecutor General act again for the prosecution.

Usually two representatives of the Office, but sometimes in large cases up to four, act for the prosecution in trials before the Regional Appeal Courts as courts of the first instance. At minimum, one of the prosecutors belongs to the permanent staff, others can be detached Assistant Public Prosecutors. Among the prosecutors acting is usually the author or one of the authors of the preferred charge. If the case becomes an appeal case acts only one representative of the Office in the trial before the Federal Court of Justice. This prosecutor belongs to the department for cases of appeals on points of

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law and has never before been occupied with the case. That secures extreme objectiveness in handling the case.

### c. Enforcement of the Sentence

Once the sentence is final it is enforced by the Office of the Federal Prosecutor General. The Office is the executing authority. In

case of a prison sentence the execution itself takes place in a state prison. There are no federal prisons in Germany, the federal states execute sentences for the federation. In cases led by the Federal Prosecutor General until the final sentence, the Federal President, *not* the Prime Minister of the federal state, has the right of pardon.

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## Tackling Crime in the 1990's

by David S. Gandy\*

### Introduction

For 30 years Britain and most western countries have endured rising crime rates. Everyone is affected by crime in one way or another. First, there are the victims—people whose homes may have been burgled or whose possessions may have been stolen, or who may have been attacked in the street, or even in their own homes. Then there are those on whom the effects of crime are less direct, but whose lives are less enjoyable because of it—parents worry about their children being lured into taking drugs, or directly into crime; and the elderly are often afraid to go out at night. Lastly, the community as a whole bears the cost. Not only do people have to pay for the criminal justice system, but burglary, car theft and shoplifting raises the costs of insurance and the price of goods in the shops. In some areas crime can become an entrenched feature of community decline and deprivation, hindering the recovery of run-down neighborhoods.

Perceptions of the causes of crime vary widely. Some see it as a manifestation of man's evil and moral turpitude (though rarely their own!); some as being the produce of social and economic pressures and others as resulting from physical, psychological, or even genetic causes. There are equally disparate views as to the correct way or ways in which to seek to control and reduce crime. As the wheel has turned through the present century, different schools of thought have become dominant, their policies becoming fash-

ionable and then falling out of favor because of perceived failure or changes in social and political attitudes. They have then been replaced by the policies of others who knew all along that their predecessor had erred, which in due time suffered the same fate. We have tried to prevent crime by using harsh punishment, by seeking to relieve deprivation through care and support, by treating crime as an "illness" to be "cured," or a sin from which offenders could be saved and reformed. Nothing seems to have worked and crime has stubbornly increased.

The problem of how to combat this surging tide of anti-social behaviour has puzzled experts throughout the world and continues to do so, I readily confess that I am no expert and cannot pretend to come before you today with any universal panacea, revealed wisdom, or even profound fresh insights. I can see no sudden breakthrough against crime because the roots of much criminality lie deep in modern society. It seems to me that if any progress is to be made it will only be achieved in small steps by a process of trial and error, people meeting together as we are now, to learn of the successes and failures of experiments in each other countries, and, allowing for the fact that each society's problems are different, testing, adapting and developing ideas and schemes that might work in one's own environment.

### A Strategy to Tackle Crime

I would now like to go on to tell you something of the strategy that we have adopted to tackle crime in England and Wales in the 1990s. Before I do so, however, let me explain why I have referred to England and Wales rather than the United Kingdom or

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even Britain, in case anyone is wondering about this. Within the United Kingdom, Scotland and Northern Ireland have their own entirely separate criminal jurisdictions and systems, so that they are, effectively, foreign countries in this context.

Until comparatively recently, strategies to tackle crime in England and Wales were largely focused on the five services, which make up the formal criminal justice system—police, courts, prosecution, probation and prisons. Indeed, these must always provide the first response to crime. It is their job to demonstrate that crime, particularly serious violent crime, will not be tolerated by apprehending and prosecuting those who break the law and ensuring that the guilty are convicted and punished. However, the formal services cannot always prevent crimes being committed in the first place, or ease the harm done to the victim. An attempt is being made in the new strategy for the 1990s, to adopt what many see as a more imaginative approach, with better prospects of success involving a partnership with the wider community to open up new possibilities in these areas. This partnership involves many other services, businesses, voluntary organizations and everyone as citizens.

Designing a strategy to tackle crime, it was recognized, must begin with a knowledge of the nature of crime: Who commits it, where and how is it changing? Indeed, even before we examine those questions, we need to ask ourselves whether there is such a thing as "crime" in the singular at all. Research evidence is now confirming what many of us have long suspected, that crime is a highly complex and fragmented phenomenon. It needs to be broken down into its component parts to see which regions or neighborhoods are particularly affected. Specific crimes will need specific tactics—strategies to reduce city fraud, for example, will clearly not be the same as for street robbery.

### What Is Crime? Who Are Criminals?

Tackling crime then involves having a clear idea of the nature of the problem—the sort of crime a country has and who commits it.

Crime is a persistent and pernicious problem: It has been increasing all over the world for the past 30 years. Recorded offenses have increased sevenfold on average by 5 to 7% per year, although in 1988 there was a 5% drop. The figure in the early 1950s was 0.5 million, that is one crime per hundred people. In 1988 there were 3.7 million offenses recorded, about one crime for every thirteen people. People are understandably alarmed by this rise. A public perception of an increasingly lawless society can generate a fear of crime which affects the lives of a large part of the population. People are reluctant to go out alone and can even feel insecure in their own homes. Such fear can stunt and cripple the lives of ordinary, decent, law-abiding people and this is unacceptable in any civilized community. One difficulty in dealing with this fear is that much of the public perception of crime and the risk of suffering at the hands of criminals is based not on direct evidence, but on what people read in newspapers and see on television news bulletins and broadcasts. Fear of crime is also often raised by experiences such as the house next door being broken into, the graffiti-daubed and poorly lit estate, or the crowd of rowdy young men hanging around the High Street on a Saturday night. The views, the myths, even the fabrications and prejudices of the public must be taken into account, but so often they are inconsistent with reality. The real rise in crime and the fear of it are genuinely serious problems. Nevertheless, statistics show that property crime makes up the vast majority of recorded crime, contrary to the impression so many people have of serious violent crime dominating the picture. In England and Wales in 1988, 94% of recorded crime was against property—vehicles, houses and other build-



ings. Only 6% involved violence and of that figure, the majority of incidents were less serious assaults and woundings, mainly involving young men as both victims and perpetrators. More than one quarter of crime was car crime—theft or taking without consent of a vehicle or theft of its contents.

For more than 100 years it has been the case that most recorded crime is against property. Within that general category of crime, however, there has, in recent years, been a large increase in criminal damage, which has grown from less than 1% of the total as late as the 1950s to 16% today. Even in the case of criminal damage, however, most offenses still involve damage of less than £20 value.

I claimed in my introduction that crime is a complex and fragmented phenomenon and it is far from the whole picture to show simply that the massively overwhelming proportion of crime is property crime. One has only to open any of the great general text books on the criminal law of any country to see how many offenses there are, what a wide range of conduct the law forbids or seeks to prevent as being unjustifiable, unacceptable, harmful or threatening. Add to that the vast range of works on jurisprudence, criminology, sociology, psychology and psychiatry, penology, politics, etc. which seek to explain the elements of crime, what causes it, who commits it and where and what needs to be done about it. It is all too apparent that crime is not a single, simple problem, to which one day we will find a universal solution. Crime affects different groups in any society and different areas in different ways. Perhaps it is not surprising that young rather than old people are most often victims of street crime or that people in the country are less often victims of burglary than those in the inner city.

### Regional Differences

For all crimes there are pronounced regional differences in England and Wales.

The London Metropolitan Police District, for example, has a robbery rate over twice that of any other police force area. Crime on the whole is centered in inner cities and deprived areas. In agricultural areas, risk of burglary is very low—about one burglary a year for every hundred houses; in inner city areas it may be as high as one in ten houses a year. Even this figure is not the same all over any given city. Certain pockets of an inner city, particularly the more deprived neighborhoods are more seriously affected than others. The one in ten figure for the inner city can rise to one in five or even worse for particular housing estates.

The same is true for car thefts. The risk of having your car stolen in a given year is about one in twenty in agricultural areas or better-off rural/down parts of an inner city. Robbery and theft from the person is also much higher in the inner city.

### The Recording Effect

We know that not all crime is recorded in England and Wales. Sometimes householders or other victims simply do not bother to report crimes that have happened to them. It has, therefore, been recognized that official statistics need to be complemented by surveys which give a much fuller picture of the public's actual experiences of crime. Every few years an inquiry is carried out in which people are asked how many criminal offenses have been committed against them. The "British Crime Survey" which is the result, has now produced information on the patterns of crime in three years: 1981, 1983 and 1987. It shows that there is a deep pool of crime which is never reported to or recorded by the police. This inevitably means that the figures of recorded crime can vary considerably—depending on how much the public is reporting or how many policemen there are available to actually record what is reported—without any change necessarily occurring in the underlying volume of crime actually experienced by the public.

This has been tested for burglary. There are survey figures for the incidents of burglary for the past several years. They show that although burglaries recorded by the police increased by 127% between 1972 and 1987, the number of burglaries ACTUALLY experienced by the public over the same period only rose by 17%. People were REPORTING more and more of the burglaries they suffered for whatever reason and the police were RECORDING more of them, swelling the statistics. This more frequent recording was almost certainly connected to two other phenomenon. There was a marked growth in the number of telephones installed during the corresponding period, making it easier to report a crime. At the same time, there was a significant increase in household insurance policies, the standard terms of which required a burglary to be reported to the Police. The growth in both telephones and insurance was especially marked during the 1970s and the early 1980s.

### **Increased Opportunities for Crime**

It would be inaccurate to suggest that there has only been a perceived, statistical increase in crime in England and Wales. There undoubtedly has been a rise in the actual commission of crime during the past 30 years. One of the causes has been the significant increase in the opportunities and therefore the temptations presented to those disposed to commit crime. Rising affluence has led to a marked increase in the opportunities for casual property crime. In 1957, car crime was only 10% (101,000 offenses) of total crime and in 1988 it had risen to 27% (988,000 offenses). There were, of course, far more cars around in the late 1980s, compared with the 1950s and the habit of on-street parking has grown enormously. Further, nearly every house now has a range of easily portable, readily salable electrical goods. A whole new set of opportunities for crime has been created of which only too many of our light-fingered citizens have

availed themselves. Increased car availability, whether owned or stolen, has made potential offenders more mobile, provided a wider range of targets for crime away from areas in which those known to their local police might readily and quickly be suspected and apprehended and has also made them less likely to be observed with stolen property.

### **A Recent Drop in Property Crime**

Thus, some of the steep rise in crime over the past 30 years has been due to more opportunity and some has been due to greater reporting and recording of crimes, rather than an increase in actual commission of crimes. Nevertheless, neither the criminal justice system or society as a whole have had much to be happy about, so far as crime has been concerned, for far too long. There has, however, been a tiny gleam of light in the most recent figures. These have shown a fall of 5% in total crime, between 1987 and 1988. Too much, of course, cannot be based on one year's figures and we must see if those for 1988/1989 continue the downward trend. There were previous false dawns in the drops in the figures for 1978 and 1979, which were not sustained. However, this is the biggest drop for 30 years and perhaps gives us some cause for cautious optimism. The fall is largely made up of a drop in property crime. There have been falls in burglary of 9%, the unlawful taking or theft of cars or theft from cars of 6% and theft from shops of 12%.

### **Violent Crime**

The depressingly dark side of the picture is that relating to violent crime. While property crime has been falling recently, recorded offenses of violent crime have risen. Offenses of violence against the person were up by 12% between 1987 and 1988. Most of these were in the category of "wounding not endangering life," which comprised 68.9%

of the total of violent crime. These offenses arise out of pub brawls, domestic violence, or football hooliganism, but they are the offenses which are rising most steeply. Homicide and life-threatening violent offenses made up 4.3% of the total; violent robbery 14.5%; rape 1.3% and other serious sexual assaults 10.9%.

As before, there is probably some recording effect contributing to the rise. The Police are paying more attention to violence against women—rape, sexual assaults and domestic violence—and victims of the crimes may be more willing to report them. When they do report them, the police are now more likely to record their allegations than before. For example, rape figures rose sharply in London in 1986, but when the figures for allegations of rape and recorded crimes of rape and recorded crimes of rape in two London boroughs were compared, it was clear that fewer women had alleged rape, but the police recorded 50% more. On instructions, police officers were responding more carefully and sympathetically to the allegations brought to them. Nevertheless, while there has been some recording effect, the British Crime Survey also suggests that there has been a real increase.

As with property crime, when the statistics on violent crime are analyzed a fragmented picture emerges. The most serious of these violent crimes—rape, armed robbery and those endangering life—make up only one third of 1% of all crime. Over the 10 years from 1978 to 1988, wounding and assaults rose by about 80% and robberies more than doubled. While sexual assaults as a whole increased by 20%, rape again more than doubled.

### Drug Abuse

We, in the United Kingdom, are particularly concerned about the links between drug abuse and other forms of crime quite apart from our anxieties about the dreadful effect that it has on the lives of so many of our

young people. All over the world, established criminals attracted by the prospects of huge profits have moved into drug trafficking using existing criminal networks for their distribution.

Once they are hooked, drug abusers enter the vicious circle in which they need large and increasing amounts of money each day in order to satisfy or cope with their addiction while they become increasingly incapable of finding the money lawfully. All too often, they begin to commit other crimes, either to steal the drugs, obtain them by fraud, or to produce money to pay for drugs. There is a particular example of this in an area I know well, the Wirral peninsula, which is part of Merseyside across the River Mersey from Liverpool. In the early 1980s, an unanticipated drug problem came to light on the Wirral. It was estimated that the local heroin market was worth around £22 million per year. At the same time, there was an exceptional rise in the number of burglaries of houses, particularly in the better-off parts of the district. At that time Merseyside was an unemployment blackspot and the Wirral was particularly badly hit, even for the fit and able. As a result of explanations given to the police when burglars were caught and from other evidence, it soon became clear that there were strong, undeniable links between the increase in burglaries and the number of young, mainly male heroin users in the area who were committing the offenses to steal money and salable property in order to support their habit. However, this pattern does not necessarily hold good everywhere. There is some research evidence of considerable variations between places and over time in the same places in the number of known heroin users and likelihood that they will commit other offenses.

Merseyside and the Wirral, in particular, continue to be areas of major concern. The Home Secretary announced last month that it will be one of the areas to benefit from a government crackdown on drug abuse. Up to twelve areas, to be announced shortly, will

receive a total of £2.3 million to be spent this year on setting up local drug prevention teams to curb drug misuse. Altogether, thirty areas are expected to be pinpointed for special attention.

The Drug Prevention Teams will consist of three to four people each and their aim will be to draw together a wide range of local groups, local councils, churches, police and voluntary organizations, all with a interest in fighting the drug menace. The areas to be selected will be those like Merseyside with an established serious drug problem and it is expected that the work of the Drug Prevention Teams will be able to start in the first of the areas in February or March.

Last year, customs officers seized a record amount of illicit drugs, including fifty tons of cannabis with a street value of £167 million, £30 million worth of heroin and £60 million worth of cocaine. They also smashed 161 major drug smuggling rings and they enabled courts to confiscate £16 million from offenders. These record seizures reflected credit on the enforcement agencies, but are also a cause for concern.

We need to find out why the underlying demand for illegal drugs seemingly continues to rise; why some areas are much more affected than others and why there is such a variation in the pattern of drug abuse between different areas.

### Alcohol Abuse

It may not be possible to prove a causal link between drinking and crime in general, but a working group on young people and alcohol reported in 1988 that there was a strong association between drunkenness and certain crimes of violence and disorder. Action has been taken on a number of fronts to reduce public drunkenness and I shall give some details of this when I come to talk about the policies geared to crime prevention, which are part of the strategy to tackle crime.

### Who Commits Crime?

Hardened professional criminals, while they do exist in greater numbers than we would wish, are not typical of offenders in England and Wales. Most crime is committed by young men and is mostly "amateur" and opportunistic. There are about eight times as many male offenders as female and the most common age for offending is 15. Offending is very common indeed among young men. One third of the entire male population has been found guilty of what is known as a "standard list offense"—that is a reasonably serious offense—by the age of 31. The proportion is probably even higher in the cities. Most of these offenders do stop committing crime after one offense or more correctly one conviction/apprehension/prosecution. Only a few go on to become serious repeat offenders. It has been calculated that just 7% of males are responsible for 65% of all offenses committed by males in England and Wales. The picture then is one of widespread involvement by young men in casual, possibly trivial crime, with a small proportion going on to re-offend persistently. An important part of tackling crime must, therefore, be to steer these young offenders away from starting on a criminal career.

Clearly, as crime is so diffused, it does not make sense to even try to think globally of one simple "crime problem." Crime needs to be analyzed and broken down into its various elements. Then strategies can be devised to tackle it. We shall have to make a special effort in those parts of the country, usually in cities where crime is rife, and in streets or on estates where local risks of robbery, burglary and other crimes are much higher than the national average.

Violent crime, whether in cities or elsewhere, needs particular attention. This includes concentration of Police effort on localized problems such as street robbery, Saturday night brawling, improved street lighting and reducing the circulation of weapons. It involves encouraging those who can influ-

ence young people to steer them away from crime. Ultimately, of course, it means ensuring that the worst offenders, who pose a continuing risk to others and for whom no other punishment is effective, are imprisoned for long periods.

### Preventing Crime

The new strategy for England and Wales, as I have already indicated, is intended to embrace a wide range of initiatives involving all the services in the criminal justice system, as well as society at large. In particular, steps are being taken to strengthen the law, to provide the police with the resources and powers that they need, to improve the efficiency, effectiveness and fairness of the courts and to ensure that the victims of crime receive adequate help and support. However, I shall concentrate today on the two aspects of the strategy that I believe embody the bolder innovations, crime prevention and the punishment of offenders in the community. Let us first look at the steps that are being taken to enhance crime prevention.

Undoubtedly, the best way of tackling crime is to prevent it from happening in the first place. There is nothing new about crime prevention; cattle branding was an early example of the realization that marking property helps to prevent crime as well as to assist detection. It can be seen as the forerunner of the modern practice of engraving the registration or license number of a car on to its windows for the same purpose. Nevertheless, the full potential of crime prevention has largely gone unexplored until recently. Hitherto, consideration of prevention has tended to take place in the context of sentencing policy, the question being whether punishment by imprisonment, in particular, deterred those who had offended from doing so again or did it otherwise prevent crime by removing from the community and so incapacitating those who had been identified as "criminals."

As the failure of society through its crimi-

nal justice system to control crime by the policy of committing more and more offenders to prison for long periods became increasingly apparent, the need for some lateral thinking became urgent. Not only was the reputation of the United Kingdom as an advanced and civilized state being called into question by its penal policy, but simple common sense demanded a new and imaginative approach.

One facet of the new approach to tackling crime has been to look at achieving the right balance between detection and prevention—to identify those crimes which are more susceptible to prevention than to detection. There is an obvious incentive to look much more deeply into crime prevention, now that crime has been a growing problem all over the world for the past 30 years. When crime is on the increase, it is often said that we are in the grip of a crime wave and pictured like this it may threaten to swamp us. However, crime is not an unstoppable tidal wave (here I have the opportunity to use practically the only word of Japanese that I understand, a "Tsunami"). The reality, as I have already indicated, is that crime is diverse, complex and fragmented, affecting different groups of people, different areas of each country, even down to different streets unequally and is the product of a multiplicity of causes. Even the concept of whether a particular act or course of conduct should or should not be criminal, can differ, not only from country to country, but also within communities.

As we have already observed, a particular inner city housing estate might suffer more burglaries, while a farming community in the country will have little to fear from break-ins. Understanding the true nature of crime, therefore, is the first step to devising adequate strategies to prevent it.

### What Can the Individual Do?

In England and Wales, the vast bulk of recorded crime, 94%, is against property. Property crime thrives on easy opportunities. In a recent survey of people on probation

who had been convicted of unlawfully taking motor vehicles, 60% of the cars taken had been left unlocked and in a similar survey of burglars, 30% of the burgled houses had not been entered by force—they had simply been left unsecured. Again, as I have already mentioned, some of the increase in recorded crime may have been due to increased opportunities. Rising affluence means that there are more goods to steal and carelessness means there are more opportunities to steal them. Therefore, a good deal of our crime prevention program seeks to deny or at least minimize easy opportunities for crime. We are seeking to persuade people to adopt precautions which the individual can take without cost or trouble. Simply remembering to lock cars and secure homes can reduce car crimes and burglaries significantly.

### **Action in the Community**

It is often assumed that the middle classes suffer most from burglary. In fact, in England and Wales, the less well-off suffer far more. Their houses are generally less well protected, they are less likely to be able to afford home insurance and the losses can be devastating to a pensioner or single parent on state benefits. A number of initiatives have been undertaken within the last three years or so to test and demonstrate that effective action to prevent crime can result from people getting together in the community to protect themselves.

### **The Kirkholt Project**

One such initiative, known as the Kirkholt Project, dramatically reduced the appalling level of burglary on the Kirkholt Estate in Rochdale near Manchester, a crime previously considered intractable. The estate consists of over 2,000 houses and when the project started in 1986, one in four was burgled every year. The Project Team brought together many local agencies, including the

housing department, police, probation officers, gas and electricity boards and a team of researchers from Manchester University. Ingenious ways to analyze the problem were found. Seventy-six recently convicted local burglars were interviewed to find out what sort of houses they targeted and what might have deterred them. All the burglary victims of the previous six months and their neighbors were interviewed and it emerged that 70% of the entry points used were visible from a neighbor's house. Half the burglaries involved cash from meters and so the first step in the preventive strategy was to persuade gas and electricity boards to replace slot meters with alternative methods of payment.

The second step involved concentrating on the most vulnerable—robbed households, which were three to four times more likely to be robbed again. £75,000 was secured within a month to upgrade the security of robbed houses with advice from the police, who would conduct a security survey within days of a burglary. The discovered that local burglars would not travel far from home and domestic burglary was almost claustrophobically local. Signs that a house was unoccupied were of primary importance when choosing a target.

The third strategy was to involve the neighbors and this was the greatest challenge. Volunteers from the Manpower Services Commission Community Project were asked to tackle the distrust and suspicion among tenants and enlist the help of victims' neighbors to take part in an experimental "cocoon" around the burgled house, to keep an eye out and maintain signs of occupation. In all, 85% of neighbors took part.

The results were encouraging—within a little over six months of beginning the project, the burglary rate had halved. Repeat victimization declined significantly and there was no evidence that the problem had simply been pushed out to other areas. perhaps most encouraging of all, the "cocoon" of self-protection grew into fully fledged home

watch schemes, operated by householders. After seven months, seventy-five such schemes have been registered with the Police and tenants have taken an increased role in running the whole program. There is a postscript to the Kirkholt Project which has entered a second phase, funded by the government, to encourage offenders not to re-offend. A full-time probation officer now focuses on drug and alcohol abuse, unemployment and debt problems, which were revealed in the earlier interviews with burglars.

The effectiveness of this co-operative effort demonstrates one of the principal lessons in crime prevention that while each of us needs to accept responsibility for looking after his own property, it is not just a matter for the individual. There is great potential for whole communities to get involved. Security is multiplied many times over if a whole community treats it as a collective responsibility.

Information, responsibility and expertise are scattered between various groups in society. Their fusion can make a powerful force in deterring crime. It has been recognized that this diaspora demanded some sort of co-ordination and in 1982 a Crime Prevention Unit was set up to act as a focus for central Government's initiatives. It was built on pioneering work in Sweden, the Netherlands and Canada, as well as on important research in the United Kingdom and elsewhere. The unit helps local agencies to design and carry out preventative measures and to evaluate the results. In this way it is able to bring together the results of research and practical experience on the ground.

### **The Five Towns Initiative**

In an attempt to get the full range of local agencies involved in crime prevention in 1986, the Crime Prevention Unit set up five projects with public funding in the towns of Bolton, Croydon, North Tyneside, Swansea and Wellingborough. These were aimed at finding local solutions to local problems and

at getting the whole community involved. The projects were known collectively as "The Five Towns Initiative." Each project had a full-time co-ordinator to run it on a day to day basis and a steering committee made up of local groups and agencies to oversee its progress. The results were very encouraging. In North Tyneside overall crime was reduced by 18% and within that figure, thefts of cars were reduced by 23%. In Bolton, residential burglaries were reduced by 21% on a housing estate of just over 6,000 households and 19,000 people. Central Government funding has now come to an end, but all the projects are being continued by the local authorities concerned.

### **The Safer Cities Program**

The Five Towns Projects have formed models for the first major series of intensive crime prevention projects from the Safer Cities program. Already, schemes have been announced in sixteen cities, many of them up and running, altogether the Crime Prevention Unit is starting twenty projects in inner city Urban Project areas, each to run for three years initially. Inner cities and those chosen for Safer Cities, face particular problems and the greatest risk of crime. The British Crime Survey, published in 1985, showed that people living in inner city areas faced a risk of being robbed between three and six times greater than residents of other areas. Although high risk communities comprise just over one tenth of households in England and Wales, residents in these areas were victims of one third of burglaries, one quarter of car thefts and one third street crime, reported to the British Crime Survey.

In deprived communities, where the incidence of crime is often at its highest, ordinary but vital elements of community life—family, school, work, neighborliness and voluntary activity—are under stress. The higher than average crime rates and fear of crime can cause these communities to lose the ability and even the will to tackle local problems.

Businesses can close, the traditional informal constraints on law breakers lessen and neighbors are lost. In England and Wales an Action for Cities campaign has been mounted to reverse this decline. Safer Cities is a contribution to that campaign and £42 million has been budgeted this year for the first sixteen projects. The program is applying the successful lessons learned from the Five Towns Initiative and other projects which found solutions to inner city crime based on a sound knowledge of local problems and needs. Safer Cities targets areas where crime rates are higher and fear of crime most intense. As with Five Towns, each project is led by a local steering committee, drawn from local agencies. The Government funds three locally-recruited staff, including a coordinator who pulls together everyone with an interest in crime prevention. The steering committee is made up of representatives from the police, probation service, community groups, local businesses and the local authority. The projects are being locally driven with a view to developing the capacity of local communities to devise their own crime prevention strategies. Working from a local crime profile and detailed local surveys, the team draws up an action plan. The government is providing £250,000 a year for each Safer Cities area to fund its projects. As an example of what is being undertaken the Bradford Safer Cities Team applied for £48,000 to help pay for better lighting, graffiti removal and landscaping on estates; improved security including an estate for the elderly and single parents; a covered play area at a Bangladeshi youth center; and classes in domestic security, "Know your Neighbor" courses and personal safety classes for women and senior citizens.

The object of the program is to reduce crime by reducing the opportunities for crime with better security; to lessen to fear of crime which cripples the lives of many people, particularly the elderly; to raise awareness about crime prevention among architects, community groups and local author-

ity staff; to tap the energies and enterprise of young people and by so doing, to create an environment where enterprise and community life can reawaken and flourish.

### **Other Action by National and Local Government**

The Department of the Environment has initiated an Estate Action Program which is improving some of the most run-down estates. Local authorities estimate that they lose £500,000 per year through criminal damage. One particular project under the Estate Action Program has shown that a local authority can protect its housing stock and its tenants with a crime prevention scheme which more than pays for itself. Gloucester House is a lower block in Kilburn, North London, which suffered very badly from vandalism and graffiti. Tenants felt anyone could walk in and out of their block without being challenged and demanded better security. Brent Council, supported by the Estate Action program, responded by restricting access to the block by building a new and redesigned entrance and placing a receptionist in the lobby. A shift system provided cover from 8 a.m. to 11 p.m. and now only residents and their guests can get in—vandals are kept out! An identical block next door, Hereford House, which was not improved, provided a direct comparison. It showed that the cost of the scheme, £92,000 for the building work and £19,000 per year for the receptionist, could be recovered within ten years. In the first year, the cost of vandalism and graffiti in Gloucester House fell to just over £1,000, compared with £10,000 for Hereford House. Further, rent revenue from Gloucester House went up as it became a better place in which to live, squatting being reduced, and more tenants moved in. Similar projects are going on elsewhere.

The Department of Transport has mounted an extensive research program into the causes of theft and assault on the London Underground. As a result of its findings £15



million has been made available by the Government to implement a range of customer safety and security measures on the Underground.

The Department of Education and Science too is involved in crime prevention. It is self-evident that schools can have a powerful influence on the development of young people and a series of pilot projects, aimed specifically to explore ways of promoting social responsibility—through curriculum development, community youth work and outdoor activities and so help reduce delinquency in areas of high juvenile crime. Others promote innovative work by youth services, particularly in urban areas and another involves action to combat the abuse of drugs. Such initiatives are not solely the province of Central Government. At its most effective, crime prevention is tailored to the local circumstances of a particular locality and local authorities have an important role to play. I have already mentioned the involvement of local authorities in projects such as the Kirkholt Project, the Five Towns Initiative, Safer Cities and the Gloucester House Project. Local authority policy affects not only housing, but also the streets, public transport schools, local amenities and much more. Among other things, local councils can improve street lighting, help design out crime from estates and co-operate with other agencies in taking action against alcohol related crime.

In South West London, Wandsworth Borough Council has initiated a "Crime-watch" program with the support of the local Police and community. It is renewing and increasing the Borough's street lights and has recruited twelve extra housing patrollers. The Council also launched a pilot "security envelope" program in a number of key localities, which aims to tackle crime in a comprehensive way by cutting out blind spots, setting up door entry systems or re-positioning lighting, for example. There is also a plan to help the most vulnerable by equipping every pensioner and registered disabled person in private accommodation

with a security package of bolts, locks and a door-viewer. All residents of the borough have been issued with a special booklet to introduce them to the "Crimewatch" scheme.

### Reaching the Community at Large

The co-operation of specialists and professionals is crucial to successful crime prevention strategies. The work that has already been done shows that beyond doubt for the success to be deep and long-lasting it is important to reach the community at large—to convince those who are the community, who are the victims or neighbors of the victims of crime that their personal involvement in crime prevention is crucial to make it work AND that it is in their own interests for it to work. The mushrooming that has taken place in what is known as "Neighborhood Watch" is evidence that the message has been got across to people England and Wales. People do believe that it is in their power to tackle crime. The number of schemes has more than quadrupled to 74,000 since 1986, covering 3.75 million households. These schemes have nothing in common with the notion of vigilantism or taking the law into your own hands. They combine good physical security to protect homes with an element of watchfulness and mutual help, but their main strength lies in their ability to bring the police and community into partnership and to generate widespread interest in and support for crime prevention.

It is interesting also to observe that the success of "Neighborhood Watch" has led to many other "Watch" schemes being set up around the country. Just three examples are:

#### (a) *Taxi Watch*

This is a scheme which enlists taxi drivers to help the police following a serious crime. Working out on the street at all times, they are well placed to act as observers. A pilot scheme in North London scored sever-

al successes, including the sighting of an escaped prisoner and a stolen car being driven by hooded men en route to a robbery. Taxi Watch has now spread to Wales, Birmingham, Manchester, North Derbyshire and other parts of London.

*(b) Pub Watch*

These schemes are intended to combat incidents of violent and disorderly behaviour in bars and public houses in the London area. There are now over twenty such schemes with many more in the pipeline. To help them, the Metropolitan Police have published a set of guidelines in handbook form. Should problems arise in their premises, Pub Watch members activate one of five early warning systems which are explained in the handbook.

*(c) Operation Shark*

This is a Boat Watch scheme launched in March 1989 by New Forest District Council, which operates along a stretch of coastline where 500 boats are moored. Owners are encouraged to put security marks party advises on security systems.

### **Crime Prevention Panels**

Another example of effective partnership between the community and the police is Crime Prevention Panels. They are made up of police officers and local people who examine crime problems in their locality and suggest practical solutions based on their local knowledge, experience and expertise. The panels were first set up in Bristol and Nottingham in 1966 and steadily increased to the present figure of 390. During this period they have been the driving force behind many highly imaginative and successful initiatives.

### **Crime Prevention Publicity**

Crime prevention advertising in England and Wales is in the hands of the Home Office. It has developed to reflect the change

in emphasis from individuals to communities acting together to prevent crime. Mass advertising is the way most households are reached. Earlier campaigns focused on burglary and theft and were regionally based. The most recent campaign was the first national campaign and part of a strategy that will continue to develop. Based on the theme "Crime: Together We'll Crack it," it uses national press and television and is underpinned by a new crime prevention handbook which contains personal advice and shows there is more to crime prevention than locks and bolts. It is available free to the public on request and to date nearly three million copies have been distributed. Other crime prevention publicity is contained in "Kidscope: Good Sense Defense for Young," which is a set of guidelines issued by a private organization which is active in protecting children against physical, or sexual threats.

### **Diversion from Crime**

Understanding the nature of crime also means understanding the nature of criminals. The professional criminal is still relatively rare in England and Wales. Most offenders, as I have already said, are opportunistic and one fifth of all crime is committed by young people—the peak age for offending is 15. This sharpens the need to find ways of steering young people away from crime and anti-social behaviour.

Parents, schools and others, who work with young people can all become involved here. The police in many areas work with juveniles which improve relations and provide a range of sporting and other "Outward Bound" activities for young people. An outstanding holiday scheme is run by the police in Staffordshire—the Staffordshire Police Activity and Community Enterprise (SPACE) program. This was set up five years ago to offer activities for young people over the school holiday period. The organizers deliberately set out to attract children known to be involved in crime or liv-

ing in areas of Staffordshire where crime is highest. Serving police officers, who run the scheme, take time to organize groups of children in walks, trips, sports days and a carnival day. Local and national firms donate money, prizes, or facilities, the local authority makes school premises available and local media provide free advertising. The scheme has successfully attracted large numbers of children, to particularly from high crime urban areas: In 1985, 25,000 children joined the scheme. It is also popular with the public and appears to have contributed to a drop in crime. The results have certainly been sufficiently encouraging to warrant a further study. Another scheme was launched by Humberside Police in 1989. This is "Operation Lifestyle," which involves thousands of school age children organized in teams of five each, supervised by an adult in projects of benefit to the local community.

This then is the direction in which we in England and Wales will be seeking to go in the 1990s, in our efforts to tackle crime and prevent it from happening.

### **Offenders in the Community**

The second major innovation and the most radical part of the new strategy is that contained in the proposals for widely extending the use of punishment in the community.

In 1968, the prison population of England and Wales was 32,400. In 1978 it was 41,800, and in 1989 there were over 50,000 people in custody in England and Wales. If past trends were to continue, the prison population could be expected to rise to well over 60,000 and possibly to 70,000 by the year 2,000. The current uncrowded capacity of the prisons is 44,700. Overcrowding is concentrated predominantly in the old urban prisons with about 5,000 prisoners living three to a cell and around 13,000 doubling in cells designed for one. The pressures of overcrowding are made worse by the lack of integral sanitation in around 22,000 prison places. Action to relieve the overcrowding

by expanding the capacity and quality of the prison system is being taken. The largest ever prison building program, costing almost £1 billion is under way. Spending on prison building has risen 100% in real terms, between 1978/9 and 1987/8. In the ten years between 1985 and 1995, twenty-eight new prisons will be opened. Eight have already been opened and together with additions and improvements to existing establishments, 25,000 new places will have been added by the mid-1990s.

Nevertheless, there is now clear evidence that for less serious offenders a spell in custody is not the most effective punishment. As I indicated in my lecture on sentencing, custodial sentences are imposed to show how seriously the public views criminal behaviour, to ensure that the offender does not commit offenses against members of the public for a specified period, to deter the offender from committing further offenses after release and to deter other potential offenders, as well as to reform and rehabilitate the offender, if that is possible. The effect of custodial sentences is to restrict offenders' freedom of action by removing them from their homes, by determining where they will live during the sentence by limiting their social relationships and by deciding how and where they will spend the twenty-four hours in each day.

The restraints placed on offenders by walls, fences, secure buildings and staff supervision, are not an end in themselves, of course, but a means of ensuring that offenders comply with these restrictions. How much reliance is placed on security measures will vary according to the likelihood that a particular offender will escape or break the institutional rules in order ways and the risk to the public that would follow. If an offender accepts the conditions of detention and personal responsibility for keeping the institution's rules and avoiding offending, then less security is necessary. Those serving long sentences for very serious offenses and who are a continuing risk

to the public, are likely to need maximum security. On the other hand, offenders who are thought unlikely to escape or commit offenses, if in conditions of minimum security, can be held in an open prison. Custody is, therefore, a continuum from close restriction to relative freedom. The more severe the restrictions the more they produce conditions which are different but it also reduces their responsibility—they are not required to face up to what they have done and the effects of their behaviour on their victims, or to make any recompense to the victims, or public reparation through useful unpaid work. They are even relieved of the responsibility of providing for themselves and their families. Moreover, if they are removed in prison from the responsibilities, problems and temptations of everyday life, they are less likely to acquire the self-discipline and self-reliance which will prevent re-offending in the future. It is also a sad fact of life that prison for all too many offenders is no more than a "school for crime."

Life imprisonment is the mandatory sentence for murder in England and Wales. In addition, most people would agree that offenders convicted of rape, robbery, aggravated burglary and other very serious violent crimes, should be sent to prison for a long time; some of these offenders will be a continuing risk to the public. Sentences for rape and robbery have become significantly longer in recent years. Similarly, most people would agree that those convicted of trafficking in large quantities of controlled drugs and of arson and criminal damage endangering life should be candidates for custody. Thus, prison will remain the sanction facing serious and particularly violent offenders. However, by keeping less serious offenders in the community they can be punished by fines or by restrictions on their freedom. They can be made to pay compensation and they can, at the same time, be helped to live a constructive life and so become less likely to commit crime.

### Cautioning

An important first step in dealing with offenders in the community and reducing the use of custody is keeping less serious offenders out of the courts altogether. In 1985, Home Office guidelines to Police Forces (Home Office Circular 14/1985) suggested wider use of police discretion not to prosecute certain offenders who committed less serious offenses, but to caution them instead.

Cautioning is now widely used for juvenile offenders—it has the advantage of not interfering with the positive influences on their lives, such as families and schools and large numbers of juveniles have successfully been diverted from the courts in this way. The need to prevent young people from beginning to see themselves as criminals is one reason for the growth of cautioning. However, there are many other reasons. While a court appearance can often take place three or four months after the incident, a caution can be given immediately, or within a few days. Such a quick response can have far more impact on the young person than a response happening months later. In addition, the caution usually consists of a very serious reprimand by a senior police officer in full uniform and this can seem more real and relevant than the formal process of the court.

Cautioning is also relatively inexpensive. Prosecution is a lengthy and costly business, especially in a juvenile court, where additional safeguards operate. Cautioning can therefore be seen as a more cost-effective and proportionate response to some less serious offenses.

Finally, cautioning seems to work—it seems to be a very effective way of dealing with juvenile crime. Studies in several English Police Force areas have found that a high proportion of cautioned first-time offenders do not come to police notice again in the next two years. One such study in 1983, concluded that around one quarter to one third of male juvenile first offenders and less than

10% of females who are cautioned are likely to be dealt with again for offenses during a two-year follow-up period. The comparable proportion for males who are prosecuted ranges between one third and one half.

The principles behind the practice of police cautioning have been widely accepted and the use of cautioning, rather than prosecuting, has developed considerably. Since 1980, the number of juveniles sentenced for indictable offenses has fallen by over 58% from 90,000 to 37,000 in 1988. Over the same period, the proportion of known juvenile offenders who were cautioned, rose from 48% in 1980 to 69% in 1988. This increase in cautioning has not been accompanied by a rise in recorded juvenile crime. In fact, recorded juvenile crime has declined significantly. In 1977, 184,100 young people were known to have committed an indictable offense, while in 1988 this number had fallen to 120,400, a drop of 35%. The number of juveniles in the population did decline over this period, but only by about 10%.

There is now a presumption in the case of first time juvenile offenders, where the offense is not serious, that cautioning will be the normal course. There is no such presumption in the case of adults, but cautioning is quite widely used in appropriate cases, particularly for dealing with the elderly or infirm, young adults or persons "at risk," such as the mentally ill or impaired. A number of police forces have adopted schemes for cautioning drunkenness offenders and those found in unlawful possession of small quantities of drugs for their own use.

The criteria for cautioning import certain safeguards. The police must be satisfied that there is sufficient evidence to make a successful prosecution likely; the offender must admit the offense and agree to be cautioned (or in the case of a juvenile the parents or guardian must do so) and the views of the victim should be taken into account. The police, in considering whether or not to caution, will also consider whether other agencies,

such as the probation services and social services should become involved.

### **Punishment Outside Prison**

Despite the increasing use of diversion, the majority of detected offenders are prosecuted. When an offender does come before the court and is convicted, a wide range of penalties other than custody are available. They include fines and fixed penalties; compensation orders; attendance center orders (for offenders under 21); probation orders; community service orders and wholly or partially suspended sentences.

### **Fines**

The fine is the most frequently used penalty—39% of offenders are dealt with in this way. Its use had, until recently, been declining while a high proportion of those fined defaulted and were sent to prison. However, numbers increased again in 1988, when one and a quarter million fines were imposed. Fines have a straightforwardly punitive character and are particularly well-suited for offenses in the middle range of seriousness, where any form of restriction of liberty is too severe a sanction and conditional sentences have seemed too mild. Moreover, fines can be readily calibrated in their comparative severities. Although fines are, at present, computed in England on a tariff scale and some allowances made for impecunious defendants where fines are adjusted downward, the system has been inequitable in that it has focused on equality of monetary amount for comparable offenses rather than equality of impact of fine—it is impermissible to increase a fine for the better-off. Very shortly, however, a more equitable system is to be introduced whereby the court will calculate the appropriate fine in term of units of the defendant's disposable income after an enquiry as to means. The effect should be to achieve greater equality of impact, between the impecunious and the

better-off defendant.

### Probation Orders

A probation order leaves the offender at liberty, but subject to certain requirements, including co-operation with the probation officer. About 41,000 offenders are placed on probation each year. Nearly half of these have committed theft of dishonest handling of stolen goods, but 17% are burglars, some are sex offenders and a few are robbers. Probation is no longer a single simple order. It has been developed into a sophisticated and flexible framework for what are in effect six different types of order, which vary in their demands on the offender. These orders are:

- (1) Probation with only the basic requirements.
- (2) Probation and psychiatric treatment.
- (3) Probation with a residential requirement.
- (4) Probation with a requirement that the offender should, (a) present himself to a specified person or persons at a specified place or places, (b) participate, or, (c) refrain from participating in specified activities.
- (5) Probation with a requirement to attend at a specified day center with facilities connected with the rehabilitation of offenders.
- (6) Probation and some other requirement.

Probation with the basic requirements, means the offender must keep touch with the probation officer and notify any change of address. Nearly 70% of Crown Court probation orders are of this type. The court expects the probation officer to supervise, to confront the offending and to help the offender. An offender may have to report weekly for the first three months, then fortnightly, then if all is going well, every three to four weeks. Confronting the offending and the consequences for both the offender and the victim, can be more easily accomplished with a group of offenders. This practice is an essen-

tial part of some probation day center programs. Most probation services have programs and facilities to help an offender with other problems, such as unemployment, homelessness and poor education.

This is the most basic probation order. Those with additional requirements all make more demands and take away more of the offenders liberty. Probation with a requirement of residence usually means the offender must live in an approved hostel. Many of these residents have a history of broken relationships, heavy drinking or violence. Individual and group programs aim to work at the problem of offending and their social needs and to build up self-confidence and hope.

Probation with a "presenting," "participating" or "refraining" requirement means the offender has to attend a named place and/or participate in a specific activity such as learning to control drink or drug abuse or how to manage aggression that can lead to offending. The power to impose such a requirement has been used recently to introduce an experimental scheme of "adult tracking" in West Yorkshire.

Probation with a requirement to attend at a day center makes the maximum demand on the defendant, requiring him to report to a probation day center three or four days a week, for up to sixty days and to participate in a varied extensive program.

This flexibility of the probation order, makes probation suitable for any but the least or most serious offender and it is now used by the Crown Court for quite serious offenses—thieves—where public interests and tolerance allow. Offenses connected with drug or alcohol misuse can vary greatly in seriousness, but those who commit the less serious of such offenses can often best be dealt with by probation, where it is apparent that they should receive help, not only to deal with their problems, but so they can avoid committing further more serious offenses.

### Community Service Orders

The next penalty available to the sentencer, who decides that non-custodial punishment is appropriate, is community service. When a court makes a community service order, it requires the offender to do unpaid work of value to the community by way of general reparation to the public. It provides a rigorous regime suitable for a fairly serious offender. About 35,000 offenders are made subject to community service orders each year; for the Crown Court it is 10.5% of all convicted offenders. Of these 35,000, more than one in five were burglars and one in eight had committed offenses of violence against the person. The aim of community service is both to punish and to make reparation. It punishes offenders by making them do tasks for the public and voluntary organizations, through arrangements by the probation service. Examples are clearance or conservation work, gardening, decorating, helping disabled people to go shopping and running luncheon clubs for the elderly. All the work is unpaid and of a kind normally undertaken by voluntary effort. At the same time, community service requires the offender to put something back into the community. For many offenders, giving to others rather than taking and receiving is an unfamiliar but salutary experience and for some there may be real benefits in the development of self-respect, self-discipline and motivation.

In April 1989, provisions contained in the Criminal Justice Act, 1988, setting national standards for community service orders, came into force. The aim is to toughen up the order and to ensure that the courts and the public do not see it as a soft option. All schemes will now meet a common set of minimum requirements as to the type of work to be done, the way the hours worked should be reckoned, the standards of performance of behavior and the action to be taken if an offender fails to comply with the terms of the order. Detailed records of attendance are to

be kept and lateness is to be treated as failure to attend.

The new requirements also emphasize that the work should be demanding and that the results should visibly make reparation to the public, for example, cleaning off graffiti in public places, removing litter or building adventure playgrounds. The full range of work is now much wider and in probation areas around the country, offenders are doing hundreds of thousands of hours of unpaid community service work for local communities. The national guidelines also lay down a strict practice for dealing with offenders who fail to comply. The normal response to a first failure to attend or work, a written warning; the second failure must be reported to a senior probation officer and the third failure leads almost inevitably to breach proceedings, which will take the offender back to the court where he was sentenced. Breach of a community service order can be punished by a fine or the offender can be re-sentenced and dealt with in any way in which he could have been dealt with on conviction.

Community service is at least as successful as imprisonment in terms of crimes committed during the ensuing two years after sentence, by people of similar age and criminal backgrounds. Of every 100 community service orders completed, 74 are successful with all hours worked, 12 terminate early because of breach and 10 because of commission of a further offense. While there are some 35,000 offenders performing community service each year, all representing a known risk, there have been very few serious incidents involving the public.

### The Future

Much has been done to make existing community based penalties sharper and more demanding so that sentences and the public will have more confidence in them as genuine punishments and realistic alternatives to sending people to prison. However, Her Majesty's Government proposes to carry this

work a step further forward. In July 1988, a Government Green Paper, entitled, "Punishment, Custody and the Community" was published. In Part I and II of the Green Paper, the case for increasing the use of non-custodial penalties, was argued in some detail. It was proposed that where an offense is so serious that financial penalty alone is inadequate, the penalty should involve three principles:

- (1) Restrictions on the offenders freedom of action—as a PUNISHMENT.
- (2) Action to reduce the risk of further offending, and,
- (3) Reparation to the community and, where possible, compensation to the victim.

By the late 1980s there was widespread concern in England and Wales that we were sentencing to imprisonment more offenders than any other West European state and our prisons had become grossly overcrowded and squalid, as well as expensive. Yet still our crime figures, particularly for serious crime, continued to climb. This situation was coupled with the sudden widespread and some would say, over-dramatic loss of faith in the ability of prison, to reform, rehabilitate, or even deter most offenders. As prison could only provide retribution and incapacitation, the belief grew that it would be both more enlightened and sensible to restrict custodial sentences to those serious and dangerous offenders, whose crimes necessitated such punishment to satisfy public opinion and to protect the community.

For less serious offenders, although the retributive principle of "just deserts" was again beginning to hold sway, it was modified in that it was being said that "sufficient" and "proportional" punishment could most effectively be found outside prison. Thus, Her Majesty's Government, in the Green Paper, argues that its three objectives can often best be met by supervising and punishing the offender in the community. The Green Paper was followed up by a document entitled,

"Tackling Offending: An Action Plan," which was issued to all probation services, police forces and Magistrates courts in August 1988. This called on the probation service and other local services to develop their own local action plans for dealing with more offenders, especially young offenders, in the community. Nearly all probation areas have now prepared local action plans and much will now depend on the ability of probation officers to persuade the courts and the police that it can effectively implement non-custodial sentences so as to reduce offending. The increased use of the existing orders available to the court for offenders who have previously served custodial sentences, is an optimistic portent. However, the government has felt that there is a case for taking things further. In Part III of the Green Paper, it produced proposals for a radical new sentence to provide punishment in the community in accordance with the three principles.

### The Proposed New Sentence

It is suggested that a new order, probably to be known as an "Intensive supervision Order," should be introduced, enabling the courts to make requirements which could include:

- (1) Compensation to the victim.
- (2) Community service.
- (3) Residence at a hostel or other approved place.
- (4) Prescribed activities at a day center or elsewhere.
- (5) Curfew or house detention.
- (6) Tracking of an offender's whereabouts.
- (7) Other conditions, such as staying away from particular places.

In the formal requirements of the order, there would inevitably be an emphasis on restrictions and on compulsory activity, but there would also be room for positive and voluntary elements as well. The program for



the individual offender might include encouraging regular attendance at work, education or training and treatment for drug or alcohol abuse.

The aim of the order would be to make a sharp initial impact on offenders, but perhaps to allow them to progress to less rigorous forms of supervision, subject to good behaviour and under judicial supervision. Relevant factors in constructing a program, suitable for the individual offender, would be the offense committed; the offender's circumstances, e.g. whether he was employed and whether he had family responsibilities, his personality, e.g. whether he had an alcohol or drug problem, his intellectual level, whether he had a tendency to be violent or easily led, etc.; the characteristics of the offending behaviour and his response to previous supervision.

If such a new sentence were to be adapted, there would need to be simple and straightforward procedures for varying requirements which were no longer necessary or practical, or if an offenders circumstances changed. Otherwise they would be oppressive. Moreover the possibility that the requirements could be relaxed, should give the offender an incentive to co-operate. In order to increase the court's confidence in such orders, it is proposed that they should be subject to judicial oversight, rather than be capable of variation entirely at the discretion of the offenders immediate supervisor. There could perhaps be a supervisory magistrate, who would have oversight of the order until it was completed. The magistrate would be able to vary the order, to relax it if good progress was made, or, if necessary, to re-impose requirements if the offender's response deteriorates without actually breaching the order. Such an arrangement would have the advantage of keeping magistrates in touch with an offender's subsequent behaviour. Because such a supervision and restriction order would, by definition, be intensive in its initial stages, the minimum length might be three months,

compared with six months for probation. The maximum might be eighteen months or two years, since it is doubtful whether intensive supervision could be sustained for longer periods. This suggests that where an order is imposed for longer than twelve months, the requirements should be reviewed no later than twelve months after the beginning of the order. There would need to be a procedure for terminating the order early, if the offender received a custodial sentence for a further offense. It might also be sensible to allow the order to be ended by the court on the initiative of the supervisor, if the offender is responding well and no longer requires intensive supervision.

Sanctions for failing to meet the requirements of an order might, depending on the seriousness of the offense, be a fine, the imposition of more demanding requirements, e.g. a curfew, or revocation of the order and sentencing the offender for the original offense to a term of imprisonment. If the requirements are made too stringent, it is more likely that the offender will fail to complete it satisfactorily and this could result in his imprisonment. This would defeat the whole purpose of the order. It is, therefore, essential that offenders should be assessed very carefully, using information from a social enquiry report and other sources, to draw up an "offender profile" at the sentencing stage and there should be realism in the use of requirements.

In the Green Paper, the Government suggested that a new intensive supervision order could be introduced in addition to the existing disposals or it could replace some of them. There seem to be three main possibilities:

- (a) An enhanced probation order in addition to existing penalties;
- (b) A new order replacing probation order, community service orders and possibly attendance center orders: and,
- (c) A new order in addition to the existing penalties.

Extending the requirements for probation orders would give the courts flexibility to tailor the disposal to individual offenders, but could cause difficulty. It would confuse the new controlling requirements with the welfare objective, inherent in the present concept of the probation order, which is that it is imposed "instead of sentencing" (Section 2 Power of Criminal Courts Act, 1973). A new order which replaced existing orders would also be flexible and the courts would still have power to give some offenders a disposal that amounted to a probation order without any punitive elements. On the other hand, it might encourage the courts to impose too severe a penalty and make them more reluctant to use supervision a second time for an offender who had failed to complete an earlier order satisfactorily. Adding a new order to the existing disposals, would have the advantage that it would not disturb existing penalties which are working well. Leaving the other disposals in place would make it clear that the new order was to be restricted for those for whom the existing disposals were not sufficient, this might encourage discriminating use of the order.

Both the sentencing structure of maximum penalties, set out in legislation, and the sentencing guidance within these maxima, given in the decisions of the Court of Appeal, are based on the principle of keeping PROPORTIONALITY between the offense and the sentence. The punishment should fit the seriousness of the crime; it should not be excessive or lenient. Since the new order with its component elements would be more severe than any of the present disposals, except custody, it follows that its proposed use should be for more serious offenders who, at present, would be given a custodial sentence. The objectives of the proposals would be frustrated if such a new order was used for those already given community service orders or placed on probation. Both the courts and the probation service would need to be clear about the purpose of the new order and the probation service would have a particu-

lar responsibility to put clear proposals for each offender before the court. The courts would need to know why the probation service consider that the new order would be suitable for an offender and the program that the offender would be expected to follow. The kind of activities to be made available could usefully be discussed locally and judges and magistrates would need to see for themselves the work which was being done if they are to understand its objectives and have confidence in it. Even so, there would be a risk that the order would be used for offenders who should receive community disposal now and it may be desirable for any legislation to define the circumstances in which the new order would be intended for use.

Because the new order would be flexible, it would have the virtue that it could be used repeatedly for persistent offenders who at present end in prison almost as a matter of despair or frustration by sentencers, who see no other way, ultimately, of dealing with people who appear incorrigibly addicted to petty crime. Imprisonment has traditionally been regarded as the inevitable ultimate destination of persistent petty offenders. The policy now being advocated in England and Wales is that there should be what is called a "twin-track" approach to sentencing, with severe sentences for serious crimes and more moderate community-based sentences for lesser offenses. There will always be offenses for which prison must be the appropriate penalty, but, for others, punishment in the community should become established as the norm. To be acceptable to the public and the courts, that punishment will, of course, have to meet stern tests. It will always have to be seen not only to be proportionate to the seriousness of the offense, but sufficient to satisfy the orthodox aims of punishment, including public condemnation and retribution for the moral wrong and the harm done. It is therefore important that every sentence, custodial or non-custodial, should be clearly seen to be appropriate, fair and,

where necessary, tough.

### Conclusions

(1) Crime is not a single phenomenon. It is diverse, complex and fragmented and needs careful analysis before specific strategies and tactics can be devised to deal with specific problems.

(2) The best way to deal with crime is to prevent its occurrence. Crime prevention policies must focus on creating confidence within individuals and the community that they are not powerless to prevent crime. Effective action is not just about locks and bolts, but needs to be specific and local. It can best be achieved by the pooling the efforts of different groups and individuals.

(3) In addition, initiatives to limit the opportunities for offending or successful offending need to be concentrated on steering potential law breakers, particularly young people, away from crime and circumstances conducive to crime.

(4) Sentencing people to imprisonment does little to reform and rehabilitate or deter. Therefore, it is better to give a convicted offender his "just deserts"—a sentence which is sufficient punishment to mark public disapproval and pay the offender's "debt to society" and it is proportionate to the wrong-doing. The severe prison overcrowding and rising prison population in England and Wales have necessitated a "twin-track" approach to penal policy. Severe sentences will remain necessary for the minority of dangerous, serious or violent offenders to mark society's abhorrence and to incapacitate them if nothing else; less severe, non-custodial sentences in the community will be appropriate for other less serious wrong-

doers.

(5) To gain and maintain the acceptance and respect of the courts and the public for community-based penalties as genuine "just deserts" punishment—a commensurate, real alternative to prison—and not a soft option, a set of demanding conditions and constraints will often need to be imposed on the offender for a stated duration.

As I have said at the outset of this lecture, I am not an expert. Nevertheless, I very much hope that what I have been able to tell you, today, of the strategy we have adopted to tackle crime in England and Wales and the steps we are taking in the direction of crime prevention and punishment in the community, would have made some modest contribution towards the discussions on the problems of "crime prevention and criminal justice administration" which are our main themes at this seminar.

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# Federal and State Legislation against Organized Crime in the United States

by B.J. George, Jr.\*

## I. Introduction

Organized crime, in one sense, has been a part of the American scene since cities developed. Various forms of ethnic criminal groups were often involved in offenses like gambling and prostitution. The so-called "noble experiment" of prohibition exacerbated the problem by fostering the development of interstate and transnational criminal activities dominated by criminal organizations.

After the repeal of the prohibition amendment in 1932,<sup>1</sup> organized crime expanded in such fields of criminal activity as prostitution, drug-trafficking, labor racketeering, traffic in pornography, illegal gambling (particularly bookmaking and numbers rackets), criminal usury (loan-sharking) and extortion, either as a means of committing offenses or as a device to launder<sup>2</sup> funds and acquire property or ownership interests in legal enterprises. The conclusion of the United States Department of Justice has been that the Mafia<sup>3</sup> is heavily involved in the drug traffic within the United States, while cocaine trafficking is under the control of a cartel of Colombian criminal organization. Mexican heroin trafficking is under the control of certain powerful groups in that country, and heroin trafficking from southeast Asia under the domination of Chinese organized-crime groups in Hong Kong and both coasts of the United States, while heroin from southwest Asia is under the direction of a number of small syndicates or organizations.<sup>4</sup>

The United States governmental response has been a sequence of increasingly sweeping federal statutes intended to reach at particular forms of organized criminal activity, resulting in a rather comprehensive coverage of activities. If one asks why this approach has been taken, rather than penal legislation criminalizing the existence and management of and membership in criminal organizations, the answer lies in certain United States Supreme Court decisions which have ruled legislative descriptions of criminal organizations unconstitutionally vague and indefinite,<sup>5</sup> status as violative of the eighth amendment's prohibition against cruel or unusual punishment.<sup>6</sup> The congressional approach probably has achieved results commensurable with those to be envisioned in creating serious crimes of status without the risk of unconstitutionality.

The primary federal legislative instrument against organized crime has been the Racketeer Influenced and Corrupt Organizations [RICO] act,<sup>7</sup> discussed immediately below, but there are several other statutes of importance that also will be discussed in sequence.

## II. RICO

### A. Legislative History

In 1967, a special commission, the President's Commission Law Enforcement and Administration of Justice, produced a voluminous report<sup>8</sup> recommending sweeping changes in and augmentation of the federal and state systems of criminal justice administration. One striking assumption by the Commission was the existence of single nationwide crime syndicate, "a society that seeks to operate outside the control of the

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American people and their government, [which] involves thousands of criminals, working within structures as complex as those of any large corporation, subject to laws more rigidly enforced than those of legitimate governments."<sup>9</sup> On that basis, Congress considered a number of bills addressing the problem of organized crime, and finally adopted the Organized Crime Control Act of 1970,<sup>10</sup> of which the RICO statute<sup>11</sup> was a part. Since its enactment, RICO has been expanded from time to time, particularly by adding new predicate offenses to the definition of "racketeering activity."<sup>12</sup>

The Supreme Court has never directly addressed the question of the constitutionality of the statute, although a number of lower federal courts<sup>13</sup> have found an ample basis for its enactment in the interstate commerce clause of the Constitution.<sup>14</sup> However, on two occasions the Court has engaged in a quite expansive reading of the statute<sup>15</sup> as a means of implementing what the Court believed to be a legitimate congressional purpose. On that basis, it is generally accepted that the statute is constitutional.

RICO does not "occupy the field" of racketeering control, so that the states are free to enact their own RICO-type statutes if they wish.<sup>16</sup> As of 1987, more than half of them had done so.<sup>17</sup>

## B. Statutory Coverage

### 1. Definitions

The statute defines a number of terms used repeatedly in the RICO statute. Among them, however, the following are the most important:

(a) "*Enterprise*." The definition includes two subcategories: (1) any individual, partnership, corporation, association or other legal entity; and (2) any union or group of individuals associated in fact although not a legal entity.<sup>18</sup>

The United States Supreme Court gave a quite broad construction to the definition in

*United States v. Turkette*.<sup>19</sup> Turkette and others entered into a number of criminal schemes in two states to engage in arson-for-hire, insurance fraud, robberies and drug trafficking. They objected to the RICO prosecution lodged against them on the basis that the statutory language required that they be involved in a legitimate enterprise perverted for criminal purposes before they could be reached under the statute, and asserted that their organization was for purely criminal purposes. The Supreme Court reversed a court of appeals' decision in their favor. The Court construed the statute to comprise two subsidiary definitions. One covers any individual or legal entity, whether listed specifically (partnership, corporation, association) or fitting within the *ejusdem generis* clause which is part of the definition. A second embraces any sort of association in fact, the legality of which is immaterial. Because *Turkette et al.* were associated in that fashion, the Court held that RICO applied directly to them.

(b) "*Racketeering Activity*." Congress did not attempt to develop a free-standing definition of racketeering activities. Instead, it has defined it in the form of a lengthy list of crimes already defined in the federal statutes at large.<sup>20</sup> Because, by design, section 1961(4) included no *ejusdem generis* clause, as new forms of organized criminal activity have emerged, the list has been expanded through amendments to include references to new or amended criminal statutes. Such an approach creates no constitutional problems of vagueness which might otherwise be generated from a broadly-stated definition of racketeering activity.<sup>21</sup>

(c) "*Pattern of Racketeering Activity*." The statute defines the term to require at least two acts of racketeering activity, one of which occurred after the effective date of RICO<sup>22</sup> and the last of which must have occurred within ten years<sup>23</sup> after the commission of a prior act of racketeering<sup>24</sup>.

That provision, too, has been given a

rather expansive reading by the Supreme Court in the context of civil RICO proceedings. In *H.J. Incorporated v. Northwestern Bell Telephone Company*,<sup>25</sup> certain customers sued Northwestern Bell for allegedly corrupt activities concerning members of the Minnesota Public Utilities Commission MPUC, asserting the existence of a pattern of racketeering activity<sup>26</sup> as defined in the statute<sup>27</sup> to require at least two acts of racketeering activity within a ten-year period; the word "pattern" itself is not legislatively defined. The district court dismissed the action for a failure to state a claim,<sup>28</sup> because the complaint had alleged only a single scheme to influence MPUC, and thus was insufficient under circuit precedent. A panel of the Eighth Circuit affirmed on the same basis.<sup>29</sup> Because the circuits were in conflict concerning the evidence required to show a "pattern" under RICO, the Supreme Court granted certiorari.

The five-Justice majority of the Court found no support in the statute and its legislative history for either of two polar definitions of "pattern": on one hand, multiple, separate schemes are not required, but on the other hand, a showing of only two predicate acts will not necessarily suffice.<sup>30</sup> The language of section 1961(5) implies that two acts are necessary but not sufficient. Because the statute failed to identify the relationships or external ordering principles to be used in determining the existence of a pattern, the Court concluded that Congress intended a flexible definition of the term; "a plaintiff or prosecutor must show that the racketeering predicates are related *and* that they amount to or pose a threat of continued criminal activity."<sup>31</sup>

The statute also does not define "related," but the Court thought that another provision in the Organized Crime Control Act [OCCA],<sup>32</sup> of which RICO is a part, would be helpful in that respect. Section 3575(e) stated that "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, partici-

pants, victims or methods of commission, or otherwise are interrelated by distinguishing characteristics, and are not isolated events." However, it did not define continuity, and the Supreme Court thought the Eighth Circuit test of multiple schemes was unacceptably inflexible for purposes of RICO. A plaintiff's or prosecutor's proof must show a "continuity of racketeering activity or its threat, *simpliciter*."<sup>33</sup> Continuity can be both a closed-end and an open-ended concept referring respectively to a closed period of repeated conduct or to past conduct that by its nature projects into the future with a threat of repetition.<sup>34</sup>

If a party attempts to prove a RICO violation over a closed period, the series of related predicates must perdure over a substantial period of time, a requirement not satisfied by acts extending over a few weeks or months and threatening no future criminal conduct. If predicate acts over a substantial period of time cannot be proven, a plaintiff or prosecutor must show a "threat of continuity" to establish liability. The Court declined however, to fix the limits of the concepts of relatedness and continuity so as to make apparent whether a "pattern" exists in a particular case. It also rejected the suggestion that the pattern requirement be drawn narrowly to ensnare only those involved in organized crime or its functional equivalent. Based on both the statutory language and the legislative history, the Court believed it clear that Congress had not intended to limit the reach of RICO to organized crime, so that the Court would not rewrite the statute to insert that limitation.<sup>35</sup>

A similar expansive approach is likely to be taken toward RICO criminal prosecutions as well, judging from the Court's interpretation of the statute's terms which govern both criminal and civil litigation brought according to its provisions.

## 2. Prohibited Criminal Activities

There are four patterns of criminal activity prohibited and punished under RICO:

- (a) *Infiltration and Control of Legitimate Enterprises.* Congress has prohibited the legal acquisition of legitimate enterprises, using illegally-derived funds.<sup>36</sup> Specifically, the statute provides that no person<sup>37</sup> can use any income or the proceeds of any income derived directly or indirectly from a pattern of racketeering or any loan-sharking activity in which that person participated as a principal, in order to establish, operate or acquire any interest in any enterprise the affairs of which affect interstate or foreign commerce.<sup>38</sup>
- (b) *Illegal Acquisitions Through Illegal Means.* The federal law prohibits any person from using a pattern of racketeering or the collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise affecting interstate or foreign commerce.<sup>39</sup> Illegal acquisitions might be accomplished through extortion, bribery, fraud, loan-sharking or other racketeering activities.
- (c) *Use of Enterprise for Pattern of Racketeering or Loan-Sharking.* The most frequently used provision of the statute makes it a crime for one who is employed by or associated with an enterprise engaged in, or the activities of which affect interstate or foreign commerce, to conduct or participate in, of which affect interstate or foreign commerce, to conduct or participate in, directly or indirectly, the conduct of the enterprise's affairs through a pattern of racketeering activity or loan-sharking.<sup>40</sup> In effect, the operations of the enterprise itself, if otherwise fitting the statutory requirements, constitute the gravamen of the crime, so that all the crimes committed by all the members of the organization become the predicate acts on which the prosecution is based.<sup>41</sup>
- (d) *Conspiracy.* Conspiracy to violate any subdivision of section 1962 is declared independently to be a crime.<sup>42</sup> Although there is a general conspiracy section in the federal criminal code,<sup>43</sup> the inclusion

of a special conspiracy provision in RICO is important because of the greater penalties set forth in RICO for all violations of section 1962, discussed immediately below.

### 3. Punishments

The penalties currently authorized for convictions under section 1962 are quite severe: imprisonment for not more than 20 year, unless the predicate racketeering activity carries life imprisonment, in which case the same punishment applies to the RICO conviction.<sup>44</sup>

The RICO statute itself does not provide for a fine in a specified amount, but instead authorizes the imposition of a fine not to exceed twice the gross profits or other proceeds realized by a convicted defendant.<sup>45</sup> However, the principal economic sanction for RICO is forfeiture, a matter discussed below.<sup>46</sup>

### C. Application in Practice

Based on analysis of reported federal precedents, Professor Gerard E. Lynch of Columbia University School of Law has identified the following principal forms of activity as those actually prosecuted under RICO:<sup>47</sup>

- (1) *Infiltration of Legitimate Business.* Only a relatively small number of prosecutions have been brought under section 1962(a), probably because of the difficult proof problems which government prosecutors confront in establishing the elements of the offense. In the small number of cases in which the government succeeded, the defendants were not members of organized crime groups, but were corrupt political officials who used their bribery or graft proceeds to buy into local businesses. Thus, it appears that an important goal which Congress entertained has not been achieved through this particular criminal definition.
- (2) *Conduct of Criminal Enterprises.* On the

basis of the Supreme Court's *Turkette* decision,<sup>48</sup> a number of successful prosecutions have been maintained against wholly illicit enterprises engaged in racketeering activities as broadly defined in RICO, in what may be called concerted criminal activity. Professor Lynch's study ranks in descending order of frequency: activities involving narcotics; gambling and sports bribery; arson; violence and extortion; political violence; loan-sharking; prostitution; and theft and fencing.<sup>49</sup>

- (3) *Governmental Corruption*. Lynch found that 30 percent of reported RICO cases were based on government corruption, most frequently involving local law enforcement officials<sup>50</sup> or, on occasion, judges and court personnel. Very few of these cases, however, involved infiltration of police organizations by organized crime. Instead, the cases involved corrupt law enforcement officers who took bribes or graft and then invested their unlawful gains in enterprises. Even if organized criminal groups were involved, they were local rather than national or international organizations.<sup>51</sup>
- (4) *White-Collar Crime*. A number of RICO prosecutions target what otherwise would be called white-collar crimes, not truly manifesting organized criminal activity. This may reflect a decision by federal prosecutors to add RICO counts to the commonly-invoked federal mail-fraud statute<sup>52</sup> charges in order to make available the heavier RICO punishments, including forfeitures.
- (5) *Labor Corruption*. A final category of RICO prosecutions successfully maintained by the government embraces corrupt labor union officials who engage in embezzlement, extortion and receipt of illegal payoffs. In many of these cases, organized crime activity is present, simply because infiltration of labor groups has been a common objective on the part of organized crime groups in the United States. Once more, penalty enhancement

would appear to be the primary reason for including RICO counts along with other federal criminal charges.

#### D. Federal-State Jurisdictional Concerns

Under the federal system in place under the United States Constitution, the primary responsibility for creating and enforcing plenary criminal codes lies with the states, not the federal government. Nevertheless, as long as one of the delegated powers, for example, the authority to regulate interstate and foreign commerce,<sup>53</sup> is the basis for federal legislation, Congress can inject the federal government's criminal justice system into an area where the states are ineffective in achieving crime control if left to their own devices. In fact, the Supreme Court in *Turkette*<sup>54</sup> used its findings of such a congressional purpose as a basis to reject *Turkette*'s arguments that Congress inappropriately had injected itself into an area that should be left to the states.<sup>55</sup>

#### E. Civil RICO

As a means of enhancing the economic pressures assertable against organized crime groups, Congress authorized any person<sup>56</sup> injured in his, her or its business or property through a violation of section 1962 to sue those responsible for treble damages; successful plaintiffs are also entitled to recover costs including reasonable attorney's fees.<sup>57</sup> This has become increasingly popular as a way of asserting consumer fraud, manipulation of securities and allegedly unfair methods of competition.<sup>58</sup> It has also been invoked in the volatile abortion field by legal clinics to halt some of the more violent or forcible tactics on the part of adherents of the "right-to-life" movement.<sup>59</sup>

As the Supreme Court confirmed in construing the provision,<sup>60</sup> no criminal RICO conviction is required before a civil action may be instituted. However, if the civil defendant also has been convicted of a RICO crime, he or she is estopped from denying the essential allegations of the criminal



charge in later civil litigation.<sup>61</sup> No distinct "racketeering injury" need be established; in dictum, the Court indicated that because the action is civil, the burden of persuasion is at the level of a preponderance (greater weight) of the evidence.<sup>62</sup>

Thus, the civil damages remedy is a very powerful auxiliary to the criminal prosecution alternative—strong enough that there have been significant efforts to persuade Congress to modify civil RICO or eliminate it entirely.<sup>63</sup> At the present writing, it appears that a likely congressional response will be to reduce the authorized damages level either to double damages or actual damages.<sup>64</sup> The latter, if adopted, will cut the frequency of civil litigation very substantially, although probably not eliminate such cases as long as attorney's fees can be recovered by successful plaintiffs.

#### F. Other Sanctions

The United States Attorney General is empowered to initiate proceedings<sup>65</sup> in an appropriate United States district court seeking suitable orders to prevent or restrain violations of section 1962.<sup>66</sup> Authorized judicial measures include:

- (1) Orders that persons divest themselves of any interest, direct or indirect, in any enterprise.<sup>67</sup>
- (2) Orders imposing reasonable restrictions on the future activities or investments of any person, including but not limited to prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce.<sup>68</sup>
- (3) Orders that an enterprise be dissolved or reorganized, provided the court makes due provision to protect the rights of innocent persons.<sup>69</sup>
- (4) Temporary restraining orders, prohibitions or actions pending completion of the litigation, including performance bonds, as determined in the court's discretion.<sup>70</sup>

#### G. Forfeitures

##### 1. Introduction

Because organized crime activities are motivated chiefly by a desire for profit, and are sustained and grow through the economic power generated by criminal activities, Congress included a criminal forfeiture provision in the original RICO statute. That provision was very significantly expanded in the Comprehensive Crime Control Act of 1984,<sup>71</sup> and has proven a major weapon against persons and entities who are convicted of RICO violative activities.

##### 2. Requirement of Forfeiture

Since 1984, forfeiture has not been discretionary, but instead must be imposed as part of a criminal sentence without regard to any apparently conflicting provisions of state law.<sup>72</sup>

##### 3. Matter Subject to Forfeiture

The following categories of property interests are subject to RICO forfeiture:

- (a) An interest a defendant has acquired or maintained through activities prohibited under the RICO statute.<sup>73</sup> This codifies the interpretation placed on the predecessor language by the Supreme Court<sup>74</sup> and is broad enough to cover employment salary, bonuses and corporate contributions to profit-sharing and pension plans, provided they were acquired or maintained in violation of section 1962.<sup>75</sup>
- (b) An interest in, security of, claim against or property<sup>76</sup> or contractual right of any kind affording a source of influence over any enterprise a defendant has established, operated, controlled, conducted or participated in the conduct of, in violation of section 1962.<sup>77</sup>
- (c) Property constituting or derived from any proceeds obtained by a defendant, directly or indirectly, from racketeering activity or unlawful debt collection<sup>78</sup> in violation of section 1962.<sup>79</sup> if proceeds came

partly from RICO-violative and partly from legal activities, Congress intended that only the percentage of property reflecting the former would constitute forfeitable matter.<sup>80</sup>

#### 4. Time of Vesting

The amended forfeiture statute provides that all right, title and interest in property forfeitable to the United States under section 1963(a) vests in the federal government immediately at the time of the commission of the criminal act under RICO.<sup>81</sup> That means that an order of forfeiture based on a special jury verdict (as provided for by law) stands unless a subsequent transferee of the property succeeds in establishing the status of a bona fide purchaser for value, without reasonable cause to believe the property was subject to forfeiture under the statute.<sup>82</sup>

#### 5. Substitute Property

A federal district court that has entered an ancillary forfeiture order can decree the forfeiture of different property of a defendant, if the property is otherwise forfeitable to the federal government (a) cannot be located; (b) has been transferred to, sold to or deposited with a third party; (c) has been placed beyond the jurisdiction of the court; (d) has been substantially diminished in value by an act or omission of the defendant; or (e) has been commingled with other property that cannot be divided without difficulty.<sup>83</sup>

#### 6. Temporary Restraining Orders

To control any possible dissipation of asset pending the completion of RICO prosecutions, the statute authorizes federal prosecutors to a federal district court in the district in which prosecution is or will be pending for (a) a restraining order, (b) an injunction, (c) an order for the execution of a satisfactory performance bond, or (d) judicial action of any other kind to preserve the availability of forfeitable property.<sup>84</sup> This requires notice to persons who have an interest in the property unless the government es-

tablishes probable cause to believe there is danger that the property to be affected by an order of forfeiture will not be available if notice is given.<sup>85</sup> A hearing must then be held after notice has been accomplished, unless that is shown to create danger that the property will be dissipated.<sup>86</sup> Such an order may be entered for ninety days,<sup>87</sup> but may be extended for good cause shown;<sup>88</sup> the return of an indictment or the filing of an information also serves to extend the effectiveness of an order until completion of criminal proceedings.<sup>89</sup>

After formal charges have been filed, a restraining order may be sought without the need to show anything beyond the fact of indictment, coupled with an allegation that property is subject to forfeiture under section 1963 in the event of conviction.<sup>90</sup> Such an order is valid until completion of trial and sentencing proceedings and need not be renewed.<sup>91</sup>

#### 7. Order of Forfeiture

An indictment or information must allege the extent of the interest or property subject to forfeiture before a forfeiture order may be issued.<sup>92</sup> The criminal trial jury must return a special verdict covering the extent of the interest or property, if any, subject to forfeiture.<sup>93</sup> On that basis, the district court must enter a judgment of criminal forfeiture<sup>94</sup> supplemented by an order that the defendant will forfeit the described property to the United States.<sup>95</sup> Both the judgment and order authorize the Attorney General to seize the specified property, subject to whatever terms and conditions the court includes in its judgment and order.<sup>96</sup> The government then may apply for any orders that are necessary to seize or protect the property.<sup>97</sup> It may also seek depositions to facilitate the identification or location of forfeited property.<sup>98</sup>

#### 8. Remissions of Forfeiture

Under the immediate vesting theory described earlier,<sup>99</sup> title to the forfeited property is in the federal government from the

time of the commission of the RICO crime. Persons who claim a prior or a bona fide subsequent interest in that property are required to make use of a special proceeding to establish their priority supporting a return of the property.<sup>100</sup> The Attorney General also is authorized in the unreviewable exercise of discretion to grant mitigation or remission of forfeitures, compromise claims arising under the section, or otherwise order disposition of forfeited property.<sup>101</sup>

#### 9. Forfeiture of Funds for Attorney's Fees

Because of the impact of the immediate vesting theory, funds that might otherwise have been used to pay trial counsel fees become in legal theory government funds if they are derived from RICO contraventions. Defense counsel immediately asserted that the forfeiture of such funds was unconstitutional as an interference with a sixth amendment-based right to retain counsel of choice. The Supreme Court, however, rejected that premise in *Caplin & Drysdale, Chartered v. United States*.<sup>102</sup> Because criminal defendants may not rely on the sixth amendment to insist that they be represented by designated counsel whom they cannot afford to retain, the Court found no interference through a RICO forfeiture with a defendant's right to representation. The sixth amendment requires only that a defendant be represented by competent counsel, provided at government expense if a defendant is financially-unable.<sup>103</sup> If forfeiture renders a defendant without funds to retain counsel, then the trial court must provide one. The Supreme Court was unsympathetic with any contention that defendants could garner a benefit from their criminal activities in the form of funds reserved from forfeiture; it noted that a major objective of RICO is to reduce the economic power of organized crime and narcotics enterprises, an objective furthered by denying to organized crime figures the economic power to hire counsel of choice and to finance an expensive defense.

In a companion decision,<sup>104</sup> the Court re-

fused to read into a similar forfeiture provision in the context of federal controlled substances legislation<sup>105</sup> a statutory exemption from forfeiture of funds used to retain counsel.<sup>106</sup>

### III. Racketeering-Related Criminal Offenses

#### A. Violent Crimes in Aid of Racketeering

Section 1959<sup>107</sup> of the Federal Criminal Code makes it a federal felony to (1) commit the crime of murder<sup>108</sup> kidnaping,<sup>109</sup> maiming,<sup>110</sup> assault with a dangerous weapon<sup>111</sup> or assault resulting in serious bodily injury,<sup>112</sup> or (2) threaten to commit a crime of violence,<sup>113</sup> when the crime serves as a consideration for the receipt of anything of pecuniary value or a promise or agreement to pay anything of pecuniary value, and is committed for the purpose of gaining entrance to an enterprise<sup>114</sup> engaged in racketeering activity,<sup>115</sup> or maintaining a position within such an enterprise.<sup>116</sup> Through this legislation, Congress intended to reach illegal organizations like organized crime "families" as well as legitimate but corrupted business organizations.<sup>117</sup>

Penalties include imprisonment ranging up to life and fines ranging up to \$50,000, depending on the predicate crime on which a particular conviction is based.<sup>118</sup> Fines, however, may be increased to as high as \$250,000 under 1987 legislation.<sup>119</sup> Alternatively, a fine may be set at an amount up to twice the gross gain realized or the loss experienced by anyone other than the defendant from the commission of an offense.<sup>120</sup> Thus, there is a substantial economic penalty awaiting those who are convicted under the provision.

#### B. Labor Racketeering

In 1984, Congress substantially increased the punishments for any act of labor bribery or payoff involving more than \$1,000.<sup>121</sup> The government must establish beyond a reasonable doubt that defendants acted willfully

and had an intent to benefit themselves or other persons they know are not permitted to receive a payment, etc., under the statute.<sup>122</sup>

In addition, persons convicted of felonies involving the abuse or misuse of a position or employment in a labor organization or employee benefit plan, or conspiracy to commit such crimes or other crimes of which the designated offense is an element, are disabled from holding that office or entering into transactions with the employee benefit plan affected by the criminal acts.<sup>123</sup> A similar disability relates to labor organizations when there are violations of the Landrum-Griffin Act affecting pension plans.<sup>124</sup> The period of imprisonment, whichever comes later. Under certain circumstances, however, the period can be reduced by the sentencing court.<sup>125</sup>

Although these provisions are not directly aimed at organized crime activities, the fact that organized crime groups have infiltrated labor unions and depleted their funds, including pension funds, means that the amended disability statutes in fact constitute significant sanctions against organized crime figures within the union movement.

#### IV. Money Laundering Control

##### A. Currency Reporting

Money laundering has become a major concern in the context of organized crime, particularly when controlled substances trafficking is the source of the funds. One enforcement device is the creation of a requirement, imposed on persons traveling in foreign commerce, to report the transportation and possession of currency or monetary instruments amounting to more than \$10,000.<sup>126</sup> A failure to comply carries civil penalties of up to \$10,000<sup>127</sup> and constitutes a felony.<sup>128</sup> Customs authorities are given broad warrantless search powers in connection with possible violative transactions if there is probable cause to believe a mone-

tary instrument is being transported in violation of the statute.<sup>129</sup> Rewards are payable to informants who facilitate arrests and either civil penalty recoveries or criminal convictions.<sup>130</sup> To indicate the organized crime relevance, these provisions are made predicate offenses for RICO purposes.<sup>131</sup>

##### B. Domestic Financial Transactions

The target of the 1986 Money Laundering Control Act is the movement of funds into legitimate banks, followed by the transfer of those funds to other banks from which apparently legitimate withdrawals can be made.<sup>132</sup> The statute penalizes those who engage in domestic financial transactions<sup>133</sup> if the transaction represents the proceeds of some form of unlawful activity.<sup>134</sup> The *scienter* is, first, knowledge that the property represents the proceeds of some form of specified unlawful activity,<sup>135</sup> coupled with either an intent to promote the carrying on of specified unlawful activity,<sup>136</sup> or knowledge that the transaction is designed wholly or in part (a) to conceal or disguise the nature, location, source, ownership or control of the proceeds of specified unlawful activity, or (b) to avoid a transaction-reporting requirement under state or federal law.<sup>137</sup>

The penalties are a fine of not more than \$500,000 or twice the value of the property involved in the transaction, whichever is greater, imprisonment for not more than 20 years, or both.<sup>138</sup>

##### C. International Financial Transactions

It is likewise a felony to transport monetary instruments across United States borders if they involve the proceeds of specified unlawful activities, which in essence relate to organized crime activities.<sup>139</sup> The *scienter* alternatives under the provision are (a) an intent to promote the carrying on of specified unlawful activity;<sup>140</sup> or (b) knowledge that the monetary instruments or funds involved in the transportation represent the proceeds of some form of unlawful activity, and that the transportation is designed wholly or in

part either (i) to conceal or disguise the nature, location, source, ownership or control of the proceeds of specified unlawful activity, or (ii) to avoid a transaction-reporting requirement under state or federal law.<sup>141</sup> The penalties are identical to those for domestic violations.<sup>142</sup>

#### *D. Sting Operations*

In 1988, Congress added a third pattern of criminal activity involving undercover "sting" operations in the money-laundering context. If one has (1) the intent (a) to promote the carrying on of specified unlawful activity, (b) to conceal or disguise the nature, location, source, ownership or control of property believed to be the proceeds of specified unlawful activity, or (c) to avoid a transaction-reporting requirement under state or federal law, and (2) conducts or attempts to conduct (3) a financial transaction involving (4) property (5) represented<sup>143</sup> by a law enforcement officer (6) to be the proceeds of specified unlawful activity or property used to conduct or facilitate specified unlawful activity, one commits the felony of laundering monetary instruments.<sup>144</sup> The penalties are the same as for the other crimes under the section.<sup>145</sup>

The statute cured a perceived deficiency in the 1986 legislation, based on the premise that money purported to be laundered was not "proceeds of unlawful activity" under section 1956(a)(1).<sup>146</sup> There might have been no difficulty if sting operations underlay directly the international-transactions alternative under the statute, because under that provision the funds need not in fact be the product of specified unlawful activity, provided they were transported for the purpose of promoting the conduct of specified unlawful activity. To illustrate, if a person or organization within the United States were willing to launder money through outbound currency transportation, it would not matter that the funds in question were government monies offered in the course of a sting operation, provided it were proven be-

yond a reasonable doubt that the transportation was intended to promote the conduct of specified unlawful activity.<sup>147</sup> The 1988 legislation resolves the matter for both internal and international transactions through its specific language.

The entire statute is given extraterritorial effect if the conduct is by a United States citizen anywhere or the conduct by a non-United States citizen occurs in part in the United States, and the transaction or related series of transactions involves funds or monetary instruments of a value exceeding \$10,000.<sup>148</sup>

#### *E. Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity*

It is a felony<sup>149</sup> to knowingly engage in or to attempt to engage in a monetary transaction<sup>105</sup> in criminally-derived property<sup>151</sup> of a value greater than \$10,000 that has been derived from specified unlawful activity.<sup>152</sup> However, one of three additional circumstances also must be present: (1) The offense must have taken place in the United States.<sup>153</sup> (2) The offense must have taken place in the special maritime and territorial jurisdiction of the United States.<sup>154</sup> (3) If the offense took place outside the United States person.<sup>155</sup> The *scienter* requirement of knowledge extends only to an awareness on the part of individuals that they are engaged in transactions with funds derived from some kind of criminal activity; it is not necessary for the government to prove knowledge that the offense constituted specified unlawful activity as defined in the statute.<sup>156</sup>

#### *F. Sale by Financial Institutions of Bank Checks, etc.*

In 1988, Congress enacted a new provision<sup>157</sup> prohibiting financial institutions from issuing or selling bank checks, cashier's checks, traveler's checks or money orders to individuals in connection with a transaction or group of such contemporaneous transactions involving United States curren-

cy or other monetary instruments<sup>158</sup> in amounts or denominations of \$3,000 or more. The prohibition does not govern if: (1) an individual has a transaction account<sup>159</sup> with the financial institution, and the latter verifies that fact and records the method of verification in accordance with Treasury Department regulations; or (2) the individual furnishes the financial institution with whatever forms of identification the Secretary of the Treasury requires through promulgated regulations, and the financial institution verifies and records that information according to Treasury regulations.

## V. Controlled Substances Dimensions

### A. Introductory

The largely futile efforts to control the torrent of drugs imported into the United States to meet a burgeoning user demand are reflected in a succession of ever-broader statutes. A detailed coverage of that legislation is beyond the reasonable limits for this paper. However, there are two provisions beyond those already discussed that merit brief attention.

### B. Investment of Illicit Drug Profits

In the Comprehensive Crime Control Act of 1984, Congress created a new crime of investment of illicit drug profits.<sup>160</sup> It is a federal felony for any person (1) who has received any income derived indirectly from a felony-level contravention of federal anti-drug legislation; and (2) who is a principal<sup>161</sup> in such felony transactions, (3) to use or invest, directly or indirectly, any part of that income or its proceeds (4) for the acquisition of any interest<sup>162</sup> in or the establishment or operation of (5) any enterprise<sup>163</sup> which is engaged in or the activities of which affect interstate or foreign commerce.

Violators are punishable by a fine of not more than \$50,000,<sup>164</sup> imprisonment for not more than 10 years, or both.<sup>165</sup>

### C. Continuing Drug Enterprise Act

Continuing criminal drug enterprises have been defined for some times as a sequence of controlled substances act felony offenses undertaken by a person in concert with five or more other persons, with respect to whom that person occupies a position of organizer, a supervisory position or any other management position, from which the person in question obtains substantial income or resources.<sup>166</sup> First offenders are subject to maximum fines computed by the greater of the formulations allowable under title 18 or \$2 million if a convicted defendant is an individual and \$5 million if it is other than an individual. Recidivists can receive double that amount of fines.<sup>167</sup> All offenders are subject to substantial terms of imprisonment.<sup>168</sup>

Persons who qualify as a "principal administrator, organizer, or leader" of a continuing criminal enterprise may be subjected to special penalties if they meet two prerequisites: (1) The amount of controlled substances involved in the offense was at least 300 times the minimum amount significant under section 841(b)(2)(A) of title 21.<sup>169</sup> (2) The enterprises involved in the prosecution, or any other enterprise of which the defendant was the principal or one of several principal administrators, organizers or leader, received \$10 million in gross receipts during any 12-month period of its existence for the manufacture, importation or distribution of a substance specified in section 841(b)(1)(B) of title 21.<sup>170</sup> Persons who meet those two criteria must be imprisoned for life, as well as fined according to the provisions of section 848(a) of title 21.<sup>171</sup>

## VI. Conclusion

It is evident from the above that the United States has an abundance of statutes directed at the problem of organized crime, whatever the nature of the illicit enterprise in question. Whether that legislation has achieved success in administration is another

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er have produced some results as far as other types of organized crime are concerned. Proof of suspected organized criminal activities can be difficult, as the 1990 acquittal of John Gotti, alleged to have been a major Mafia crime figure, attests.<sup>172</sup> Whether organized crime control will be helped or hindered by the recent Department of Justice administrative decision to eliminate special organized crime task forces and place enforcement responsibility in each United States Attorney's office also remains to be seen.<sup>173</sup> But a generally unarticulated lesson seems to be that, however plenary and indeed draconian the federal legislation, to be truly effective it requires very efficient law enforcement efforts which a government and society may not be able or willing to underwrite.

### Notes

1. U.S. Const. amend. XXI, § 1.
2. This consists of a series of deposits, transfers and withdrawals designed to place illicitly-obtained funds in bank accounts from which they may be drawn without an obvious indication of their criminal source.
3. Otherwise designated as "La Cosa Nostra" or "LCN." See U.S. President's Comm'n on Organized Crime, *America's Habit: Drug Abuse, Drug Trafficking, and Organized Crime 71-72* (1986).
4. *Id.* at 73-83, 100-03, 109-11, 120-23, 141, 146-47, 151-53, 171-77.
5. See *Lanzetta v. New Jersey*, 306 U.S. 451 (1939). On the general vagueness and indefiniteness doctrine, see *Boos v. Berry*, 485 U.S. 312, 329-32 (1988); *Kolender v. Lawson*, 461 U.S. 352 (1983); *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982).
6. See *Robinson v. California*, 370 U.S. 660 (1962) (crime of being an addict), but see *Powell v. Texas*, 392 U.S. 514 (1968) (majority of Court upheld law penalizing being intoxicated in a public place; no majority opinion). See generally G. Fletcher, *Rethinking Criminal Law 426-33* (1978).
7. 18 U.S.C. §§ 1961-1985 (1988).
8. U.S. President's Comm'n on Law Enforcement and Administration of Justice: *The Challenge of Crime in a Free Society* (1967).
9. *Id.* at 187.
10. Pub. L. 91-452, 84 Stat. 922 (1970).
11. On the legislative history of RICO, see generally Blakey & Perry, *An Analysis of Myths That Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: "Mother of God—Is This the End of RICO?"*, 43 Vand. L. Rev. 851, 853-55 (1990) [hereinafter cited as Blakey & Perry] (and see *id.* at 853 n.1 for a comprehensive bibliography on RICO); Hughes, *RICO Reform: How Much Is Needed?*, 43 Vand. L. Rev. 639, 640-41 (1990) [hereinafter cited as Hughes]; Lynch, *RICO: The Crime of Being a Criminal*, 87 Colum. L. Rev. 661, 673-80 (1987) [hereinafter cited as Lynch]; Comment, *Of Racketeers, RICO, the Enterprise-Pattern Separateness Issue and Chicken Little: What's Really Falling?*, 17 Sw. U.L. Rev. 565, 570-74 (1988).
12. 18 U.S.C.A. § 1961(1) (West Supp. 1990).
13. See, e.g., *United States v. Vignola*, 464 F. Supp. 1091 (E.D. Pa. 1979), *aff'd*, 605 F.2d 1199 (3d Cir. 1979), *cert. denied*, 444 U.S. 1072 (1979). Not is the statute vague and indefinite. See, e.g., *United States v. Tripp*, 782 F.2d 38 (6th Cir.), *cert. denied*, 475 U.S. 1128 (1986); *United States v. Campanale*, 518 F.2d 352 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976). For a persisting view that RICO is unconstitutionally vague and indefinite, see Reed, *The Defense Case for RICO Reform*, 43 Vand. L. Rev. 691, 721-32 (1990) [hereinafter cited as Reed].
14. U.S. Const. art. I, § 8, cl. 3.
15. *Russello v. United States*, 464 U.S. 16 (1983); *United States v. Turkette*, 452 U.S. 576 (1981).
16. The Supreme Court so held with reference to civil RICO statutes in *Tafflin v. Levitt*, 110 S. Ct. 792 (1990). One may assume that the same will hold true of state criminal RICO legislation.
17. See Blakey & Perry, *supra* note 11, at 988-1011, for a comparative chart of federal and state provisions with comprehensive citations; Lynch, *supra* note 11, at 715 & n.236, for state statutory citations.
18. 18 U.S.C. § 1961(4) (1988).
19. 452 U.S. 576 (1981).
20. 18 U.S.C.A. § 1961 (West Supp. 1990).

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21. See text accompanying note 5 *supra*.
22. This was to avoid any problems of *ex post facto* that otherwise might have arisen under U.S. Const. art. I, § 9, cl. 3; § 10, cl. 1. See *Collins v. Youngblood*, 110 S. Ct. 2715 (1990); *Miller v. Florida*, 482 U.S. 423 (1987); *Weaver v. Graham*, 450 U.S. 24 (1981). Twenty and more years after the effective date of the statute, the problem no longer (or rarely) survives, because of the second requirement next discussed in the main text.
23. Excluding any period of imprisonment. 18 U.S.C. § 1961(4) (1988).
24. *Id.*
25. 109 S. Ct. 2893 (1989). See generally *Dennis, Current RICO Policies of the Department of Justice*, 43 Vand. L. Rev. 651, 655-68 (1990) [hereinafter cited as *Dennis*]. On later Department of Justice policies concerning "pattern" activities, see *id.* at 668-69.
26. 18 U.S.C. § 1962(a)-(c) (1988).
27. *Id.* § 1961(5).
28. Fed. R. Civ. P. 12(b)(6).
29. 829 F.2d 648 (8th Cir. 1987), *rev'd*, 109 S. Ct. 2893 (1989).
30. 109 S. Ct. at 2898-99.
31. *Id.* (emphasis in original).
32. 18 U.S.C. § 3575 (1982) (repealed 1984).
33. 109 S. Ct. at 2901.
34. *Id.* at 2902.
35. *Id.* at 2902-05. Because the district court had dismissed the complaint, the Supreme Court had to examine the facts alleged by the plaintiffs in the light most favorable to them, because it could affirm only if it was clear that no relief could be granted under any set of facts that could be proved consistently with the plaintiff's allegations. It thought that the complaint had alleged acts of bribery, which is a predicate offense for racketeering activity, 18 U.S.C. § 1961(1) (1988), extending over a six-year period with some frequency. That, if proved, would meet the requirement of a pattern of racketeering activity, as would proof that the alleged bribes were either a regular part of conducting Northwestern Bell's business or of the ongoing RICO enterprise [MUPC]. Accordingly, the Supreme Court reversed and remanded.  
On the double jeopardy implications of using a continuing enterprise to support a RICO prosecution and a later conspiracy charge relating to the RICO-violative activities, see *United States v. Ciancaglini*, 858 F.2d 923 (3d Cir. 1988) (not double jeopardy under the circumstances of the prosecutions). An acquittal on RICO prosecution rested. *United States v. Esposito*,—F.2d—, 47 Crim. L. Rptr. 1374 (3d Cir. No. 89-5971, July 31, 1990).
36. U.S.C. § 1962(a) (1988).
37. Defined in the statute to include "any individual or entity capable of holding a legal or beneficial interest in property." *Id.* & 1961(3).
38. *Id.* & 1961(a). A broad interpretation of "affecting commerce" was accorded the statute in *Russello v. United States*, 464 U.S. 16 (1983) (arson for profit involving a two-unit apartment house).
39. 18 U.S.C. § 1962(b) (1988).
40. *Id.* § 1962(c).
41. See *Lynch, supra* note 11, at 703.
42. *Id.* § 1963. For a typical RICO conspiracy case, see *United States v. Boylan*, 898 F.2d 230, 241-43 (1st Cir. 1990).
43. 18 U.S.C. § 371 (1988).
44. *Id.* § 1963. Under the federal sentencing guidelines, a court at sentencing may consider all underlying predicate acts, even though only some of them were necessary for conviction. See *United States v. Sacco*, 899 F.2d 142 (2d Cir. 1990).
45. *Id.* § 1963(A)(3). However, under the general fine provision, *id.* § 3571(b)(1)(A), any person convicted of a felony may be fined not more than \$250,000, which provides a basis for imposing fines on RICO convicts who cannot be shown to have derived profits or other proceeds from the RICO violation.
46. See text accompanying notes 70-100, *infra*.
47. *Lynch, supra* note 11, at 726-63; *Lynch, A Conceptual, Practical, and Political Guide to RICO Reform*, 43 Vand. L. Rev. 796, 777-92 (1990). For a criticism of Professor Lynch's methodology, see Goldsmith, *RICO and Enterprise Criminality: A Response to Gerard E. Lynch*, 88 Colum. L. Rev. 774 (1988). For Professor Lynch's rebuttal, see *Lynch, A Reply to Michael Goldsmith*, 88 Colum. L. Rev. 802 (1988). For a summary from the Department of Justice's viewpoint of the



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- targets of RICO prosecutions, see Dennis, *supra* note 25, at 652-55.
48. U.S. 576 (1981). See text accompanying note 19 *supra*.
  49. See Lynch, *supra* note 11, at 735. He also noted 14 out of 94 cases as involving diversified syndicate activities. *Id.*
  50. An example is United States v. Boylan, 898 F.2d 230 (1st Cir. 1990) (police officers accepting cash payments from liquor licensees over whom the officers had statutory powers of inspection, in return for various forms assistance and protection).
  51. In the past three or four years, however, the author's qualitative impression, gained from newspaper accounts, is that the frequency of corruption of police by interstate or international drug-trafficking groups has increased greatly, simply because of the oceans of narcotics-generated cash that are available. Such cases, though, do not appear to have been prosecuted thus far under RICO.
  52. 18 U.S.C. § 1341 (1988), which is a listed predicate offense in RICO's definition of racketeering activity, *id.* § 1961(1). Wire fraud, *id.* § 1343, is also a frequently used predicate and concurrently-charged offense. See generally Hughes, *supra* note 11, at 642.
  53. U.S. Const. art. I, § 2, cl.3.
  54. 452 U.S. 576 (1981). See text accompanying note 19 *supra*.
  55. *Turkette*, 452 U.S. at 586-87.
  56. The term "person" wherever it appears in RICO includes any individual or entity capable of holding a legal or beneficial interest in property. 18 U.S.C. § 1961(3) (1988).
  57. *Id.* § 1964(c). Venue is in the district in which the defendant resides, is found, has an agent, or transacts his, her or its affairs. *Id.* § 1965(a). In *Tafflin v. Levitt*, 110 S. Ct. 792, 799 (1990), the Supreme Court noted that concurrent federal-state jurisdiction is constitutionally possible even when federal law includes extended venue and service-of-process provisions emulated by state procedural mechanisms.  
Service of Process is covered in 18 U.S.C. § 1965(c)-(d) (1988).  
The Supreme Court applied the four-year statute of limitations of the Clayton Act to RICO suits. *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143 (1987). On the matter of determining "accrual" for purposes of computing the period of limitations, see Note, *RICO and a Uniform Rule of Accrual*, 99 Yale L.J. 1399 (1990).
  58. See Getzendanner, *Judicial "Pruning" of "Garden Variety Fraud" Civil RICO Cases Does Not Work: It's Time for Congress to Act*, 43 Vand. L. Rev. 673, 678-685 (1990) [hereinafter cited as Getzendanner]; Hughes, *supra* note 11, at 644.
  59. This category of litigation is summarized and described in Califa, *RICO Threatens Civil Liberties*, 43 Vand. L. Rev. 805, 824-31 (1990) [hereinafter cited as Clifa].
  60. *Sedima*, S.P.R.L. Imrex Co., 473 U.S. 479 (1985).
  61. 18 U.S.C. § 1964(d) (1988).
  62. *Sedima*, 473 U.S. at 491.
  63. See generally Blakey & Perry, *supra* note 11, at 924-79 (1990); Califa, *supra* note 59, at 846-49; Getzendanner, *supra* note 58, at 678-89. Hughes, *supra* note 11, at 655-60; Rasmussen, *Introductory Remarks and a Comment on Civil RICO's Remedial Provisions*, 43 Vand. L. Rev. 623, 629-37 (1990). Blakey & Perry, *supra* note 11, at 979-85, although supportive of certain technical amendments, generally oppose substantial revisions.
  64. Goldsmith & Linderman, *Civil RICO Reform: The Gatekeeper Concept*, 43 Vand. L. Rev. 735 (1990), recommend a form of "gatekeeping" by a recipient federal court, although one differing significantly from that proposed in pending federal legislation, *id.* at 763-67.
  65. 18 U.S.C.A. § 1964(d) (West Supp. 1990).
  66. 18 U.S.C. § 1864(a) (1988).
  67. *Id.*
  68. *Id.*
  69. *Id.*
  70. *Id.*
  71. See generally 2 B. George, *Contemporary Federal Criminal Practice: The Comprehensive Crime Control Act of 1984*, § 12.01 (1986 & Supp. 1990).
  72. 18 U.S.C. § 1963(a) (1988).
  73. *Id.* § 1963(a)(1).
  74. *Russello v. United States*, 464 U.S. 16 (1983)
  75. *United States v. Horack*, 833 F.2d 1235, 1241-43 (7th Cir. 1987).
  76. The term property includes: (a) real proper-

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- ty, including things growing on, affixed to, and found in land; and (b) tangible and intangible personal property, including rights, privileges, interests, claims and securities. 18 U.S.C.A. § 1963(b) (West Supp. 1990).
77. *Id.* § 1963(a)(2).
78. The term "unlawful debt" is defined in 18 U.S.C. § 1961(6) (1988) to include (a) a gambling debt (i) incurred or contracted in gambling activity unlawful under federal, state or local law, or which is unenforceable under such law in whole or in part as to principal or interest because of laws relating to usury and (ii) which was incurred in connection with illegal gambling; or (b) was in violation of federal, state or local usury laws when the usurious rate is at least twice the legally-enforceable interest rate.
79. 18 U.S.C. § 1963(a)(3) (West Supp. 1990).
80. See S. Rep. No. 255, 98th Cong., 1st Sess. 199 (1984) [hereinafter, Report No. 98-225], reprinted 1984 U.S. Code Cong. & Ad. News 3182.
81. U.S.C. § 1963(c) (1998).
82. *Id.*
83. *Id.* § 1963(d).
84. *Id.* § 1963(d)(1).
85. *Id.* § 1963(e)(2).
86. *Id.*
87. Ten days only if no hearing has been held. *Id.*
88. *Id.*, proviso.
89. *Id.* § 1963(e)(2). See generally Dennis, *supra* note 25, at 657-60; Reed, *supra* note 11, at 715-17.
90. 18 U.S.C. § 1963(e)(1)(A) (1988).
91. *Id.*
92. Feb. R. Cr. P. 7(d)(2).
93. *Id.* R. 31(e).
94. 18 U.S.C. § 1963(f) (1988).
95. *Id.* § 1963(a), final sentence. The government must have proven relevant facts beyond a reasonable doubt, including a causal relationship between the proven activity in violation of RICO and the asset in question. United States v. Horak, 833 F.2d 1235, 1243-44 (7th Cir. 1987) (citing authorities).
96. 18 U.S.C. § 1963(f) (1988).
97. *Id.*
98. *Id.*
99. See text accompanying notes 80-81 *supra*.
100. 18 U.S.C. § 1963(l)(2)-(6) (1988).
101. *Id.* § 1963(g), (h).
102. 109 S. Ct. 2646 (1989).
103. Strickland v. Washington, 466 U.S. 668 (1984).
104. United States v. Monsanto, 109 S. Ct. 2657 (1989).
105. 21 U.S.C.A. § 853 (West Supp. 1990).
106. For a criticism of the impact of fee forfeiture decision, see Ree, *supra* note 25, at 703-04.
107. 18 U.S.C.A. § 1959 (West Supp. 1990).
108. 18 U.S.C. § 1111(a) (1988).
109. *Id.* §1201.
110. *Id.* § 114.
111. *Id.* § 113(c)
112. *Id.* § 113(f).
113. Defined in *id.* § 16 to include an offense that has as an element the use, attempted use or threatened use of physical force against the person or property of another; or felony that by its nature involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.
114. Defined to include any partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity, which is engaged in or the activities of which affect interstate or foreign commerce. *Id.* § 1959(b)(2).
115. Defined with reference to *id.* § 1961(1).
116. *Id.* § 1959(a), main clause.
117. See Report No. 98-225, *supra* note 79, at 306.
118. 18 U.S.C. § 1959(a)(1)-(6) (1988).
119. *Id.* § 3571(b)(1)(A). Entities may be fined up to \$500,000 *Id.* § 3571(b)(2)(A).
120. *Id.* § 3571(d).
121. 29 U.S.C. § 1861(d)(2) (1988) (punishable by a fine of not more than \$15,000 (increasable under the Criminal Fine Improvement Act of 1987; see *supra*, notes 118-22 and accompanying text), imprisonment for not more than five years, or both. Penalties for payoffs or payments of \$1,000 or less remain at a misdemeanor level.
122. 29 U.S.C. § 1861(d)(1) (1988). A case involving both RICO conspiracy and Hobbs Act counts arising from the activities of corrupt local police officers is United States v. Boylan, 898 F.2d 230, 251-54 (1st Cir. 1990).
123. 29 U.S.C. § 1111(a) (1988).
124. *Id.* § 504(a).

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125. *Id.* §§ 504(a), 1111(a).
126. 31 U.S.C. § 5321(a)(1) (1988).
127. *Id.*
128. *Id.* § 5322(a).
129. *Id.* § 5317(a).
130. *Id.* § 5323(a).
131. 18 U.S.C.A. § 1961(1) (West Supp. 1990).
132. *See generally* Burnett, *Money Laundering—Recent Judicial Decisions and Legislative Developments*, 33 Fed. B. News & J. 372 (1986).
133. Defined in 18 U.S.C.A. § 1956(c)(4) (West Supp. 1990) as any of several designated forms of transaction involving (1) the movement of funds by wire or other means or (2) one or more monetary instruments, or (3) the use of a financial institution engaged in or the activities of which affect interstate or foreign commerce, if the transaction in any way or degree affects interstate or foreign commerce. The term "monetary instrument" is defined in *id.* § 1956(c)(5), and "financial institution" in *id.* § 1956(c)(6).
134. *Id.* § 1956(a)(1).
135. *Id.* The term "specified unlawful activity" is defined in *id.* § 1956(c)(7), which incorporates a lengthy list of specified federal criminal statutes.
136. *Id.* § 1956(a)(1)(A).
137. *Id.* § 1956(a)(1)(B).
138. *Id.* § 1956(a)(1), final clause.
139. *Id.* § 1956(a)(2).
140. *Id.* § 1956(a)(2)(A).
141. *Id.* § 1956(a)(2)(B).
142. *Id.* § 1956(a)(2), final clause. *See supra*, text accompanying note 136.
143. The term means a representation made by a law enforcement officer or by another person at the direction of or with the approval of a federal official authorized to investigate or prosecute violations of section. 18 U.S.C.A. § 1956(a)(3) (West Supp. 1990), last sentence.
144. *Id.* § 1956(a)(3).
145. *Id.* *See supra*, text accompanying note 136.
146. *See* S. Rep. 433, 99th Cong., 2d Ses. 10-11 (1986).
147. *See* U.S. Dept. of Justice, *Handbook on the Anti-Drug Abuse Act of 1986*, 74 (1987).
148. 18 U.S.C.A. § 1956(f) (West Supp. 1990).
149. *Id.* § 1957(a).
150. Defined in *id.* § 1957(f)(1).
151. Defined in *id.* § 1957(f)(2).
152. Defined in *id.* § 1957(f)(3) by reference to *id.* § 1956(c)(7).
153. *Id.* § 1957(d)(1).
154. *Id.* § 1957(d)(2). The latter term is defined in *id.* § 7.
155. *Id.* § 1957(d)(3).
156. *Id.* § 1957(c).
157. 31 U.S.C.A. § 5325 (West Supp. 1990).
158. As prescribed by the Secretary of the Treasury. *Id.*
159. *Id.* § 5325(c) cross-refers to the definition of the term in 12 U.S.C. § 461(b)(1)(C) (1988).
160. 21 U.S.C. § 854 (1988).
161. Defined in 18 U.S.C. § 2 (1988), incorporated by reference in 21 U.S.C. § 854(a) (1988).
162. Defined in 21 U.S.C. § 854(a) (1988) in language identical to that in RICO, 18 U.S.C. § 1962(a) (1988).
163. Defined in 21 U.S.C. § 854(c) (1988) in language identical to that in RICO, 18 U.S.C. § 1961(4) (1988). *See supra*, text accompanying notes 18-19.
164. Adjustable upward under the Criminal Fine Improvement Act of 1987. *See supra*, notes 118-19 and accompanying text.
165. 21 U.S.C. § 854(b) (1988).
166. *Id.* § 848(d).
167. *Id.* § 848(a).
168. *Id.* § 848(a) provides that first offenders must give a minimum sentence of 10 years and may be sentenced to any more lengthy term up to life imprisonment, while recidivists must receive a minimum 20-year term. Offenders cannot be given probation or a suspended sentence, or granted parole. *Id.* § 848(e).
169. *Id.* § 848(b)(2)(A).
170. *Id.* § 848(b)(2)(B).
171. *Id.* § 848(b). The provision does not govern schedule I and II controlled substances not listed in *id.* § 848(b)(1)(B), like methamphetamines and non-fentanyl analogs, or any schedule III, IV or V controlled substances.
172. *See* N.Y. Times, Feb. 10, 1990, § 1, at 1, col. 2.
173. *See id.*, June 20, 1989, § A, at p. 16, col. 3.

## SECTION 2: PARTICIPANTS' PAPERS

## Some Aspects of Brazilian Criminal Justice System and Crime Prevention

*by Edes Costa\**

### 1. Criminal Justice Policies in Relation to Problems of Imprisonment, Other Penal Sanctions and Alternative Measures

The prison population in Brazil at the present time is approximately 90,000 prisoners, in institutions that are built to hold 45,000. Therefore, there is a shortage of space amounting to 50%.

Of these 90,000 convicts, only 30,000 at the most are considered dangerous and must be held in maximum security prisons; the rest are in medium or minimum security facilities.

The overcrowding of Brazilian penal institutions coupled with modern criminal and prison policies already successfully adopted in other countries recommend that sentences that restrain freedom be applied prudently, being reserved for perpetrators of crimes that are considered grave (those committed with violence against a person, torture, drug trafficking, terrorism and heinous crimes).

Since the adoption of the Penal Code in 1940, Brazilian penal legislation has been gradually perfected. Proofs of this are the changes made in the Code itself, by the Penal Misdemeanor Laws, by the Penal Procedure Code, in addition to the adoption of highly progressive laws, such as the Penal Execution Law and the Narcotics Law.

In 1985, for example, the General Section

of the Penal Code was profoundly changed by Law 7.209 of July 11, 1985.

Criticism made in every country regarding penalties restraining freedom and based on increasingly important social facts (such as frequently inadequate types of treatment that are almost always aimed at punishing, the futility of methods used until now for dealing with habitual criminals and recidivists, the high cost of construction and maintenance of penal institutions, the harmful consequences for first offenders, occasional offenders or those who have committed petty crimes, and who are subjected, in the prison environment, to vices and corruption and to the loss of aptitude for work)—has caused the United Nations Organization to seek alternative world solutions for offenders who have not threatened the peace and security of society.

For these reasons, the new General Section of the Penal Code has adopted a new list of penalties, with the objective of perfecting the prison sentence (when necessary) and, at the same time, replacing it (when advisable) with other forms of effectively corrective criminal sanctions. This truly represents the first big step toward future changes.

The criminal sanctions in Brazilian law are: restraint of freedom (imprisonment/detention for crimes, simple confinement for misdemeanors); restriction of rights (performance of community service, temporary suspension of rights, and weekend restriction); and financial (fine). The security measure is for non-liable defendants who suffer from mental illness and is of an assistive and therapeutic type.

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The serving of sentences that restrain freedom will be done in a progressive manner from the more to the less rigorous, that is, closed (maximum security prison), semi-open (prison farms) and open (halfway houses). A penalty of up to four years is to be served in an open system; from four years to eight years at a prison farm; and for eight years and above in a closed system.

A system based on the amount of time to be served, as well as on the behavior of the defendant, his personality before and after the crime, his social behavior in relation to the family, work, in a word, the environment in which he lives (outside or within the prison), according to his character and merit. By way of exception there may be a regression for the less rigorous system to a stricter one.

The Panel Execution Law, in Article 84 provides that "the temporary inmate shall be separated from the convicted prisoner while his sentence is undergoing judgment." This repeats the guiding principle of presumption of innocence and is an attempt to avoid the harmful effects of contacts between habitual criminals and first offenders.

The Brazilian system adopts the system of strict separation of the sexes in the serving of time restraining freedom, and women serve their sentences in separate institutions, due to their personal condition (Article 37 of the Penal Code). This is due to the physiology of the female sex, her fragility and affective psychology, and furthermore to maintain strict order within penal institutions.

A minor of less than 18 (eighteen) years of age who commits and illicit act that is considered as a crime under criminal law shall receive special treatment, since he is not considered as criminally liable, but rather as a minor offender subject to the special norms established by Law 6.697/79 (Juvenile Code), considered as non-chargeable (Art. 27 of the Penal Code), not being criminally liable for his action. He must be interned in "correctional homes" for assistive treatment. The Brazilian Supreme Court (STF) expressly decided that: "detention of minor under 18

years in a common prison is not recommendable, even in a special and separate cell." (RF 256/356).

Regarding the crimes defined in Article 69 of the Penal Code (Law 7.209/85), the rule is first to apply the penalty of confinement and of detention, when there is need for cumulative sentencing in the case of an offender who, by means of one action or omission, commits two or more crimes. Those detained are separated from the convicts, according to the gravity of the crime and the penalty applied.

The closed prison system for the serving of a sentence restraining freedom, to be served in a maximum security prison, must be exclusively for those condemned to long terms and/or who are incorrigible and show evidence of being dangerous.

The cost of maximum security prisons is high for maintaining security and for administering the system in general.

The prison farm, with its system of semi-freedom, and known as semi-institutional, called work-furlough in the United States, and semi-liberte in France, is, in our opinion, the system most feasible and reliable for a possible reintroduction of the prisoner to society.

The first question refers to the work of the convict, where on the prison farm idleness is almost impossible since there is much work to be done, both with farming and livestock in general, in the activities of the farmer, making possible the sustenance of the convict himself and his family (dependents).

When the sentence has been served in the semi-open system, the convict on being transferred to a less restrictive system (open), will be accustomed to working, and will not encounter many obstacles as a free man.

Work is a decisive factor in social reintegration; A closed system (penitentiaries) does not provide this privilege.

The cost of a semi-open system (prison farms) is much lower and may even be self-

administering and supporting, since almost all of the labor is provided by the convicts themselves, the number of guards and security measures is less, due to the fact that the convict does not show a tendency to escape, and to the compatibility between the system, the provisions made in the criminal sentence and the absence of criminally dangerous convicts.

Brazilian lawmakers were inspired by the semi-open system in the Witzwill prison in the rural area of Switzerland.

A system combining the serving of the sentence and work in the open air, reduces costs for the security system (absence of high walls, guards, etc.), the convict works all day and at night retires to collective cells, although the rules call for individual cells (Article 88—Penal Execution Law) each containing a bed, toilet and washbowl, in a minimum area of 6 (six) square meters.

The best means of bringing about the reintegration of the convict into society is through work. In the closed system, the prisoner has his attention turned toward escaping, while in the semi-open system, this does not occur, due to the conditions obtaining in the latter.

Besides the satisfactory causes for work done by the convict inside the prison, he can benefit from the redemption system, being able to redeem part of his sentence by working, in a proportion of one day subtracted from his sentence for every three days of work (Art. 126, Penal Execution Law).

Work by the convict is done based on the principles of labor legislation (CLT), although it does not come under the general rules. Compensation cannot be less than three-fourths of the current minimum wage, and social security guarantees are made.

Work by the convict is a social duty and a condition for human dignity, with an educational and productive purpose (Art. 28 and following of the Penal Execution Law), in accordance with the aptitudes, skills, and personal condition and capability of the worker (convict).

In the semi-open establishment, the convict has already made the option for changing his behavior. There is active participation by the convict in the activities of his re-education. There is greater approximation between the convict and the prison personnel. More confidence is placed in the convict in the light of his acquiescence to the program of treatment. The period of crisis, with lack of confidence and affective rigidity being broken down, is changed into a reappearance of moral awareness as noted by Pinatel and Bouzai (Jason Sesezarias—Commentary on the Penal Execution Law, Aide Editora, 1st edition, 1987).

The open prison system in Brazil is provided for in Article 36 of the Penal Code and Art. 93-95 of the Penal Execution Code, for first offenders, whose sentence is equal to or less than four years; it is based exclusively on self-discipline and a sense of responsibility on the part of the convict, since the sentence is to be served in "halfway houses" without any type of vigilance, where the convict performs outside work during the day and returns to spend the night.

The halfway houses also require that those serving their sentence include weekend restriction, a type of penal restriction of rights stipulated in Art. 43 and following of Law 7.209/84, as substitute for restraint of freedom for terms of less than 1 (one) year.

As of the present date, there are few halfway houses existing in Brazil, in complete disregard for the legal provision of Art. 203 of the Penal Execution Code, which determines that the States provide, within a period of six months, for the acquisition or taking over of buildings for this purpose.

Due to this illegal situation, in practice there has arisen what is called "house arrest" which is categorically contrary to what is contained in Article 117 of the Penal Execution Code, where domiciliary confinement is allowed in only 4 (four) cases, namely: a defendant of more than seventy years of age; a defendant afflicted with a grave illness; one with a minor or physically or mentally defi-

cient child, and finally, when the defendant is pregnant.

The open prison system is of great value, in our opinion, since it more closely approaches the objectives of the penalty, with more probability of recuperation; it is better than the closed prison system in that the State has less expense and achieves the purpose of reintegration into society, keeping the convict far from the corrupting influence of the penitentiary and from the contagion of recuperable first offenders by dangerous habitual criminals.

The State, by providing the opportunity for serving the sentence that restrains freedom by means of an open system, is showing confidence in the capability of the man in terms of recuperation, with work providing the opportunity to survive and maintain his family, heading for total freedom and rehabilitation with dignity.

The country's penal system also includes institutes for conditional suspension of the sanction that restrains freedom, parole, clemency (individual or collective) and pardon that removes the punishment.

Collective clemency has usually been granted at the end of each year (Christmas clemency) and, by exception, on special occasions such as a visit to the country by the Pope. Along with total clemency, which effectively removes the sentence, there is partial clemency which provides or remission or substitution of the sanction (already commented on above).

It belongs exclusively to the President of the Republic to grant this clemency. The granting of a pardon falls within the competency of the National Congress.

## **2. Effective National and International Action against:**

### *2.1 Organized Crime*

Organized crime in Brazil at the present time is particularly engaged in the following types of criminal activity:

- a) The misdemeanor of the numbers game—that together with drug trafficking involve the most powerful and the financially strongest.

The "banqueiros" (numbers racketeers) control a vast network of ("cambistas") bookies who take bets, and control the betting places set up in a business serving as a front. The numbers results are controlled by rigid security schemes and announced simultaneously throughout the entire country.

There is an intimate relationship between this type of organized crime and drug trafficking, smuggling and prostitution.

- b) For the moment, we may cite, without exhausting the list, the smuggling of beverages, electronic products, arms, coffee, soybeans, lumber, precious stones, gold, pornographic material, live animals and animal hides.
- c) Drug trafficking—the crimes against public health, notably those related to the drug traffic, have brought about cooperative action among countries and scientific organizations in the on-going fight against this social blight that is corrupting values and discouraging even the formation of nationality, in the final instance.

The situation is of the utmost concern because of the danger represented by the spread of the use of drugs, notable among the young, and the new Brazilian Constitution, promulgated on October 5, 1988, included this matter (drug trafficking) in several Articles.

Thus, for example, Article 5, Item XLIII provides that the trafficking of narcotics and related drugs will be considered under the law as crimes not entitled to bail nor to mercy or amnesty. And item LI of the same article establishes that "no Brazilian shall be extradited, except for naturalized Brazilians in the case of a common crime committed before naturalization, or proven involvement in the unlawful trafficking of narcotics and sim-

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ilar drugs, as set forth in the law.”

Law 6.386, of October 21, 1976—that provides for the prevention and repression of illicit drug trafficking and the illegal use of narcotic substances or that cause physical or psychic dependency—in Article 12, provides for the sanction of imprisonment from 3 to 15 years and a penalty of from 50 to 360 days of community service for whoever: imports or exports, remits, prepares, produces, fabricates, acquires, sells, puts up for sale or offers, furnishes gratuitously, stores, transports, carries on his person, keeps, preserves, administers or delivers, in any form for the consumption of a narcotic substance or one that causes physical or psychic dependence, without authorization or in accordance with legal or regulatory provisions.

In Brazil, the Department of the Federal Police (DPF) has never been alien to the problem and has been an important cog in the execution of treaties and conventions entered into for systematically combatting this veritable epidemic which is assailing the world.

The Federal Police which are responsible: “for hindering and repressing illegal trafficking of narcotics and like drugs, smuggling and contraband, without prejudice to action by the treasury and other government agencies within their respective jurisdiction” (Art. 144, paragraph 1, item II, Brazilian Constitution); either alone or in conjunction with other agencies of the Brazilian Police System—State Civil and Military Police, has been effectively combatting this type of organized crime.

For more than ten years, the Federal Police Department has been sending police to the United States for training and courses organized by the Drug Enforcement Administration (DEA) an agency for the repression of drug trafficking in that country.

Moreover, the National Police Academy has been the site of many specialization courses for a growing number of police personnel in the different methods used in fighting the narcotics traffic, especially for oper-

ating in the large urban centers and along the borders, whether in fighting organized crime or hindering the action of those who come to Brazil for the acquisition of ether, acetone and other substances indispensable for the processing of cocaine.

In the wake of police action and in order to make it more effective, the Brazilian government has signed agreements with Bolivia, Venezuela, Peru and Colombia with the objective of perfecting the mechanisms for the prevention and suppression of the narcotics trade in this critical polygon in South America.

The effective operationalization of these agreements, and of other that will be signed in the future, requires the posting of police representatives in these countries, a type of police attache, such as the Americans, Germans, Canadians, Italians and other western nations have, with the objective of maintaining effective and rapid information exchange with authorities in this sector.

Despite what are still deficient budgetary and material resources, the Brazilian Police have made important achievements in the fight against drug trafficking in our country. Worthy of mention in this regard are the operations undertaken in 1988 such as “Operation Sao Francisco” that resulted in the eradication of 215 marijuana plantations, totalling almost 8,510,000 marijuana plants in the hinterland of the state of Pernambuco; “Operation Cloud” carried out in the Amazon Region and concluded with the destruction of two laboratories and approximately 7,657,850 Epadu plants, the “Brazilian Coca” plant; “Operation Exodus” in the state of Tocantins, resulting in the deactivation of a laboratory and the arrest of 11 foreign traffickers; “Operation International” which resulted in the deactivation of two laboratories and the eradication of 100,440 Epadu plants.

The control action regarding chemical products led to the apprehension of 8,018 liters of ether and 5,920 liter of acetone.

In the narcotics field, the year 1988 end-



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ed with a total of 2,775 investigations, with four thousand persons being indicted.

- d) Extortion through kidnapping; homicides committed by the so-called "death squads" that execute persons who they presume to petty criminals.
- e) There are, moreover, the groups that organized themselves within prison walls to obtain internal control over the inmates, who are forced to pay "protection" and to obey orders from the group, under pain of death.

Unfortunately, organized crime is encouraged by the impunity of those who commit privileged crimes, white-collar crimes, and by not being apprehended by the justice system due to lack of a repressive apparatus.

The criminals connected with these groups are infiltrating important sectors of society by means of the practice of "good works" among the community (principally among the most needy), providing funds for sports and leisure. The members of these groups are seen as benefactors and protectors of the more needy classes of the population, many times replacing the States social assistance program itself.

Thus, these Mafia-types are penetrating the dominant elite and taking part in pressure groups. As an example of the influence of these groups in the political field, we can point out the legislative bill elaborated by the Official Commission to legalize the numbers game.

We also point out the interest of organized crime in controlling the communications media, a fact which would facilitate its activities, as well as serving as a front for money-laundering operations. Appearing in the press, at the present time, are articles on the legalization of marijuana, which really only is of interest to the trafficker. Members of organized crime pose next to public authorities (federal, state and municipal) in news photos which are after published in major newspapers. They also appear on television

programs as exemplary citizens.

The Brazilian Government, despite the economic difficulties afflicting the country, has availed itself of all of the human and material resources at its disposal in the organizations that comprise the Police System in Brazil—the Federal and State Police (civil and military, with the latter being responsible for uniformed police work)—as well as establishing bilateral agreements and international cooperation, such as:

- a) Interpol—International Police Area—Organized crime in all of its forms: terrorism, narcotics trafficking, crimes of international repercussion.
- b) Bilateral agreements with: Bolivia, Colombia, Unites States, Peru, Venezuela, Argentina, Uruguay, Surinam, for mutual assistance and information exchange in the fight against the drug trafficking.
- c) International Cooperation: Based on the Convention on narcotics, held in New York in 1961. Mutual assistance and information exchange in the fight against drug trafficking.
- d) South American Agreements—on drugs and psychotropic substances. With all of the countries in South America. Regional cooperation in five major areas:
  - illegal consumption of drugs;
  - preventive education;
  - analysis and compatibility of legislation;
  - repression of drug trafficking;
  - treatment and rehabilitation of drug users.
- e) United Nations Fund for Combatting Drugs: Brazil is a participant, receiving funds just as the other contributors and participants.

In addition to these, there are various Programs for Combatting Organized Crime, aimed at action against local and international criminal organizations.

Despite all this effort there is still much to be done. The re-equipping of the Brazilian Police which requires more funds, would give us some hope of more effective dealing

with organized crime.

The relaxing of banking account secrecy, telephone wire-tapping, control of correspondence, more effective confiscation of the goods of these persons, greater participation by tax investigators (with breaking up of their patrimony), in a word, greater integration among the police, tax regulators, the banking system, the justice system and information agencies is what is recommended.

### *2.2 Terrorist Criminal Activities*

At the present time, terrorism has not caused great concern among us since it has not manifested itself. Therefore, only preventive measures are called for regarding this activity, that is very active in some countries.

Worth noting here are two provisions made in our new Constitution:

Article 5, Item XLIII—"the law shall consider the practice of torture, unlawful traffic of narcotics and similar drugs, terrorism and crimes defined as heinous crimes to be crimes not entitled to bail and to mercy or amnesty, and the principals, the accessories and those who, although able to avoid them, abstain from doing so, shall be held liable;"

Article 5, Item XLIV—"the acts of civilian or military armed groups, against the constitutional order and the Democratic State, are crimes not entitled to bail or subject to the statute of limitations."

### **3. Delinquency Prevention, Juvenile Justice and Protection of the Young**

The juvenile problem has a long history in our country. It dates back to the colonial period when philanthropic agencies performed charitable works in an attempt to solve the problem of abandoned children<sup>1</sup>. At that time, private charity, mainly through religious fraternities, voluntarily assumed the commitment to provide assistance to aban-

doned children.

The government hesitated to assume the responsibility of protecting, providing for and educating the needy child—either with or without a family—so that it was significant when provincial law of October 1, 1828 declared in paragraphs 69 and 70 that it was incumbent upon the Municipal Authorities to provide for "the maintenance of charity houses for caring for the sick and for the raising of abandoned children<sup>2</sup>."

Having never been addressed in its root causes, the problem became more serious, in the context of the present time, with the adoption by the State of an economic model that resulted in the concentration of income, that gradually corroded the purchasing power of wages. Moreover,

"The Brazilian policy of social welfare, in recent decades, has been concentrated more on the maintenance and guarantee of social control, rather than on an effective and full search for social development. Thus, those programs are characterized by a lack of convergence between strategies for State domination and those aimed at the survival of the poorest strata of the population."<sup>3</sup>

Families have been socially marginalized due to the economic model that has been adopted and due to the State social welfare policy that, in the eyes of the National Foundation for the Welfare of Minors (FUNABEM), is an erroneous one, and these families have been unable to support and educate their children in order to provide them with the adequate means for social integration. Thus, there are not a few needy children who gravitate toward commission of crime, since,

"... in the absence of any ambition that gives meaning to existence, violence constitutes the normative code for orienting their behavior."<sup>4</sup>

In order to implement a national welfare

policy for minors, the Congress passed Law 4.513 on December 1, 1964, creating the National Foundation for the Welfare of Minors (FUNABEM). This was an attempt to give more direction to state action that, at the time, was fragmented and ineffective. Unfortunately, however, the FUNABEM followed a policy in the last two decades of,

“...establishment of a correctional-repressive model based on the construction of large detention centers for children and adolescents, *the negative results of which are public and notorious.*”<sup>5</sup>

If one may generalize on the results of study of one of these large institution—the FEBEM/SP—undertaken by Maria Lucia V. Violante, the “real function” of these places is for the State to keep watch over the minors,

“...to contain and render passive those who have been excluded...turning them into imbeciles.”<sup>6</sup>

No work is done of an educational nature or for rehabilitating the minors for the purpose of their integration (or reintegration) into society, but rather to produce and reproduce submission<sup>7</sup>.

If the institutions that maintain minors under their custody historically reproduce,

“...conditions that are very similar to those encountered by the minor in his family circle or on the streets, especially with regard to lack of affection, rejection, physical and psychological violence.”<sup>8</sup>

We should remember that institutional training by means of violence produces results contrary to those officially proposed.

Repressive treatment methods provoke resistance and rebellion in juvenile offenders, adding to the reproduction and aggravating their social rejection. It is not absurd to suppose, as Violante suggests, that the scars

from institutional action imbed themselves in the identity of the minor, transforming themselves into points of reference for his behavior when he leaves the institution.

Upon leaving the total institution, the juvenile offender does not take with him any of the cognitive references needed for critical insertion into his real situation, therefore remaining with a marginal role as agent of his own future. The result of this is that the juvenile offender, who has learned to conduct himself according to the rules of violence, and without the necessary instruments to overcome his condition of marginality, can be led to demonstrate “anti-social” behavior. Recidivism could thus become a natural consequence of this vicious circle.

Seeking to correct the errors of the past and to meet situations of fact that require immediate and pressing solutions, the FUNABEM underwent a redirectioning and reorganization of its policy, methods and techniques in 1986,

“...in order to retrieve the mission for which it was created.”<sup>9</sup>

Therefore, in keeping with the directives of the I National Development Plan of the New Republic (1986-1989), the Plan for Strategic Goals (1986-1989) and the Sectoral Plan of the former Ministry of Social Welfare and Assistance (1986-1989), FUNABEM seeks at the present time to define,

“...directives that not only consolidate the project of national emancipation, but also recuperate the sense of participation, integration and articulation fundamental to social, economic and political development.”<sup>10</sup>

The directives now issuing from the FUNABEM are in harmony with the “Rules of Beijing,” the UN and, if followed, will significantly minimize the rancid remains of institutional violence existing in the institutions responsible for the custody of minors by rea-

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son of judicial order.

It is widely known that palliative measures do not lead to the solution of problems which, in the case of the minor offender, call for basic social policies for a true confrontation with and solution to the problem. Nevertheless, compensatory policies are still necessary for the eradication of the more flagrant and inhuman form of institutional violence. Compensatory policies continue to be of important value since situations of fact require immediate solution regarding the rehabilitation of the interned minor as a citizen.

When one considers the trajectory of the National Policy for the Welfare of Minors (PNBEM) during its historical development, it is possible to delineate the main concepts that have guided it during the three-year period from 1987 to 1989: priority given to child and adolescents between 7 and 18, the marginalized, those in extreme personal and social risk situations.

Therefore, priority is given by FUNABEM to groups that are most vulnerable in terms of physical survival and social integration, those not covered by the various public agencies that have an obligation to ensure access to basic goods and services.

The high risk situation can be defined as a set of circumstances capable of bringing about the personal and social degradation of the child or youth, prejudicing his development as a person and citizen. This situation manifests itself in principle by involvement of these youths with the provisions of the Juvenile Code, starting out on a trajectory that involves a diversified set of agencies, namely: Police Patrol, Judiciary Police, and agencies that implement the National Policy for the Welfare of Minors in the various states.

Without exhausting all of the possibilities covered by the concept of High Risk Situation, it is possible to establish some definite situations. They are children and youths:

- exploited in the labor market;
- involved in schemes for criminal training

(theft, drug trafficking, mendicancy, prostitution, etc.);

- forced to use the streets for their place of work and habitation (boys and girls of the street);
- perpetrators of a criminal offense;
- involved in the use of drugs;
- with physical and/or mental handicap;
- confined in institutions.

Worthy of mention at this time are some of the causes or partial causes that contribute to the criminality of the juvenile offender, listed by a Commission of Jurists and Social Scientists appointed by the Brazilian Minister of Justice in 1979.<sup>11</sup>

- 1) Moral and material abandonment;
- 2) Conditions precarious to physical health and harmful to emotional development;
- 3) Lack of, or incomplete schooling;
- 4) Excessive time spent on the streets in a bad and harmful environment;
- 5) Lack of professional skills;
- 6) Involvement in marginal and anti-social activities.

The work of the FUNABEM increases in the measure that the social and economic difficulties of Brazil increase. Today, it provides support to 900 thousands children and youths from 7 to 18 years of age, through programs in 1,300 municipalities all over Brazil.

The children and adolescents cared for by these programs come from the poorest sectors of the population. It is estimated that today 11 million children and adolescents are found in this sector, whose parents do not earn 2 minimum monthly wages (the monthly minimum wage as of January, 1990 was the equivalent of US\$100). Thus these families are unable to provide their children with basic nutritional or health needs nor with the most elementary education necessary for healthy growth and a dignified life.

The Brazilian Government, through the FUNABEM, has given priority to meeting

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the needs of adolescents characterized as criminal offenders, by means of the Open Environment Program. In 1987 alone, 23,671 offenders were cared for by dozens of public institutions under an agreement with FUNABEM. The highest incidence of crimes by those under 18 years of age is found in the Southeast Region, notable in the States of Rio de Janeiro and Sao Paulo that together account for 80% of these cases.

In the same year (1987) several programs benefited 37,385 abandoned children throughout Brazil (children and adolescents who have family: a father, mother, brother or sister, grandparents, aunt, uncle, etc.).

Today it is difficult to give a precise number of the "street children" in Brazil, but it is estimated that they total about 7 million. Many people consider any minor who lives on the street as an abandoned child. This is not true. The great majority of children and adolescents roaming the streets have a family. They just do not live with the family due to the extreme poverty which does not allow them to survive.

The problem is dramatic and will only cease when Brazil is able to offer all of its children the basic services such as health, education, employment and decent housing, minimal conditions for survival and the struggle for a more just, human and fraternal society.

### *The Most Serious Cases of Criminal Offense*

There are cases of juvenile offenders that require special measures of confinement. Such measures are necessary both by reason of the gravity of the crimes committed and as a result of the recognized necessity of protecting the life and physical integrity of the juvenile himself. Involvement with organized crime and persecution by extermination groups connected with the police system justify such measures.

As an alternative to confinement, the FUNABEM has expanded its support into actions that encourage measures such as Directed Probation and Semi-Freedom, provid-

ed for in the Juvenile Code.

### 3.1 Existing Juvenile Justice System and Preventive Measures against Juvenile Delinquency

The Juvenile Code, instituted by Law No. 6.697 of October 12, 1979, makes provision for assistance, protection and vigilance of minors:

- 1) up to 18 years of age, who are in an irregular situation;
- 2) between 18 and 21 years, in cases specified by law.

For the purposes of the Code, a minor is in an irregular situation: if the perpetrator of penal offense; with behavioral problems, in virtue of grave inadaptability to the family or community; etc. (Art. 2).

Judicial, police and administrative acts regarding minors are free and secret, with their publication, even by means of certificates, depending on the approval of the competent judicial authority. Judicial authorities referred to in the Law are the Juvenile Judge or the Judge exercising this function according to local legislation (Art. 9).

Measure applicable to minors by judicial authority are:

- 1) warning;
- 2) handing over to parents or those responsible or to a suitable person, by means of an act of custody;
- 3) placement in a foster home;
- 4) imposition of a system of probation;
- 5) placement in a home with restricted freedom;
- 6) internment in an educational, psychopedagogical, hospital, psychiatric or other adequate institution.

Internment will only be determined if the use of other measures is unfeasible or impractical.

The minor with behavioral problems or the author of a penal offense may be interned in

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an adequate institution until such time as the judicial authority, by an appropriate order, determines his release, and may, in accordance with the nature of the case, require a technical opinion from a competent service and hear the Public Ministry.

If the minor completes 21 years before the cessation of his internment has been declared, he will pass under the jurisdiction of the Court entrusted with Penal Cases.

According to our Federal Constitution (Art. 228) and our Penal Code (Art. 27), those under 18 years of age cannot be charged penally, and are subject to the norms established in special legislation (Juvenile Code).

Regarding non-liability, the Penal Code further provides that:

“Art. 26—The perpetrator is exempt from punishment who, through mental illness or incomplete or retarded mental development, was at the time of the action or omission entirely incapable of understanding the illicit character of the fact or of behaving in accordance with such understanding.”

“Paragraph—The punishment can be reduced by one or two thirds, if the perpetrator, in virtue of mental disturbance or by reason of incomplete or retarded mental development was not entirely capable of understanding the illicit character of the fact or of behaving in accordance with such understanding.”

Regarding non-imputability in accordance with the provision of Article 97 of the Penal Code, allowance is made for the imposition of security measures:

“Art. 97—If the perpetrator is non-imputable the judge shall determine his internment (Art. 26). If, however, the fact considered as a crime were punishable by detention, the judge may replace it with outpatient treatment.” The outpatient treatment may be converted to internment if the perpetrator reveals incompatibility

with the former measure (Law No. 7.210 of July 11, 1988—Law of Penal Execution, Art. 184).

Internment or outpatient treatment shall be for an indeterminate period, lasting until the cessation of criminal tendency attested to by medical certification. The minimum period shall be from one to three years (Art. 97 @ 1 of the Penal Code).

The following measures are applicable to parents or those responsible:

- 1) warning;
- 2) obligation to submit the minor to treatment;
- 3) loss or suspension of parental power;
- 4) loss of guardianship;
- 5) loss of custody.

### *On procedure (Penal Code, Title I)*

“Art. 84—Juvenile jurisdiction shall be exercised in each District, by a Judge charged with the constitutional guarantees of a magistrate, specialized or not, and in a second degree, by the Magistral Council or equivalent judicial organ, in accordance with the Law of Judiciary Organization.”

“Art. 85—Juvenile jurisdiction shall be exercised by means of a procedure of cautionary charge and without any execution, with proper execution belonging to the entities that are referred to in Art. 9 of this Law (Agencies for assistance and protection of minors created by the public authority, according to the directives of the National Policy for the Welfare of Minors).”

“Art. 86—The measures provided for in this Code shall be applied by means of an administrative or contradictory procedure, of official initiative or brought about by the Public Ministry or by those with legitimate interest.”

“Art. 87—If the judicial measure to be adopted does not correspond to the procedure provided for in this or in another Law, the judicial authority can freely investigate the facts and officially order the measures

to be taken.”

Paragraph—Pertinent procedural legislation shall be applied, in subsidiary fashion, in juvenile jurisdiction.

*On the Public Ministry (Juvenile Code)*

“Art. 70—The functions of the Public Ministry shall be exercised by the Juvenile Curator, or by the one taking his place, in terms of local legislation.”

“Art. 91—The representative of the Public Ministry shall be intimated, personally, for any order or decision issued by the judicial authority in procedures and processes regulated by this Law.”

“Art. 92—The representative of the Public Ministry, in the exercise of his functions, shall have free access to every place where the minor may be.”

*On the verification of penal offenses*

The Juvenile Code, with regard to “infractors,” established a legal procedure for verifying penal offenses. This procedure is summarized and abridged in the following terms:

The juvenile caught in the practice of a penal offense or considered as its perpetrator by reason of prior investigation shall be apprehended and sent to the police authorities, that is, to the Police Headquarters of the district where the fact occurred. This is taken from @@ 2, 3, 4, and 5 of Art. 99 of the JC. Since this it is the authority responsible for sending the minor to the Judge, it can request a time period for the undertaking of investigations, it can apprehend and submit products and instruments used in the offense, and may submit a report on the investigation of the occurrence, forwarding everything to the judge.

The law determines that “the minor under 18 years of age, who has been charged with the penal offense, will as soon as possible be arraigned before the judicial authority” (JC, Art. 99, caput). This is the so-called rule of

“immediate arraignment of the minor before the judge, and is reinforced in paragraph 2 of the same article, namely by an explicit determination that the minor must be sent to the judge as soon as it comes to the knowledge of the police authorities that there is knowledge and proof of the commission of a crime by a person under 18 years of age (JC, Art. 99, @ 1).

The rule of “immediate arraignment of the minor before the judge” admits of only two exceptions. His immediate presentation being impossible “the police authorities shall send the minor to the specialized police agency or to an assistance institution that will present the minor to the judicial authority within a period of twenty-four hours” (JC, Art. 99, @ 2). The second exception refers to those grave crimes or those practiced in collaboration with an adult, that call for investigation, an occasion in which the police authorities can request an extension of the time period from the judge, but not more than five days for the presentation of the minor (JC, Art. 99, @ 4).

When the Police chief presents the minor, he must submit “a report on the investigation of the occurrence, as well as the product or instrument of the offense (JC, Art. 99, @ 5) and also “his parents or those responsible, the victim and witnesses” (JC, Art. 100, II).

The documentation shall be received and recorded (JC, Art. 100, I). This means that the Registry must collate the documents in the form of a “process,” providing them with a cover and a record number, that will be noted in an appropriate book. The legal papers are forwarded to the Judge who, according to law, “will determine the holding of a hearing for the arraignment of the minor” (JC, Art. 100, I).

Up to this point, then, according to the Code, we would have two general rules: immediate arraignment of the minor before the judge (1st rule) who will hold an arraignment hearing (2nd rule).

The Juvenile Code (Art. 100, I) determines

that in this arraignment hearing the Public Ministry (Juvenile Curator) and the Juvenile Solicitor (Attorney) must be present.

During the hearing, the judge shall proceed to hearing the minor, his parents or those responsible, the victim and the witnesses of the offense (JC, Art. 100, II). After the hearing, he may "determine the holding of an investigation, having heard the opinion of technical experts" (JC, Art. 100, III).

When the hearing is over, having heard the Public Ministry and the Juvenile Solicitor, the judge may summarily decide to close the case or to opt for a continuance. He may also summarily decide if the fact was of little gravity (JC, Art. 100, IV) or in cases in which the perpetrator of the penal offense is a minor of more than 10 and less than 14 years of age (JC, Art. 101, single paragraph). If it becomes evident that the fact is grave, the Judge shall determine the continuance of the case, with the period "never being superior to 30 days for investigations and for the interprofessional staff to submit a report on its study of the case" (JC, Art. 100, V).

If the minor remains under detention, the maximum period for instruction and decision in the case is 45 days, beginning from the presentation hearing. This represents the sum of the time periods provided for by law. There are 30 days for the investigation and presentation of the case study by the interprofessional staff (JC, Art. 100, V), five days for the Public Ministry to declare itself regarding the defendant (JC, Art. 100, VII), five days for the declaration by the Juvenile Solicitor (JC, Art. 100, VII) and five days for the Judge to issue his sentence (JC, Art. 100, VIII).

The exceptions to the rule of immediate presentation of the minor to the judicial authority do not include those cases in which the perpetrator of the offense is a minor under 10 years of age, and who, whatever the infraction and its circumstances, must be promptly sent to the judge, who "can dispense him from the arraignment hearing, or

determine that he appear before him for an interview or that the technical orientator be heard" (JC, Art. 102).

Appeal may be made from the decisions handed down in procedures of verification of the irregular situation of a minor by the interested parties and the Public Ministry, to the judicial organ of superior jurisdiction, by means of an instrument, within the period of 10 days, counting from the intimation, and offering its reasons. This recourse does not have any suspensive effect. (JC, Art. 116, @ 1).

### 3.2 Constitutional Norms Regarding the Rights of Minors

Art. 227—It is the duty of the family, society and the State to give absolute priority to ensuring for the child and adolescent the right to life, health, food, education, leisure, professional training, culture, dignity, respect, liberty and family and community living, in addition to protecting them from all forms of neglect, discrimination, exploitation, violence, cruelty and oppression.

@ 3—The right to special protection shall embrace the following aspects:

IV—Guarantee of full and formal knowledge of the charge concerning the offense, equality with regard to the procedural report and defense by a technically qualified professional, as provided for by specific tutorial legislation.

As can be seen, the constitutional legislators preferred to adopt a clear, explicit and exhaustively minute text, although pleonastic, since the expression "right to life," strictly speaking, includes the right to health, food, etc.

This concern was correct and fortunately was inserted into subitem IV of paragraph 3 of the article in question the expression "as provided for by specific tutorial legislation."

Creating an insurmountable obstacle to possible future discussions, the constitutional legislators expressly established that juvenile



legislation must be fundamentally tutorial, that is to say, protective, providing assistance for the minor, and therefore, contrary to the institutes that ensure equal treatment for society under the law.

For this very reason abolishment of the contradictory principle was approved in the first round of voting, since due to penal procedural law it would be incompatible with the protection of the interests of the juvenile offender, since such a principle consists in practice in "being able to contradict the accusation; being able to require the furnishing of proofs. . ."

It was preferred, and rightly so, to establish some guarantees that would protect the minor from any arbitrariness, without transforming him into an accused and the case into one of probatory discussion, instead of a discussion regarding what is best for the minor.

Knowledge of the charge concerning the infraction was guaranteed, as well as equality in the procedural report, that is, that the minor not be considered as a criminal and that he have technical defense, in other words, that he be treated as someone to be cared for, being provided with qualified technical assistance by one with knowledge and training in the juvenile area.

The rights set forth in the Article under consideration are repeated elsewhere in the new Constitution. They can be found in Title II "One Fundamental Rights and Guarantees" and in the Chapter "On Social Security," both in the General Provisions and in the sections regarding Health and Social Assistance. They are further found in the Chapter "On Education, Culture and Sports."

This repetitive insistence in the Constitution is not redundancy, but rather a proof, on the part of the legislators, of enlightened respect for the social reality in which we live. Some examples of this reiteration with regard to the Rights of Minors: affirming the duty of society to guarantee the right to life, to food, to health and making a commitment

to a frank, honest and effective combatting of infant mortality, the high rate of which is a shame. Reaffirming the right to culture, education, leisure, and professional training, and repudiating the obvious system of discrimination practiced by the school system, the reformulation of which is aimed at providing for the needs of citizenship, but above all, to recuperate our sensitivity to the obvious fact once again: that the child has a right to be a child. Reaffirming human rights regarding liberty, family and community life, and assuming a clear and definite position of not adopting pseudo-solutions that do not respect the child in its day-to-day treatment, arriving at the point of institutionalized violence by adopting the practical norm of transferring the task of "recuperating" or promoting the child's well-being to the process by means of which the child is separated from family and community.

In these aspects we must admit that the new Constitution deeply disturbs those who, directly or indirectly, are responsible for the immense number of children and adolescents that live in closed institutions in Brazil. The family, society and the State now have the definite and clear duty of transforming themselves, both with respect to the ideas and proposals as well as, and principally, to their actions. The Constitution obliges a profound reformulation of legislation, of proposals, of actions.

The child, precisely because it is a person in development, has, the right to special protection, specified in paragraph 3 of article 227 that includes the following aspects:

- a minimum age of 14 for employment, which until the age of 18 cannot be at night, in dangerous or unhealthy conditions and which must guarantee his social security and worker's rights, as well as his access to school; (I, II and III);
- a guarantee that the principles of brevity, exceptionality and respect for the peculiar condition of the person in development will be obeyed, when applying any measure

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- that restricts freedom;
- stimulus from the Public Sector for the receiving of children in the form of child or adolescent custody for orphans or abandoned children;
- development of programs of prevention and treatment for the child and adolescent that is drug dependent.

Item IV of this article has already been commented on.

Other points, no less important, of the constitutional document refer to:

- adoption assisted by the Public Authority;
- the severe punishment of abuse, violence and sexual exploitation of the child and adolescent;
- equality of the rights of children, born of marriage or adopted.

(1—According to the constitutional text, the expression “minor,” used until now, must be understood to mean a child or adolescent, that is, a Brazilian citizen who has not yet attained his full legal age. 2—The National Congress is considering a “Substitute Proposal” to “Bill No. 1506 of 1989” that “provides for the Statute of the Child and Adolescent,” in order to replace the current Juvenile Code.)

This proposal considers the child as a person up to 12 complete years of age, and the adolescent as one between 12 and 18 years of age.

### 4. United Nations Norms and Guidelines in Crime Prevention and Criminal Justice

#### 4.1 *The United Nations Standard Minimum Rules for Treatment of Prisoners as Reflected in Law 7.210, of July 11, 1984, Establishing the Brazilian “Penal Execution Law”*

In keeping with the UN Minimum Rules, the list of “recommendations” regarding the rights in favor of the prisoner or one who is

simply interned is significant. They are detailed in Article 40, expressly referring to: sufficient food and clothing; work assignment and remuneration; social security; constitution and peculium; proportionality in the distribution of time for work, rest and recreation; exercise of professional, intellectual, artistic and sporting activities formerly practiced, when they are compatible with the serving of the sentence; material, health, juridical, educational, social, religious assistance; protection against any form of sensationalism; personal and reserved interview with an attorney; visits by spouse, companion, relatives and friends; being addressed by name; equality of treatment; appointment with the Director of the Penal Institution; representation before and appeal to any authority and defense by law, contact with the outside world by means of written correspondence, reading and other means of information.

To better visualize the UN Minimum Rules as reflected in the Penal Execution Law, the following table illustrates the correlation between the provisions of said Law and the items in the UN Recommendations:

Law 7.210 of July 11, 1984	Article for Reference	Standard Minimum Rules for Treatment of Prisoners
<b>TITLE I</b>		
1) The Object and Application of the Penal Execution Law	1 3, sole @ 4	65 and 66 6 60 and 61
<b>TITLE II</b>		
2) The Convicted and Interned	5	63; 67-69
<b>CHAPTER I</b>		
Classification		
<b>CHAPTER II</b>		
3) Assistance	10	56-59; 65 and 66
<b>SECTION I</b>		
<b>SECTION II</b>		
4) Material Assistance	12	9-21

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SECTION III		
5) Health Assistance	14	22-26 and 62
SECTION V		
6) Educational Assistance	22	40, 77 and 78
SECTION VI		
7) Social Assistance	22	78 and 79
SECTION III		
8) Religious Assistance	24	41 and 42
SECTION VIII		
9) Assistance to the Ex-convict	25	64, 80 and 81
CHAPTER IV		
SECTION II		
10) Rights	40	9-26 and 35-45
SECTION III		
11) Discipline		
SUBSECTION I	44	27-34
SUBSECTION II		
12) Sanctions and Recompenses	53/56	33, 34 and 70
TITLE III		
CHAPTER VI		
SECTION III		
13) Administration and Personnel of Penal Institutions	75	46-55 and attachment "Recommendations for penitentiary selection and training."
CHAPTER VII		
14) Reformatory	78	64 and 81
CHAPTER VIII		
15) Community Council	80	60 and 61
TITLE IV		
CHAPTER I		
16) Penal Institutions	82	8, 21 and 63-3
CHAPTER II		
17) Penitentiary	87	9-14 and 23
TITLE V		
18) Serving of Types of Sentences	105	7
TITLE IX		
19) Final and Transitory Provisions	199	33

As can be observed, many recommendations made by the UN are found in our Penal Execution Law, in addition to some of them being the object of constitutional provisions.

Although not having the force of law, they serve as a paradigm for Prison Systems which, with necessary adjustments, can and should find positive expression in the legislation of countries whether members of the UN or not.

The recommendations demonstrate their great worth in the measure in which they are aimed mainly at the recuperation of the convict and his reintroduction into society—from which he came and which many times is responsible for his behavioral aberration—all in conformity with the provisions of the "Universal Declaration of Human Rights."

### *4.2 The Juvenile Code and the Beijing Rules*

The Juvenile Code (Law 6.697/79) now in force, despite having been promulgated prior to the formulation of the "Beijing Rules" (1984), contains the entire essence of the philosophy that inspired the international text, for example, the behavioral deviation that appears in article 2, subitem v of our Code appears in the provision of "Rule" No. 31 of Beijing.

Many other examples could be adduced, such as the judicial seal of secrecy in Art. 3 of the Juvenile Code found in "Rule" 11.4; individualized treatment of "cases" by inter-professional staff, provided for in Art. 4 of our Code and recommended by "Rule" No. 16; the character of exceptionality and brevity of detention of Art. 40 and Art. 41 of the Juvenile Code, now a constitutional norm of art. 227, paragraph 3, V of the new Constitution, included in "Rule" No. 19 of the Beijing text, etc.

However, if it is true that the "Beijing Rules" have already been incorporated into our positive law, even before the recommendation for their adoption, "it is also necessary to point out the impropriety of the application of certain provisions of that international text within our legislative frame of reference, due to the different systems adopted

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by other countries and by Brazil, principally regarding criminal liability of minors.

Thus, the contradictory instruction and the principal of ample defense, provided for by "Beijing" rules, 7 and 15, that are not applicable in our juvenile law."<sup>12</sup>

This is also the understanding of the renowned professor Alyrio Cavallieri, the official representative of Brazil in international meetings and the one who introduced the "Beijing Rules" to Brazil, "despite the recommendation for the adoption of a process of investigating juvenile crime by means of a contradiction developed according to rigid procedural norms."<sup>13</sup>

Finally, and still according to professor Alyrio Cavallieri, the proportion between the act and the response to it, as provided for in the Rules of Beijing, 5.1, is not applicable to the Brazilian system. The reference to the grave fact, included in Article 100, Item V of the Brazilian Code is strictly related to the study of the case.

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# The Impact of Socio-economic Change upon Criminality and the Extent of Crime Which Exerts a Baneful Influence upon Development in Indonesia

by *H. Adam Nasution*\*

## Part I

I. Before we discuss the above mentioned title of this paper, it is beneficial that I first introduce the state of The Republic of Indonesia including both the geographic and the sociologic aspects. The knowledge on the conditions of both aspects may be referred in order to have a better understanding about the criminological issues of a certain nation.

Geographically, the territory of the Republic of Indonesia is located in a tropical region along the equator between 97 degrees East longitude and 141 East latitude, between 8 North latitude and 10 degrees South latitude. It is in an intersecting position between two continents and two oceans, passed by the equator. The climate is tropical.

The Republic of Indonesia is a unitary state despite its territory which consists of thousands of islands and is inhabited by many different ethnic tribes which have their own customary law. Nevertheless, those ethnic-groups, each with their own customs are united in the form of "Bhineka Tunggal Ika" (Unity in diversity) by the fundamental bond of Pancasila (The Five Principles) as the basic life philosophy of the Indonesia Nation. The population is ±176 million people.

Indonesia has entered the fifth Five-Year Development Era since the year of 1989/1990. Indonesia's guidelines have determined the 25 years of Development of In-

donesia as a long-term development which is divided into five-year short-term development plans. Thus the development plan began in 1970. I can say that the development of Indonesia is successful based on the GNP per capita that was a mere \$60 in 1970 and has now increased to \$600 per capita.

The success of the development is enjoyed by the Indonesian Nation. Nevertheless as is usually the case when there is a positive aspect, (advancement for Indonesia, especially in the field of law, and more specifically from the criminal aspect) a negative aspect is also a result. In this case, the negative aspect has been the emergence of various New Crimes, that were unfamiliar to the Indonesian society before.

The aim of National Development is to create a prosperous and just society both materially and spiritually based on Pancasila (The Five Principles) and the UUD 1945 (the 1945 Constitution), and also to create a total Indonesian body.

II. In the first part I have mentioned the Development of Indonesia that was realized gradually as planned and covers all aspects of life. The realization is based on the state guidelines made by the Peoples Assembly (Majelis Permusyawaratan Rakyat), and is reviewed every five years to be adjusted to the advancement of Indonesian Nation Life. The Law-development in Indonesia is carried out with the following aims:

1. To increase the law consciousness, to guarantee the erudition and the confirmation of law;
2. To develop national discipline and a sense of responsibility in the members of society;

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3. To exercise the law-reformation in accordance with the need due to the advancement of the development;
4. To increase/extend the knowledge and capability of the personnel in the field of law erudition;
5. To spread information on law to the members of society, so that they are aware of their right and obligations as the citizens of the Republic of Indonesia;
6. To exercise legal aid and consultation for these who need them;
7. To increase the provision of the need devices and utilities;
8. To develop harmoniously, the rights and obligations of the citizen in order to put Pancasila and the 1945 Constitution into practice.

It is clear that in the Development of Indonesia, the Government has also considered the negative impact that might emerge in society. For that reason the anticipation from the legal aspect has been arranged as explained above. The negative impact that will be discussed is in the form of the development of crime.

III. The newly emerging criminal deeds were not known by the Indonesian society before, and therefore can be appraised as the impact of the existing development advancement, are as follows:

### *1. Related to Water Territory/Fishery*

a. Indonesia follows the definition of 200 sea-miles of Exclusive Economic Zone, measured from the outer most point of the farthest island. Therefore any fishing-ship of foreign origin must obtain a permit prior to fishing in the sea. Now there is terminology such as FISH THEFT by foreign fishing-ships.

b. Shrimp is a high-valued export commodity as well as being used for domestic consumption. Shrimp hatcheries which produce tons of shrimps per hectare have been built. Usually they are located in a quiet place along the waters edge and are guarded by

workers. Now there is shrimp theft/robbery, where a group of people take shrimp from the pond illegally. Then there is a new terminology such as "shrimp theft."

### *2. Homicide*

Murder cases where the victims are cut into pieces and then thrown about and scattered in separate places so that the victim's corpse can't be identified, especially his finger prints. Therefore there is the terminology as "10 cut pieces" murder.

### *3. Computer Crime*

As in other developed countries, crime by using a computer has occurred in Indonesia, especially in relation to banks.

4. Another specific crime such as subversion is related to the security of the state of the Republic of Indonesia which is based on Pancasila and the 1945 Constitution. Nowadays when the government is busy in realizing development, there are certain individuals, who for the sake of their personal interest, commit economic crime or corruption. Both economic and corruption crimes can be classified as subversion.

IV. In overcoming criminality of Indonesia, the solution can be observed from the following figures of cases:

Crime Cases	1986/1987	1987/1988
Counterfeit currency	126	232
Rape	847	967
Homocide	1,613	1,805
Theft	2,582	3,339
Death caused by negligence	6,476	6,256
Narcotics	474	486
Traffic violence	1,497,652	863,196
Subversion	55	29
Corruption	383	319
Smuggling	329	227
Water territory violence	19	15

V. From the above explanation we can conclude that as a developing country, in the field of law in facing the new-crimes that may possibly emerge, Indonesia has prepared anticipating devices either in the form of law or the effort to increase the human-consciousness. The broadcasting of the criminal picture on television is exercised so that the society may become aware of crime and so as to stimulate the consciousness for those who might consider committing crime. Regionally, meetings have been held among jurists within "THE ASEAN LAW" as well as the Attorney Generals of the Asean Countries. Even the latter will periodically hold meetings to discuss regional legal issues. The Attorney General of the Republic of Indonesia himself had presented his address: "Efforts of the Government of Indonesia in taking measures against corruption" at the fourth International Anti Corruption Conference which had been held in Sidney, Australia from the 12th to the 17th of November 1989 recently.

It is hoped that this paper will be useful for all the participants.

## Part II

1. In accordance with the view of the Indonesian Government that crime prevention and the treatment of offenders cannot be carried out effectively unless they are closely linked with social and economic programmes, the nation's developmental planning has placed top priority on addressing the issues of poverty and unemployment in rural areas which encompass the overwhelming majority of the people.

National resources have been directed towards the increased development of labour-intensive industries in these areas utilizing appropriate techniques and technology commensurate with the needs and skills of the people. Local markets are being expanded and the necessary transportation facilities to bring goods to the markets are being increased. Various activities have been

undertaken to improve housing, public health and other social welfare services available to the people.

The Government recognizes the important role which education can play in enriching the spiritual and material life of the people and in contributing to the developmental progress of the nation. Emphasis has been placed on the improvement of general education for all children; in addition, vocational education and job-training programmes have been initiated, especially for school dropouts, to provide these young people with marketable skills. More recreational facilities are planned under the auspices of the Ministry for Youth and Sports to offer healthy leisure-time activities such as sports, arts and cultural events to maintain an appreciation and respect for their rich heritage.

The participation of the people in social defence efforts is considered vital for its success. In this regard, the Office of Public Prosecution and the Court of Justice are becoming involved in providing legal counseling and training to the village people. The objective of this strategy is to educate people about the law, to raise awareness of their rights and duties under the law, and to increase their compliance with the law and their participation in the prevention of crime and the treatment of offenders.

It is hoped that this developmental approach to the problems confronting the rural areas will improve the overall living standards of the people which, in turn, may discourage migration to the urban centres and reduce the factors contributing to criminal behaviour.

A number of steps have been taken to counteract the increase in crime in urban areas. An important measure among these is the use of environmental design techniques to reduce the opportunity for crime. City planners and architects are focusing their efforts on built-in security and surveillance systems in new housing complexes, office buildings and shopping areas. Slum clearance programmes have been initiated

and these areas are gradually being replaced by lower and middle income housing. In addition, public education campaigns have been carried out to inform the people how to properly protect their property and personal valuables, the correct procedures for reporting a crime as well as encouraging the public to assist law enforcement authorities and aid the victims of crime.

## 2. *Adat Law*

The term "adat" has long been accepted (diterima) by Indonesians, and has become familiar to Dutch jurists and ethnologists. It is still somewhat strange (aneh) to the Anglo-American reader. The translators of this work have given serious consideration (pemikiran) to the choice (pilihan) of an English language equivalent; but no fitting (cocok) English term was found. Translation of the term with "customary law" is not only clumsy (ganjil) but implies (mengandung makna) a difference in kind from the law of civilized peoples—a distinction (perbedaan) which is not justified (dibenarkan) in fact. Indonesians have for many centuries lived under the humanitarian impress of Hinduism and Islam; so, their law is part of a civilized heritage. "Native law" would be an adequate (cukup) translation to distinguish (membedakan) adat law from Dutch law as it operates in the Indies. But the word "native" carries overtones (nada) of colonial snobbishness (kecongkakan) and is distasteful (jelek) to the resurgent (yang bergolak) feelings of an awakening Asia. By analogy with the terminology adopted (digunakan) in respect to other parts of the world, it would be proper to consider indigenous Indonesian law as "primitive" law. But this term, too, has unfortunate connotations and, moreover, is not practical in the present instance, because within Indonesian society one must distinguish between the adat of the great majority and that of relatively small and unimportant tribes which really are primitive in the usual meaning of that word. To call the adat law "primitive" would be an error (kesala-

han), since the people have lived for more than a thousand years under the influence (pengaruh) of world religions and for three hundred years under the rule of a Christian nation.

## 3. *Modern Law*

In Indonesia, laws of the land date back to (mulai semenjak) the Dutch colonial rule. It was the Dutch who introduced European laws to the country, then known as the Netherlands East Indies. As early as 1824, there was a concept of separate (terpisah) law made by the Dutch government. The population was then divided (dibagi) into three groups as far as laws were concerned, namely: Europeans, native (pribumi) and foreign orientals. Netherlanders living in the Indies were subject to the laws for Europeans; the indigenous inhabitants were subject to the laws for natives, whereas (sedangkan) the foreign Asians were not subject to either of the above. They were subject to a separate ordinance.

During the Dutch colonial rule, the laws for the natives were primarily the adat laws. Snouck Hurgronje, the Dutch Indonesian-Arabic scholar and statesman of the nineteenth century, first pointed out (menjelaskan) that, since customary practices (kebiasaan) among most of the peoples of the archipelago were dominated (dipengaruhi) by the Arabic word adat, or custom, adat also had legal connotation—so, adat became "adatrecht" in Dutch or "adat law" in English.

Many historians (ahli sejarah) stated that the traits or customs of the people were the basis of adat law. Though deeply rooted in traditional culture, adat is an embodiment of the traditional values (nilai) and morals as well as an expression of universal values. Today adat law still regulates (mengatur) such aspects of life as marriage (perkawinan), birth (kelahiran), death, inheritance (warisan), and divorce (perceraian).

When speaking of the origin of laws in Indonesia, one must go back to the period



when the Indonesian archipelago was under Dutch Colonial rule. The Dutch brought with them the European system of government and other aspects of life, and European law was one of them. As has been previously mentioned (disebutkan), there were separate laws in the country under the colonial government in 1826. Different groups of people were subject to different laws. However, by 1848, there was a start towards codification of the law for the population along European lines by enacting (pengesahan) a Police and Procedure Code for Natives and Foreign Orientals of Java and Madura in 1848, and a Criminal Code for Natives in 1872. Thus (maka), even beginning from the Dutch Colonial rule, the nature of the law to be applied (yang digunakan) to each group of the different groups of peoples living in the country was one of the most difficult policy problems in the Netherlands East Indies.

Another factor which is of great significance in the study of the origin of law in Indonesia is the existence of the different ethnic groups (suku) in the country. The various ethnic groups have different cultural backgrounds, values and customs with regard to many aspects of communal life. For instance (umpamanya), concerning marriage, the Minangkabau follow the matrilineal system, while (sedangkan) the Batak adopt (memakai) the patrilineal system. In the Batak clan system, members of the clan should assist one another in marriage ceremonies, and a certain type of hierarchy in the marriage organization, such as who should be the speaker, is decided by custom. The bilateral system is common to most of the regions of Indonesia, including (termasuk) Java and Madura, East Sumatra, Riau, Aceh, etc.

#### 4. Military Courts

##### A. Regular Military Courts

Military justice is ordinarily administered by a system of military courts, based on Law No. 5 of 1950. The system is made up of district military courts (pengadilan tentara),

high military courts (pengadilan tentara), high military courts (pengadilan tentara tinggi), and a supreme military court (pengadilan tentara agung). The Supreme Court (Mahkamah Agung) is also authorized to sit in on military sessions. Each branch of the armed forces—army, navy and air force—has its own courts.

Military courts have jurisdiction over the following persons:

1. all members of the Indonesian armed forces;
2. all persons who, either by statute or government regulation, are declared to be of the same status as members of the armed forces;
3. all persons belonging to a group of office which, based on statute, is deemed to be of the same status as the armed forces;
4. all persons not otherwise included in 1-3 who are designated by the Minister of Defense together with the Minister of Justice as subject to the jurisdiction of these courts.

B. In addition, by Presidential Decree, certain members of two "civilian defense" units (Hansip and Sukarelawan) have been made subject to the military codes and brought within the jurisdiction of the military courts. Also by Presidential Decree, jurisdiction has been extended to the police. The latter are treated as a separate branch of the armed forces, and as such have their own courts.

##### C. Extraordinary Military Courts (Mahkamah, Militer Luar Biasa—MAHMILUB)

The MAHMILUB is a military court established by Presidential Decree in 1963 with original and exclusive jurisdiction over any person—civilian or military—designated by the President. Judges and prosecutors are military personnel nominated by the respective chiefs of staff of the armed forces and appointed by the President. There must be at least three judges.

D. Joint Military Courts (Mahkamah Bersama Angkatan Bersenjata—MAHSAMANTA)

In areas where military personnel from different branches of the armed forces are stationed together—such as Jakarta—crimes are sometimes committed jointly by persons from different branches. Such joint crimes may be tried by the MAHSAMANTA, a court with jurisdiction over crimes in Jakarta committed jointly by persons from the different armed forces, police, Hansip and Sukarelawan. Judges are military personnel nominated by the respective chiefs of staff and appointed by the chairman of the joint chiefs. A minimum of three judges is required.

E. Although the MAHSAMANTA exists only for Jakarta, the President has authority to set up similar courts in other regions if they are needed.

5. *Religions Courts (Pengadilan Agama)*

Throughout Indonesia there are religious courts with jurisdiction over disputes between husbands and wives of the Islamic

faith, and also over cases involving Islamic law in enumerated areas (such as dowry, divorce, inheritance and gifts) to the extent that such areas have not been superceded by statutory law applicable to the Islamic population.

The structure, procedure and names of these courts vary slightly depending on which of three regions they are located in, on Java and Madura, Banjarmasin (in Kalimantan) or the rest of Indonesia the courts in each region being subject to a separate piece of legislation. Each region also has an appellate court which hears cases on appeal from the regular religious courts and jurisdictional disputes between those courts. Judges in each area are appointed by the Minister of Religion. To be enforced, the decision of a religious court needs the approval of an ordinary district court (*pengadilan negeri*). Within the Ministry of Religion, the Head of the Directorate of Religious Justice has been authorized by the Minister to decide on appeals from the appellate courts. And under Law No. 13 of 1965, the Supreme Court is authorized to grant cessation.

# The Malaysian Policy Perspectives on Contemporary Problems in Crime Prevention and Criminal Justice Administration

by Syed Ibrahim bin Syed Abdul Rahman\*

## 1. Malaysia in Profile

Malaysia covers an area of about 330,307 square kilometers, occupying the Malay Peninsula and the states of Sabah and Sarawak in the northwestern coastal area of Borneo Island. The country is situated near the equator between latitudes 1° and 7° north and longitudes 100° and 119° east. Malaysia, with a population of approximately 17 million people, is a fast-developing country in Southeast Asia. Her economy is precisely based on agriculture with developments in the industrial sector being actively pursued. Malaysian society is multiracial, multilingual and multicultural. There is mutual respect and tolerance for the customs, languages, religions and traditions of the different races, namely the Malays, Chinese, Indians and other ethnic groups upon which Malaysia maintains its unity in diversity.

## 2. The Malaysian Constitution

The Malaysian Constitution is the supreme law of the country. The Constitution, like all other parliamentary systems of government, is founded upon the "Doctrine of Separation of Powers." An underlying feature of the nation's Constitution and legal system is its adherence to the rule of law, a system based precisely on the English Common Law System, and the Independence of the Judiciary and a corpus of written common law judgments and statutes. The hopes and aspirations of Malaysians are reflected in the Ma-

laysian Constitution which safeguards peace and harmony and ensures political and social stability.

## 3. Crime Situation in Malaysia (1980-1989)

A downward crime trend was noted for the ten-year period between the years 1980-1989. Indexed Crime offenses recorded a decrease of 7.5%, from 70,823 offenses in 1980 to 65,510 in 1989. However, crime hit an all-time high of 95,159 offenses in 1986. In 1987, after a year of rigorous counteraction, Index Crime offenses dropped by 10.41% when compared to 1986. There was a further decrease of 7.94% in 1988 over 1987 and a very significant decrease of 16.52% in 1989 as compared to 1988. The crime per 100,000 population ratio for the year 1988/1989 period decreased by 19.5%, from 478 crimes per 100,000 in 1988 to 385 per 100,000 in 1989.

The graph showing Crime Statistics of Malaysia for the period from 1980-1989 is an Appendix.

## 4. Common Offenses Identified

Four common criminal offenses which are most relevant and preventable in nature have been identified as critical to the crime situation of the country and have been the focus and concern of enforcement and preventive action. They are:

- Robbery using firearms;
- Theft of motor vehicles;
- House burglary and theft; and
- Other thefts.

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These crimes taken together constitute approximately 90% of the total volume of crime recorded annually in Malaysia. In 1989 alone, the total volume of crime recorded in Malaysia was 65,510, of which 5,479 cases of robbery were reported; 14,068 for theft of motor vehicles; 16,984 for house burglary and theft and 23,057 for other thefts. Other thefts alone contributed to about 37% of the total annual volume of crime.

### 5. Factors Influencing Crime in Malaysia

Many socio-economic factors have been identified as influencing crime trends and patterns in Malaysia. However, no one factor can be conclusively singled out as being the main cause. It has been observed that crime does not necessarily increase with economic development *per se*. But the socio-economic conditions that are created as a result of development may give rise to greater opportunities for the commission of crime. The difference in wage earnings and social mobility such as the rural-urban drift have influenced crime in Malaysia. We have also observed that in Malaysia, population in itself does not satisfactorily explain crime trends, although it has been established that there is some degree of association/correlation between population and crime. It has been noted in Malaysia that other demographic variables such as racial composition/distribution and population structure have a profound influence of the incidence of crime.

Other contributory factors to crime in Malaysia have been identified as:

- The rural-urban migration phenomenon.
- The Dadah or drug problem. For the period 1986-1989, 45,019 people were arrested for various drug offenses.
- Triad or secret society activities.
- The influx of illegal immigrants and refugees since the 1970s.
- Burgeoning unemployment due to the re-

cession of 1983-1988.

### 6. Effective Crime Prevention Policies and Strategies

Crime, though part and parcel of societal life, is for the most part not unpreventable. Despite this fact, it is becoming a source of insecurity and concern in Malaysia and most parts of the world. In view of its seriousness and the lack of means in combating it, there is an urgent need for an adequate and positive response at the national, regional and international levels. Certain traditional methods practiced are no longer effective to combat crime, and new thinking is therefore required. What is required is the elaboration of policies and strategies fully responsive to day-to-day realities and needs, taking into account the constantly changing needs of society. It has been stated that crime could no longer be treated as an isolated problem to be tackled by *ad hoc* simplistic and fragmentary methods, but rather as a complex and multi-dimensional phenomenon requiring systematic strategies and differential approaches. Effective co-ordination between criminal justice agencies and public police cooperation will have to be activated to eliminate possible opportunities of crime. In short, an integrated approach with active and continuous participation of all concerned is necessary for the realization of our crime prevention objective.

### 7. Formation of Police Crime Prevention Branch

In Malaysia, the Police Crime Prevention Branch was set up in 1986 with the fundamental objective of mobilizing the public to prevent crimes, a problem which now does not only concern the police but every citizen of Malaysia. The inception of the Crime Prevention Department was based on the realization of two premises; first, that manpower must be effectively used and geared against crime upon which policing methods

can make an impact, and second, that public support must be harnessed to deal with random and opportunist crime against which police action alone cannot wholly be effective. Guided by these two premises, the police have set about to implement a "Pro-Active Policing Strategy," and on the part of the public, Community Policing Schemes in the form of the Neighborhood Watch Group and other crime prevention activities and programs now form the structural framework of a nationwide crime prevention strategy.

(1) One part of this twin strategy is the implementation of the "Pro-Active Policing Strategy," whereby the police at all levels will take the initiative to reach out and communicate with the public through all channels and avenues available with a view to foster good police/public relations. This is done through school and home visits, dialogues, briefings, meetings and joint community projects with the relevant authorities, associations or groups concerned.

(2) The police have formed Crime Prevention Committees for all 14 states, 121 districts and 694 station levels to plan, initiate and monitor all crime prevention activities in their respective areas of jurisdiction. The Pro-Active Policing is also complemented with other crime prevention schemes that will ultimately have the whole population working hand in hand with the police. The "Neighborhood Watch Scheme" is the other scheme referred to. Through its "self-help" philosophy, the Neighborhood Watch Scheme brings residents together into informal groupings to keep their neighborhoods crime-free. This scheme works as a simple concept of encouraging residents to be good friends with their neighbors, which will automatically nurture a sense of care and concern for one another, thereby developing a friendly obligation to help one another in times of distress. A resident will keep a friendly eye on his neighbor's house and

property, especially when he and his family go on an outing.

(3) The "self-help" schemes of Neighborhood Watch Scheme and Crime Prevention Committees are not, however, totally crime-proof. Neighborhood Watch Scheme and Crime Prevention Committee measures cannot be alert to suspicious activities all the time. Security devices, therefore, play an important role in supplementing human efforts. It is for this purpose that the police frequently promote the use of security devices through television, radio, pamphlets, posters and the press. From time to time, the police organize exhibitions with security device companies and other volunteers to urge residents and businessmen to install good locks, alarms, safes and electronic devices, ect. on their premises. In addition, motorcar and motorcycle owners are constantly urged to have their vehicles engraved with identification marks to detect theft.

(4) It is heartening to note that since the formation of the Crime Prevention Branch and the implementation of the various crime prevention strategies and programs, the national index crime rate has shown a continuous downward trend of 10.41% for the year 1987 as compared to 1986 and 7.94% for 1988 as compared to 1987, and a further reduction of 16.52% when compared to 1988 figures. Therefore, it can be concluded that Malaysians today are more crime-prevention conscious than they were in 1986 when the incidence of index crimes reported was at its highest in the country.

It is true that there is no single factor strategy of combating crimes. Nevertheless, we realize that by complementing traditional police efforts, crime prevention can go a long way toward making crime control a lot easier. This being the case, there should be no let-up in public police cooperation as we firmly believe that together the public and the police can prevent crime successfully.

## 8. Preventive Arrests and Rehabilitation Measures

Over and above some of the penal laws providing for increased and stiffer penalties, there exist in Malaysia preventive laws that are invoked against a certain category of criminal offenders. These preventive laws provide for the more effectual prevention of crime and for the control of criminals, members of secret societies and other undesirable persons. These laws further provide for the securing of public order and the suppression of violence. It also provides for the preventive detention of those with a history of using violence in furtherance of criminal activities.

I must mention here that it is through the enforcement of these laws that triad and other organized criminal activity in Malaysia have been contained considerably.

## 9. The Role of the Prison Department

The duties and responsibilities of the department are contained in the Prisons Ordinance of 1952. Among other aspects this statute provides for:

- The admission, discharge, removal and safe custody of prisoners;
- The treatment of prisoners (bedding, clothing, cleanliness, diets, etc.);
- Letters and visits to prisoners;
- Religious instructions, education and general welfare of prisoners.

## 10. Rehabilitation Measures

Inmates are provided with vocational training and academic lessons. They are also given spiritual and moral guidance through religious instructions and worship. Rehabilitation-related activities for prisoners about to be discharged include:

- Undertaking community projects like repair work on the homes of the aged and

handicapped;

- Landscaping activities;
- Being gainfully employed in plantation, construction firms and in agricultural activities.

To enable discharged prisoners to get back into the mainstream of social activity through the process of rehabilitation and reintegration, the *Society for the Aid of Discharged Prisoners* has been established. The objectives of this society are:

- To ensure that discharged prisoners are gainfully employed;
- To assist them in finding suitable accommodations;
- And to look into their other welfare needs.

## 11. Response to Overcrowding in Prisons

In view of the growing prison population the department has taken positive measures to evenly accommodate prison inmates in some of the 21 prisons and 14 rehabilitation/correctional and protection centers in the country. A new prison has also been constructed and is now occupied. Action is under way to convert certain existing prisons only for remand prisoners (prisoners awaiting trial). This action has to an extent helped to address the problem of overcrowding in prisons and centers and in the process it has contributed substantially to better amenities, facilities and improved prison conditions making for better treatment of prison inmates.

## 12. Role of the Courts

*Overcoming the Backlog of Cases and Delays in Judicial Proceedings:* Overcoming the backlog of cases and the ensuing delay of judicial proceedings is being viewed seriously by Judicial Administrators. To ensure that justice is done, priority has been given to hasten judicial proceedings and to dispose of all re-

mand and other pending legal matters. On this score, judges, judicial commissioners and magistrates have been appointed to further streamline the administration of the courts and to further contribute to their functional requirements.

Furthermore, the act of granting postponements of cases either on the request of the prosecution or the defense has been subjected to severe scrutiny and rules have been formulated to check the cause of delay. It has been decided that request for postponements can be granted only in certain exceptional and pressing circumstances and situations. It is hoped that with this action delays in court proceedings will be minimized.

### 13. International Cooperation in Crime Prevention

It has long been recognized by the Royal Malaysia Police that preventive measures within the country alone are not sufficient to effectively counter the incidence of criminality in the country and that external factors must also be given due consideration. In this context it was felt that prevention must have an international dimension.

1. By virtue of the close proximity of countries in the Southeast Asia region and taking cognizance of the fact that organized crime and some other criminal activities have become transnational, and that there is a need for mutual action and assistance in the detection and deterrence of these crimes and criminals, regional police cooperation has always been viewed as the only practical means by which local enforcement authorities can pursue a criminal matter outside its jurisdiction. In this respect, the Royal Malaysia Police is not only a member of the I.C.P.O., Interpol, but has established a close working relationship with countries in the ASEAN (Association of South East Asian Nations) region through the following:

#### (1) *Regional Police Cooperation*

The Association of National Police Forces of the ASEAN Region: In 1981 ASEAN Chiefs of Police, namely those of Singapore, Indonesia, Thailand, the Philippines, Malaysia, and more recently Negara Brunei Darussalam, held their first conference in Manila, formalizing and charting the destiny of the Association consistent with crime-related matters. This is an annual conference and venues alternate among member countries.

#### (2) *Bilateral Cooperation*

Malaysia has always viewed that the limitations of regional cooperation within a formal framework should not prevent countries of the region from trying to forge the closest possible links on a bilateral basis with one another. Such bilateral contacts which may be mutually acceptable should be pursued as far as possible. In this respect, the Royal Malaysia Police is already in close bilateral cooperation with the following countries:

#### (a) The Malaysia/Singapore Criminal Investigation Department Liaison Meeting

Meetings between the C.I.D.s of Malaysia and Singapore are held quarterly. C.I.D.-related matters are discussed and criminal intelligence is exchanged at these meetings.

#### (b) The Joint Malaysia/Thailand Working Committee on Criminal Activity

This working committee has just been formalized. This bilateral arrangement will further center around the exchange of criminal intelligence and on matters relating to the improvement of communication on the following types of crimes:

- Smuggling;
- Forgery/Currency Counterfeiting;
- Robbery/Extortion;
- Other syndicate criminal activities with regional implications and related matters;
- The handing over of fugitive criminal offenders.

The Royal Malaysia Police has a special

relationship with the office of the Narcotic Central Board (O.N.C.B.) of Thailand. A bilateral meeting is held once a year.

(c) Indonesia/Malaysia

The "Rapat" conference is held annually between the Royal Malaysia Police and the Republic of Indonesia Police. A strong working relationship between the forces has been firmly established.

2. Scope of Cooperation: The scope of police cooperation either on a regional or bilateral basis has centered around 3 main areas:

- Preventive Intelligence;
- Exchange of Information and Effective Communication in Urgent Cases;
- The Exchange of Personnel and Training, taking the form of familiarization attachments and course attendance.

With these regional meetings, the police force is now able to relate better and is mutually responsive to relevant police matters.

## 16. Conclusion

The Royal Malaysia Police, as part of the Malaysian Criminal Justice System, subscribes to the view that initiatives in crime prevention, hitherto taken in isolation, must now be taken by concerted action, and that future activities should involve everyone and every sector concerned, i.e. groups of citizens, private and public organizations, the legal and judicial services, the correctional agencies, the municipal and rural authorities, education circles, social welfare services, clubs, associations and guilds. Expanding social consciousness and community awareness are essential factors in the efforts to reverse the current trend toward growing criminal activities. In marking its 182nd anniversary on March 25th, the Royal Malaysia Police adopted as the year's theme the following:

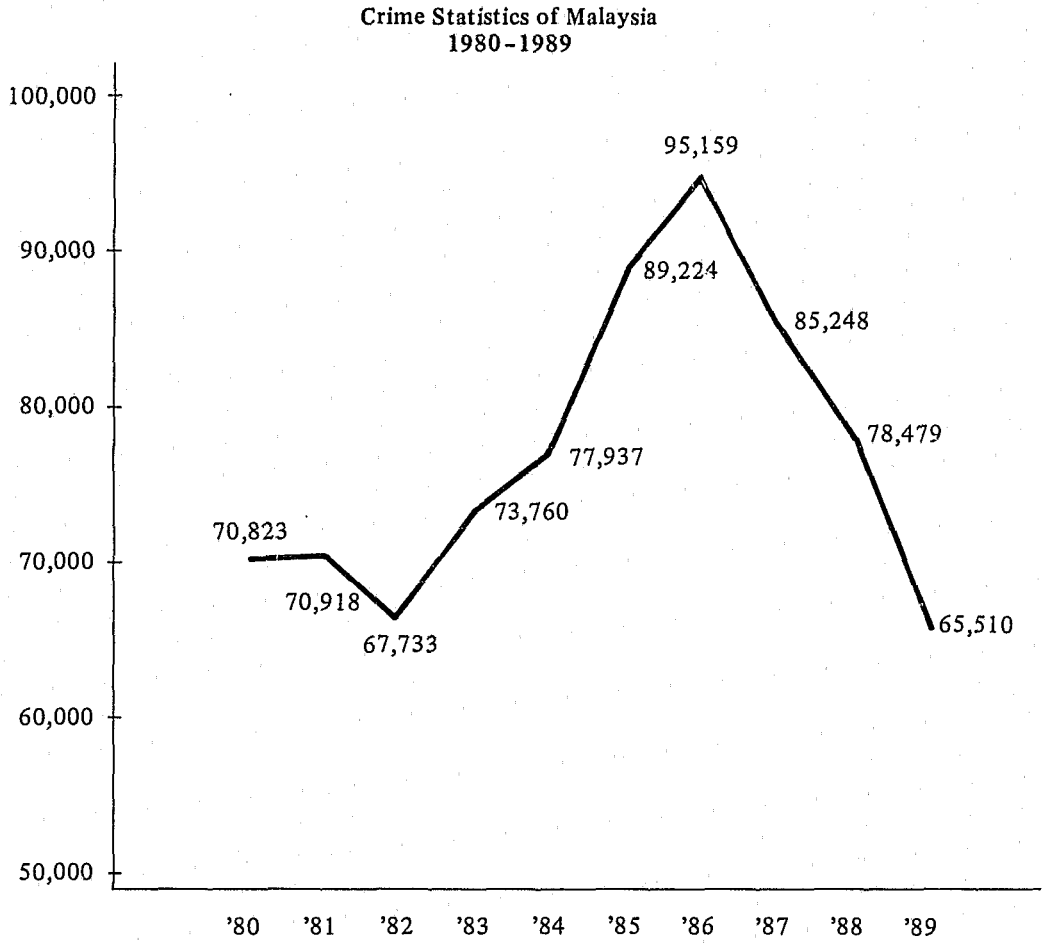
"The people and the police: together in crime and prevention and suppression."

We hope that through this integrated approach, we will achieve even better success in the future.



MALAYSIAN POLICY PERSPECTIVES

Appendix



# Alternatives to Imprisonment to Cope with Overcrowding

by *Pricha Songsamphant*\*

## Introduction

The responsibilities of correctional institutions are the care, custody and rehabilitation of prisoners. The chief objective of the three-fold functions is to develop persons in custody's behaviour for their return to the community. To achieve this goal, qualified personnel and effective administrations through appropriate financing is needed. But in the last decade, the Thailand prison population rate has climbed higher each year due to the increase of crime and gross number of offenders, while the financial support for corrections remains insufficient. The overcrowding thus creates many problems in corrections.

## Problems of Overcrowding

The overcrowded prisons undoubtedly generate ill affects on the correctional system and the prisoners. The stipulated capacity of all correctional institutions is 40,000 inmates yet 64,996 prisoners have been detained.<sup>1</sup> A 4×6 metre-room which has the capacity for 4 persons has held 12 inmates. Despite the proper ratio of prison officers to prison inmates regulated by the Ministry of Interior, 1:5, proportion has reached 1:11 in reality. The overpopulated prison brings about problems, such as increasing expenditure for correctional works, undisciplined and ineffective rehabilitation, education, vocational training, increased escapes by prisoners, a strain on welfare treatment, and

the spiritual environment.

## Prison Population

The crime rate in Thailand has been increasing every year. Imprisonment is frequently imposed on offenders by sentencing courts because the sanction is deemed to be most protective for the public and likely to serve as a deterrent. Prisoners awaiting trial, if not released on bail, are remanded in custody and detained in prisons; consequently, the prisons become overpopulated. The statistical data shows that in each year the number of prisoners admitted is higher than those released, save for the year of 1988 when a great number of them were released by royal pardon, where as the fiscal budget allocated for the Department of Corrections still remains the same. Level of support increase appears impossible because of serious constraints on all other public expenditures and the increasing burden on taxpayers.

## Remedial Alternatives

It is generally recognized that remedial measures must be taken to cope with problems of overcrowding. Penal and correctional authorities encourage the use of various alternatives to imprisonment for offenders who do not require institutional confinement. Those alternatives are fine, bail, pardon, parole, probation, suspended prosecution. Fine and bail are routinely practiced with no complication to the individual accused or offender. But the rest are collective measures applied to groups of offenders as essential methods of resolution. These alternatives which are worth reporting are:

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## ALTERNATIVES TO IMPRISONMENT

Table 1: Number of Prison Population<sup>2</sup>

Year	1985	1986	1987	1988
Admission	188,728	190,686	198,337	209,400
Releases	100,656	98,845	102,347	144,404
Total Balance	88,072	91,841	95,990	64,996

Table 2: Budget Received by Department of Corrections<sup>3</sup>

Year	1985	1986	1987	1988
Bahts <sup>4</sup>	926,765,885	903,044,225	945,863,329	893,588,377

1. Royal Pardon,
2. Probation,
3. Parole,
4. Suspended Prosecution.

### *Royal Pardon*

In the old days, a royal pardon was the sole authorization by the King for granting pardon to convicted offenders on the occasion of changing reigns.

At present it has become a governmental means and legal process for providing royal approval in dispensing mercy and relief to prisoners by releasing or remitting sentence under the determination of a committee appointed by the Department of Corrections. Occasions for the grant of royal pardon have been enlarged to a wide variety of national events.

Royal pardon may be divided into 2 kinds.

#### 1. Individual Pardon

Individual royal pardon to a person is authorized under section 259 and 261 of Thai Criminal Procedure Code of Thailand which provides:

*Section 259:* After a case has become final, a person sentenced to whatever punishment or an interested person wishing to petition to the King praying for pardon, may do so

by submitting such petition to the State Council in charge of the Ministry of the Interior.

*Section 261:* In the case where the Council of Minister thinks fit, he may submit to the King a recommendation for the grant of a pardon to the person receiving the punishment.

#### 2. Collective Pardon

Collective pardon is a pardon occasionally granted for a group of eligible prisoners on special and important national events such as the King's 60th Birthday and the Celebration of Bangkok's Bicentennial.

Convicted prisoners who are granted royal pardons will be released or credited with remission of sentence before the expiration of their sentence. All released prisoners will not be subject to a statutory period of post released supervision.

A major reason for granting a royal pardon is to relieve tension and bring good hope to prison inmates as it is indicated in a recommendation to the King for granting a pardon in 1979 as "From the comparison of statistical data, Thailand has a rather high ratio of prisoners to general population compared with other countries. The cause of offences is due to the socio-economic changes which inspire the poor, living in hardship, to com-

mit crimes against their will. Those convicted prisoners are in a state of spiritual despair. If a pardon is granted it will bring hope and good will toward the society."

Royal pardon is a significant measure to cope with overcrowding of prisoners in Thailand. In 1988, the number of convicted prisoners decreased by one-third through pardon. But recently statistical reports show 14% of convicted prisoners<sup>5</sup> are recidivists and society still requires protection against dangerous persons by placing them in prisons. The alternative of royal pardon makes the public perplexed as to conflict between penal measures of incarcerating criminals and the aim of corrections which is to release them. Many evaluate the latter alternative as being weak law enforcement and believe that it will finally bring on repetitive crimes.<sup>6</sup> The defect of royal pardon is that it requires no post supervision and aftercare services. Furthermore it also gives even repetitive offenders a chance to make requests for eligibility.

#### *Probation*

Probation is an alternative to the imprisonment system derived from the development of criminal justice. It is aimed to reform criminals by means of care and supervision without the necessity of segregating them from society.

Probation in Thailand is adopted from the original English system as a result of the western educational influence spreading throughout the country. It started in 1952 but was used only with juvenile delinquents. The measure was not applied for adult offenders despite the authorization of section 56 of the Thai Penal Code which states that courts may use suspension of imprisonment either with or without supervision.

Section 56 provides as follows:

*Section 56:* In the case where any person commits an offence, the punishment of which is imprisonment, the Court may, in such case, impose a term not exceeding two

years. If it appears that the offender has not been previously punished with imprisonment, or it appears that former punishment was for an offence committed through negligence or a petty offence, the Court may take into consideration the offender's age, past record, behaviour, intelligence, education and instruction, health, condition of mind, habit, calling and environment of the offender, the nature of the offence, and other extenuating circumstances, and render a judgement of guilt, but determine that punishment be suspended. In this case the offender is released with or without conditions for controlling his behaviour so as to give him an opportunity to reform himself within a period of time to be determined by the Court but not exceeding five years as from the day on which the court gives judgement.

Regarding the conditions for controlling the behaviour of the offender, the Court may determine one or more condition as follows:

- (1) To report to the official specified by the Court from time to time so that the official may make inquiries, give advice, assistance or admonition on the behaviour and job-related activities;
- (2) To be trained or to do the work substantially;
- (3) To refrain from going into social situations or exhibiting behaviour which may lead to the commission of the same offence again.

Regarding any conditions determined by the Court according to the preceding paragraph, if it appears to the Court afterwards from the request of the offender, his legal representative or guardian, the public prosecutor or official that the behaviour of the offender has changed, the Court may, if it thinks fit, modify or revoke any of the conditions.

Notwithstanding the above provisions, criminal proceedings still concentrate mostly on the act or offence committed by

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offenders for consideration of suspended imprisonment rather than personal characteristic and record of offenders. This may be because of a lack of authorized officers for pre-sentence investigation. Sometimes information regarding the offender's behaviour, intelligence or educational background is scarce or omitted entirely from the file of police reports. Most of the facts come from the statement of offenders themselves instead of fact-finding by officers. At the same time there was no responsibility for post-supervision and documentation on offender compliance with conditions laid down by the courts. The courts, therefore, without confidence frequently gave judgements for suspended imprisonment without conditions for controlling offenders' behaviour.

In 1979 the Ministry of Justice, realizing the need for probation duties set up a new office called Central Probation Office to fulfil the requirement of law.

With Support by Probation Act., the office administers its three main divisions concerning probation:

### 1. Division of Investigation and Report

This division is assigned to investigate and document offenders' past records and environment and prepare pre-sentence opinions for submission to the courts for consideration of probation with certain offenders.

### 2. Division of Examination and Supervision

This division is responsible for supervision of offenders who were placed under probation and to determine whether they comply with conditions laid down by courts and report to the Court about the offender's behaviour for modifying or revoking conditions.

### 3. Division of Statistics and Planning

This division is responsible for collecting data, research and planning for the whole process of probation.

**Table 3: Number of Cases under Pre-Sentence Investigation and Post-Sentence Supervision<sup>7</sup>**

Year	Pre-Sentence Investigation	Post-Sentence Supervision
1985	4,796	7,876
1986	7,390	9,399
1987	9,540	11,154
1988	10,577	10,367

Probation for adults, however, still faces obstacles due to its introduction and operation for only a decade and there are still problems of procedures and insufficient officers. The investigation and reporting takes time and the fact-finding process always keeps offenders waiting for trial for long periods of custody. Furthermore it is found that offenders who are placed under supervised release do not in good faith cooperate with officers and adjust themselves to lawful purposes.

### *Parole*

Parole is an alternative to imprisonment awarded to prisoners who have demonstrated good behaviour.

Convicted prisoners are eligible for a parole board hearing after two-thirds of their sentence term has been served. The released parolees are subject to a statutory period of aftercare supervision for the remainder of their original term. During this supervisory period, if they fail to comply with the conditions laid down in a supervision order, they may be recalled for further imprisonment.

The eligible prisoners for parole have been stipulated under section 32 of correctional law as follows:

- (1) Must be a convicted prisoner who has good behaviour, diligent, progressive in education, showing good progress beneficial to royal government.
- (2) Having served two-thirds of the sentence under the warrant to imprisonment or at

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least having been ten years imprisoned in case of life imprisonment.

- (3) Must be excellent, very good or good class prisoners.
- (4) The excellent class prisoners are eligible to be granted one-third of their original term of sentence.
- (5) The very good class prisoners are eligible to be granted parole of up to one-fourth of their original term of sentence.
- (6) The good class prisoners are eligible to be granted parole of up to one-fifth of their original term of sentence.

**Table 4: Number of Released Prisoners on Parole<sup>8</sup>**

Year	Convicted Prisoners Admitted	Granted Parolee	Percentage
1985	44,454	1,503	3.12%
1986	64,377	1,956	3.03%
1987	73,296	2,278	3.10%
1988	43,746	706	3.11%

Parole is observed as an effective and practical system in resolving the overpopulated prisoners problem but it has not yet been reached major goal because of unqualified and insufficient parole officers. Besides this, short-term convicted prisoners find difficulty in taking advantage of parole because of the long process of classification of prisoners as well as parole board hearings and consideration.

### *Suspended Prosecution*

Suspended prosecution is a means for the public prosecutor to consider the accused and ways to improve behavior and handle them without trial by courts. If the accused will be released from detention earlier, it will relieve them and their families from grave and burdensome expenses.

The program of suspended prosecution was proposed by the Department of Public Prosecution to the Ministry of Interior for promulgation by law. But up to the present time it has not been utilized due to prolonged consideration of applicability and uncertainty of policies.

The proposed conditions for eligibility of offenders to be placed under suspended prosecution are:

#### (1) Violation of Penal Code

- 1) Offence by misunderstanding of facts under section 62 of the Penal Code.
- 2) Offence by ignorance of law under section 64 of the Penal Code.
- 3) Self-defence or offence on account of necessity, if the act committed in excess of necessity or for defence under section 69 of Penal Code.
- 4) Offence at the time of grave or unjust maltreatment under section 72 of Penal Code.
- 5) Offence by negligence causing death or grievous bodily harm but the accused made compensation such as paying compensation for medical treatment, damages, funeral expenses to the injured persons or their heirs under section 291, 300 of Penal Code.
- 6) Offence of theft but committed against the will or on account of unbearable poverty or property stolen is of little value under section 334 of Penal Code.

#### (2) Commission of Other Acts

- 1) Carrying firearms in a town, village or public way without permission.
- 2) The accused admits guilt.
- 3) The accused makes a request for suspended prosecution.

Public prosecutors, after receiving the report, and after noting that the accused has not received punishment of imprisonment previously, or it appears that the previous punishment was for petty offence, after consideration of age, past record, behaviour in-

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telligence, education and training, health, condition of mind, habit, occupation and environment of the accused or nature of the offence or other extenuating circumstances, if the public prosecutor thinks suspended prosecution is needed, he will send the report to the Prosecutor General for consideration. During the period of waiting, the accused will be temporarily released.

If the Prosecutor General determines suspended prosecution, the accused will be released with at most a two-year period for controlling the accused behaviour.

The program for suspension based on the practice of discretionary power of public prosecutor receives generally favourable support and has been written in the master plan of Ministry of Interior for 1987-1991. But there are still obstacles in introducing this practice. First, it is questioned by the Ministry of Justice on the grounds that it will deprive them of judicial power regarding trial. The disagreement may eventually bring on non-cooperation. Secondly, Department of Public Prosecution has no subordinate organ for probation activities and establishment of a new office will create a costly and repetitive workload in the Central Probation Office.

### Conclusion

To solve problems of prisoner overcrowding, four alternatives should be applied simultaneously. Among them, royal pardon is the most defective due to lack of conditional supervision and aftercare service. To strengthen public trust in legal enforcement and to safeguard the community, the frequency and scale of this alternative should be limited somewhat.

Parole and probation are recognized practices, but surprisingly they are employed to

a lesser extent when compared with other countries. Both alternatives are worth expansion provided that parole and probative officers are strengthened quantitatively and qualitatively. The conditions laid down should also be evolved to enhance more eligible opportunities for short-term prisoners.

Suspended Prosecution gains wide acceptance save for the Ministry of Justice. This alternative will help eliminate prisoners waiting for trial remanded in custody form prison. But the feasibility of practice is still in doubt because the Department of Public Prosecution has no subordinative organ to carry out probation activities/functions. There is little likelihood that they may receive assistance or cooperation from the Central Probation Office which is attached to a different Ministry. If this measure is adopted, the Central Probation Office should be recognized as the sole responsible organ for probation so as to prevent overlap and redundancy.

### Notes

1. Daves Choosap, *Innovation in Criminal Justice in Thailand, Criminal Justice in Asia*, p. 314, UNAFEI 1982.
2. Annual Report 1985-1988, Department of Corrections, Ministry of Interior.
3. Ibid.
4. 100 Yen = 17.53 Baht (Buying rate).
5. Annual Report 1987, Department of Corrections.
6. Viroengrong Ratanavilaikul, *Attitude of Criminal Justice Personnel toward the Solutions of the Overpopulated Prison in Bangkok Metropolis (A thesis for master's degree of social science)*, 1987, p. 55.
7. Ten years of Adult Probation, Central Probation Office Report 1989.
8. Annual Report 1988, Department of Corrections.

## Reforms in Treatment Measures for Juvenile Offenders —An Experience in Japan—

*by Mitutaka Kawamoto\**

### I. Introduction

The purpose of this paper is to compare the responses of juvenile justice in Japan to the changes in forms and dimensions of juvenile delinquency during a quarter of century from 1955 to 1979, putting the main focus on the response of juvenile courts and on the reforms in juvenile custodial correction, probation and parole. How did each of these juvenile justice agencies succeed or fail to make appropriate responses to changing situations? The paper also aims to provide a better understanding for the current setting of juvenile justice as an outgrowth feature of past reforms and modifications and to reveal the factors to be considered for continuous reforms in this field.

### II. Change of Juvenile Delinquency during 25 Years from 1955 to 1979

Some interesting facts about the change of juvenile delinquency can be found in the past 25 years (see Table 1). First, the total number of juvenile delinquents had an increasing trend during the decade from 1955 to 1965, but during following decade of 1965 to 1975 there was a decreasing trend. However, there was another increasing trend again in the late 1970s. Mostly "traffic offenders" and "minor" offenders contributed to this trend. Second, those juveniles who committed the most serious offences like murder, rape, robbery and arson increased until 1960, but since then decreased

rapidly. In 1979, the number of those juveniles was almost less than half of that in 1955. Those "moderate serious" juvenile offenders who committed assault or extortion showed the same trend as the most serious ones. In 1979, they numbered the same as that in 1955. Third, drug abusers who mainly abused stimulant drugs or sniffed painting thinner disappeared after 1955 and suddenly came back in 1975, increasing very rapidly ever since. However, the most interesting fact is that the distribution of seriousness of juvenile non-traffic offenders did not change remarkably during this 25 year period.

### III. Change of Dispositions in Family Courts

The dispositions on non-traffic juvenile offenders in family courts are shown in Table 2. It is undoubtedly clear that the rate of dismissal before hearing increased remarkably while those of probation and commitment to juvenile training schools drastically decreased especially during the two decades from 1955 to 1975. Considering the finding that the severity of distribution did not change much during those two decades, this fact implies that sentencing policy became unlikely to take intensive protective or rehabilitative measures such as probation and commitment to juvenile training school.

Some explanations can be made about the causes of this inclination in the family courts decision making. The ideal setting for sentencing is that the most appropriate measure can be taken precisely according to the individual juvenile's need for protection or rehabilitation. The degree of individual juvenile offenders need for rehabilitation

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must reflect on the type of measures, the difference of treatment term and the diversity of treatment programme. However, the setting of protective measures for juvenile offenders at least before 1977 was far away from the ideal in continuance of the intensity of protective measures and diversity of treatment term and programme.

First of all, there seems to exist a judicial recognition that the difference in intensity or severity as a treatment measure between probationary supervision and commitment to juvenile school had been so vast that judges in family courts were likely to put borderline cases on probation. Of course, this tendency was to some extent influenced by the prevailing trend of deinstitutionalization in criminal justice philosophy. But the greatest reason was that the average term of incarceration in juvenile training school was fixed relatively long.

Second, the treatment terms in both probationary supervision and commitment to juvenile school were not so flexible to reflect the degree of the juveniles' individual needs for rehabilitation. The probation term was determined by the statute up to 20 years of age or two years in case of a juvenile over 18 years of age. As a result, when a juvenile is put on probation at 14 years of age, he may be supervised for as long as six years up to 20 years of age. Probation offices hold the discretionary power for early discharge, but at least before the 1970s it was not invoked to the extent of meeting individual juvenile need for treatment by terminating unnecessary supervision. The term of commitment for juvenile training school also was fixed rather indiscriminately about 12 to 14 months. Although the Parole Board had both the authority to release juveniles from training schools, whether putting them on parole or not, and to discharge them from parole supervision, they did not exercise their power so actively as duly expected.

Third, treatment programmes in both probation and juvenile training school were monotonous. Probationary supervision was

undertaken by the traditional one-to-one case-work method. Although juvenile training schools were classified into four types, that is, primary ones for those from age 14 to 16, middle ones for age 16 to 20, advanced ones for serious juvenile offenders and medical ones for those needing medical care, the main emphasis of correctional programmes was placed only on vocational and academic education and did not have much variety.

These defects in juvenile treatment mechanism existed potentially from the beginning of the enactment of Juvenile Law in 1949, and gradually appeared on the surface and were more clearly recognized in both family courts and juvenile correctional agencies as time passed, especially as the population of probationers and inmates in juvenile training schools decreased. At least in the 1970s, three juvenile justice agencies, family courts, probation and parole agencies and institutional correctional agencies, felt the keen necessity for some drastic reforms in juvenile treatment measures, and correctional agencies, both institutional and non-institutional, started reform work in each field.

### **IV. Reforms in Treatment Measures for Juvenile Offenders around 1977**

The year of 1977 was the epoch-making one for juvenile correction in Japan. In the field of probation, short-term programmes for juvenile traffic offenders was introduced. The treatment term of this programme was only for three or four months during which a probationer is required, instead of individual supervision by a professional or volunteer probation officer, to attend a group meeting at least two times for learning good driving manners and a law-abiding attitude and to report once a month to a probation officer by mail. If he or she fulfills these two requirements and does not commit any serious offences including traffic offences, he or she is granted early discharge immediately.

For non-traffic offenders, probation offices started from about 1975 to make full use of

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the discretionary power of early discharge from probationary supervision, so that they could avoid unnecessary supervision as soon as possible. In addition, it should not be ignored that a special programme for a traffic juvenile probationer had already been introduced in 1974. In this programme, the traditional supervision method was maintained but the group work method like that in the short-term programme was introduced and the supervision term was shortened to as short as about six months.

Juvenile training schools also made very extensive reforms in their operation. One is the introduction of short-term programmes both for traffic offenders and for non-traffic ones. This programme is a kind of combined one of institutional and non-institutional programmes, called "split sentences" in some countries. In order to make the treatment term shorter, the discretionary power of the Parole Board is fully utilized. The Parole Board releases a juvenile under this programme on parole as early as three months in case of a traffic offender or six months in the case of a non-traffic offender after the incarceration, and then discharges him from parole supervision as early as within six months, so that the total treatment term of this programme becomes less than one year. This programme may be the one to bridge the gap between probation and commitment to juvenile training school and to realize a continuance of treatment intensity among the juvenile treatment measures.

The type of treatment programmes in juvenile training schools was also expanded. In addition to classifying schools by age-classification of inmates, schools were reclassified by type of treatment programmes such as vocational, educational, living guidance and medical care programme. Thus, these reforms in juvenile correctional setting came to fulfill such requirements as the continuance of intensity of protective measures and the diversity of treatment term and programme that are essentially necessary for meeting the needs of individual case and for

satisfying the individual severity of offence.

Some points should be pointed out about these reforms in juvenile correction undertaken around 1977. First, the reforms were not accompanied by any legislative revisions. Juvenile Law, Juvenile Training School Law, and the law concerning juvenile probation were not revised at all. All reforms were done on a purely administrative basis, making full use of the discretionary power in the administration of correctional agencies. Second, the reforms were implemented through close cooperation between and among family courts and correctional agencies.

At the national level, the Secretariat of the Supreme Court, the Correction Bureau and the Rehabilitation Bureau of the Ministry of Justice, all of which have responsibility for the operation or administration of respective fields, negotiated in a very tough way, made every effort to find out the most appropriate way for all of them, and finally reached general guidelines which could be appropriately implemented all over the country. At the regional or local level, regional or local agencies of those three fields had continuous meetings to implement the general guideline on a practical basis. If cooperation was lacking at the national or local level, such extensive and difficult reforms could not have been implemented without any legislative measure.

Finally, it should not be ignored that efforts for the reformation in juvenile correction had already started before 1977. In probation, as already mentioned, special programmes for traffic offenders had come into practice in 1974. And some local probation-parole offices introduced on their own initiative such innovative programmes as short-term programmes for traffic offenders on an experimental basis. In regard to institutional corrections, some juvenile training schools also experimented with a kind of imaginative programme. These experimental efforts had yielded very good models which were successfully emulated in the subsequent reform work on a national level.

## V. Consequence of the Reformation

As a result of the foregoing reformation, the rate of commitment to juvenile schools increased in 1979, as shown in Table 2, in spite of the fact that, as shown in Table 1, the distribution of the severity of offences has not changed in 1979 (although the number of juvenile offenders increased). Namely, the dispositions in family courts have become less reluctant to choose incarceration and probation. This demonstrates that the cases which were considered too risky for probationary supervision in the free society but too severe to subject them to commitment to juvenile schools before 1977, have now been shifted toward the short-term programme at juvenile schools. Also, those juveniles who need some extent of treatment or supervision, but it would seem too severe for them to place them under probationary supervision before, have begun to be placed on probation with the expectation of early discharge.

## VI. Conclusion

Some lessons can be drawn from the before-mentioned Japanese experience in the reforms of juvenile correction. First is that the basic defects in the system, whether potential or not, such as the lack of intensity in the continuance of protective measures or the lack of diversity in correctional terms and programmes, are crucial to the effective administration of the juvenile justice system. This kind of defect cannot be rectified by an

effort of a single agency, however, hard it might try. It needs concerted actions of all the related agencies following a systems approach.

Second, the reforms of this fundamental nature can be undertaken on an administrative basis to some extent within the basic framework of the existing legislative statutes. Although the legislative revision may make the reformation more stable and effective, the legislation alone might not produce expected results unless and otherwise the related agencies are determined to effect the necessary reformation.

Third, the reforms need some preceding experimental attempts to verify the direction of reform, sufficient preparation particularly in terms of complete understanding among the related agencies and, of course, courage in the decision to carry them out.

However, the above-mentioned reform is not certainly a panacea for juvenile problems. It will be a help, but it should anticipate well planned and better coordinated measures with the wider participation of a larger number of agencies so as to meet the changing forms and dimensions of juvenile delinquency. The pressing problem for Japan is, like many other countries, the drug abuse problem. Much more must be done. Nonetheless, it can be safely claimed that however difficult the problem might appear to be, some solution will be found if and when all the related agencies would closely and wisely cooperate together so as to optimize their total effects as a system.

**Table 1: Juvenile Offenders Referred to Family Courts by the Type and Severity of Offenders**  
(Annual Report of Judicial Statistics, General Secretariat, Supreme Court)

Year	Total	Non-Traffic Offenders					Drug Offenders	Pre-Delinquents	Traffic Offenders
		Sub-total	High Serious	Moderate Serious	Low Serious				
Numbers									
1955	331,354	123,960	4,418	19,096	88,036	3,112	9,298	207,394	
1960	782,676	173,457	7,945	43,319	114,215	47	7,931	609,219	
1965	1,078,017	202,934	7,615	48,552	136,622	39	10,106	875,083	
1970	785,926	149,921	4,271	29,115	109,139	53	7,343	636,005	
1975	437,981	146,581	2,587	22,087	107,751	10,184	3,972	291,400	
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1979	540,820	191,393	1,979	19,890	139,123	25,975	4,426	349,427	
Index (100 = number in 1955)									
1955	100	100	100	100	100	100	100	100	
1960	236	140	178	226	130	2	85	294	
1965	325	164	172	254	155	1	109	422	
1970	237	121	97	152	124	2	79	306	
1975	132	118	59	116	122	327	43	141	
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1979	163	154	45	104	158	835	48	168	
Distribution (percentage)									
1955	100.0	31.4 (100.0)	(3.6)	(15.4)	(71.0)	( 2.5)	(7.5)	62.6	
1960	100.0	22.2 (100.0)	(4.6)	(25.0)	(65.8)	( 0.0)	(4.6)	77.8	
1965	100.0	18.8 (100.0)	(3.8)	(23.9)	(67.3)	( 0.0)	(5.0)	81.2	
1970	100.0	10.1 (100.0)	(2.8)	(19.4)	(72.8)	( 0.0)	(4.9)	80.9	
1975	100.0	33.5 (100.0)	(1.8)	(15.1)	(73.5)	( 6.9)	(2.7)	66.5	
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1979	100.0	35.4 (100.0)	(1.0)	(10.4)	(72.7)	(13.6)	(2.3)	64.6	

Note: High serious offenders include those committed murder, rape, robbery, and arson. Moderate serious offenders include those committed assault and extortion. Low serious offenders includes all those committed other offences than high, moderate, drug and traffic offences. Drug offenders include those abused mainly stimulant drugs and organic solvent like painting thinner.

Table 2: Final Disposition on Juvenile Non-Traffic Offenders in Family Courts  
(White Paper on Crime, 1979)

Year	Total	Dismissal before Hearing	Dismissal after Hearing	Referral to Child Guidance Home	Probation Super- vision	Commitment to Child Education Home	Commitment to Juvenile Training School	Referral to Public Prosecutor
Numbers								
1955	96,465	41,277	29,205	508	15,268	180	7,579	2,448
1965	158,384	87,979	39,668	561	19,262	228	7,079	3,607
1975	118,509	77,760	28,475	168	8,655	155	2,230	1,106
1979	158,974	108,374	33,040	228	12,139	251	3,860	1,082
Index (100 = number in 1955)								
1955	100	100	100	100	100	100	100	100
1965	164	213	136	110	126	127	93	147
1975	123	188	98	33	57	64	29	45
1979	165	263	113	45	80	139	51	44
Distribution (percentage)								
1955	100.0	42.8	30.3	0.5	15.8	0.2	7.9	2.5
1965	100.0	55.5	25.0	0.4	12.2	0.1	4.5	2.3
1975	100.0	65.6	24.0	0.1	7.3	0.1	1.9	0.9
1979	100.0	68.0	20.8	0.1	7.0	0.2	2.4	0.7

## SECTION 3: REPORT OF THE SEMINAR

### Summary Reports of the Rapporteurs

#### Session 1: Crime Prevention and Criminal Justice in the Context of Development

*Chairperson: Mr. Qazi Masood-ur-Rehman (Pakistan)*

*Rapporteur: Mr. Syed Ibrahim bin Syed Abdul Rahman (Malaysia)*

*Advisers: Dr. David S. Gandy  
Mr. Yutaka Nagashima*

#### 1. Introduction

Crime prevention and its control forms one of the most important responsibilities of any government. It is a prerequisite to national progress. If a nation cannot protect the basic security needs of its citizens, their possessions and their fundamental institutions, a nation's economic, social, and cultural advancement will be stifled by high incidence of crime. Yet, in all countries serious crime persists while in most nations it is increasing. Domestic crime has outstripped the control of most nations and transnational crime has accelerated beyond the reach of the international community. It is imperative that these countries receive assistance in dealing with problems of national crime. But all countries require help with the overwhelming problems of transnational crime. However, availability of assistance is grossly inadequate and hence dramatic changes are required in the size and form of international efforts to overcome these problems more effectively in the future.

In light of the serious and pernicious effects of crime, and the often lowered priorities in funding the agencies charged with combatting it, there is an urgent need for adequate responses at the national, regional and international levels. What is required is

the elaboration of policies and strategies fully responsive to day-to-day realities and needs, taking into account the constantly changing needs of society. It is realized universally that crime can no longer be treated as an isolated problem to be tackled by *ad hoc*, simplistic and fragmentary methods, but rather as a complex and multi-dimensional phenomenon requiring systematic strategies and differential approaches. An integrated approach to crime prevention and criminal justice policies and strategies is of utmost importance. This can only be achieved with increased co-operation between nations, co-ordination among criminal justice agencies of each nation, and the active support and participation of all citizens of every nation in their respective national crime prevention policies, strategies and programmes.

#### 2. Impact of Socio-Economic Change upon Criminality and the Extent of Crimes Which Exert a Baneful Influence upon Development

It is well known that every society changes and develops; consequently crime assumes new forms and dimensions. The seriousness and extent of criminality is different from time to time, and from region to region. Experience shows that all over the world the traditional control measures have become insufficient to cope with contemporary types of criminality, particularly new forms of crime which have appeared side by side with development. Economic growth in many countries has given rise to a high crime rate, such as mugging, robberies, car thefts, and other crimes against property, along with new forms, such as drug addiction and drug trafficking.

When discussing crime in the context of

development, it should be noted that development means socio-economic change which brings about better living standards and which strengthens the economy of countries. It may be clarified at this stage that development *per se* is neither criminogenic, nor is it something undesirable by any means. However, it is a common experience that as countries develop more and more, a change in the social structure takes place as a necessary consequence. It is therefore imperative that there should be effective measures that may guarantee the avoidance of disintegration of the social structure. Presently we perceive that wherever development has taken place, criminality has usually assumed high proportions in its old form, and has also created new types of criminality transcending national boundaries. This modern form of development related crime has become regional and international in scope, thus necessitating equally wider collective and transnational activities and integrated joint efforts to cope with it. It is heartening to note that the United Nations has realized this fact and has long taken initiatives to combat modernized criminality. Moreover, some developed nations, such as the United States of America, Japan and some European countries, have started campaigns to fight crime of international dimensions. It is felt that the most problematic crimes which exert a baneful influence upon development are:

- (a) Corruption; both political and economic, and other illegal acts resulting in an uneven distribution of wealth;
- (b) International drug trade;
- (c) Environmental criminality;
- (d) Transnational economic criminality, including internationally organized criminality; money laundering and computer criminality;
- (e) Maritime crime; and
- (f) Terrorism.

These new forms of transnational crime shall be briefly analyzed in the following:

*(a) Corruption*

Development has been described to mean socio-economic growth which is inevitable in present contemporary society. However, corruption, both political and economic, sets in side by side with development as a result of disintegration of the social structure. Persons in authority are prone to give preference to their vested interests, ignoring social values, motivated by sheer greed and personal aggrandizement. This creates unequal distribution of wealth and pernicious stratification of society. The deprived class naturally tends to resort to crime by way of retaliation. The most deplorable form of corruption is that amongst civil servants in authority. In search of innovative and effective measures to be taken to overcome corruption, we find that both developed and developing countries are alert to this problem. Legislation has been promulgated in various countries to prevent political corruption which has threatened legally constituted governments and undermined constitutions of nations. To prevent economic corruption there is hardly any country where anti-corruption laws do not exist. In this respect all nations have penal laws to respond to forms of corruption, and procedures designed to prevent corrupt activities. Many have initiated procedures to ensure detection, investigation and conviction of corrupt officials, and provided for the forfeiture of funds and property obtained by corrupt officials. In the case of Malaysia, all forms of corruption are taken cognizance of by virtue of the Prevention of Corruption Act 1961 (Revised 1971), in addition to the existing provisions of the Penal Code. In addition, there exists, a Malpractice Committee headed by a Minister to handle cases in which, due to insufficiency of evidence, the above-mentioned laws could not be effectively invoked. Yet there is a need among all nations to consistently review the adequacy of these penal laws so as to render them effective and up to date.

*(b) The International Drug Trade*

The illegal international drug trade has created a global black market economy of vast dimensions. Almost all countries in the world are involved directly or indirectly through the impact of the trade, either as producer, consumer, transit country or are indirectly affected by spill-over effects which affect the stability and integrity of governments involved. It is realized that the international drug trade will continue to persist globally, in view of the apparent increase of producer and exporting countries. This drug threat is completely beyond the control of national and international authorities. Therefore, in view of the alarming threat it poses to humanity as a whole, all efforts already taken at national, regional and international levels, should be further strengthened. Consequently, the international community, through the United Nations, should innovate additional measures towards eradicating the production of cocaine, opiates, marijuana and other drugs, so as to remove the global threat to mankind.

*(c) Environmental Criminality*

High profit motivation without adequate attention to public health standards and labour conditions can result in environmental and safety hazards, culminating in the criminal destruction of the environment. Air and water pollution caused by chemicals and industrial processes is no longer limited to one territory, and the disposal of industrial waste being dumped at sea, as well as super tanker ships spilling oil—especially in narrow straits—may result in serious harm to humankind and marine life with transnational consequences. At this juncture it is felt that nothing much has been done. Therefore, urgent action must be taken to develop effective strategies to protect the environment, including the application of adequate safety procedures, the establishment of satisfactory methods to safeguard the environment and the enactment of stricter environmental laws.

*(d) Transnational Economic Criminality*

Improvements in the field of commerce, transportation and communication, the reduction of trade restrictions, and the opening of frontiers, have not only strengthened traditional organized crime syndicates, but have caused the emergence of new organizations, including the well known cocaine (Medellin) cartel of Colombia, which almost succeeded in placing the Colombian government at ransom. A new form of transnational economic crime is that of money laundering, i.e., the channeling of illegally obtained funds (annually US\$300 to 500 billion in drug money alone) into unnumbered accounts in countries permitting such banking practices, from which transfer into the banks of other countries occurs. This so-called clean money is used by organized criminals to enter and subvert legitimate businesses, to corrupt governments, and to finance terrorism. Another new form of international economic criminality is computer fraud and computer terrorism. The former being profit motivated while the latter is a form of computer sabotage. Today all developed and some developing nations are experiencing an annual loss estimated to be in the region of US\$5 billion due to computer fraud. Existing legislation appears to be powerless to deal with this problem and international control appears to be non-existent. Therefore the problem is out-of-hand.

*(e) Maritime Crime*

Maritime crime had reached unprecedented levels with the influx of narcotics being smuggled by marine transport. It has spawned the re-emergence of piracy. The construction of enormous super tankers to decrease shipping costs rendered thousands of old vessels obsolete, leading to vastly increased marine insurance fraud for supposedly lost vessels. By 1989 there were 14 reported acts or attempts at terrorism against passenger ships. Only a few wealthy nations can maintain adequate maritime law enforcement, but even their resources are inadequate.



quate to police the high seas. Thus maritime crime is also out-of-hand.

*(f) Terrorism*

Besides national terrorism, international terrorism is a problem of considerable magnitude, endangering the lives of totally unsuspecting, uninvolved civilians, and costing national economies billions of dollars in losses and for security expenditures. Although a number of governments which in the past had supported liberation organizations have reduced, or discontinued such support, international terrorist organizations are still abundant and well-financed. Despite the adoption of various international conventions, especially on hostage taking, and despite the cooperation of member states in the exchange of information and expertise to combat terrorism, there does not exist a system capable of dealing with world-wide terrorism effectively, although the hope and aspiration to overcome this problem remains high and long in the offing in certain regions.

**3. Effective and Innovative Measures to Combat Crime**

While dealing with this subject a review can be made of what has so far been done so as to determine how far these proposed measures have worked successfully in the field of crime prevention. It will then be possible to determine what further steps should be taken. Having an overall view, it can be seen easily that there is no country or nation in the world now which has not been alarmed by the shape which criminality has taken, especially considering its upward and dangerous trends. The nations are also fully aware of the fact that due to globalization and easy and quick means of communication among criminal organization all over the world, the crime of today has assumed transnational dimensions. The first priority therefore, is that of improving the existing system of crime prevention and criminal justice administration, with due regard to the recognition of

human rights. In searching for effective and innovative measures for dealing with the problem of crime, past and current experiences of successful crime prevention measures should not be neglected. It is no coincidence that the nations with the lowest crime rates all share one common characteristic; they have preserved, supplemented or strengthened their systems of social control. Consequently, governments are urged to identify and strengthen the social control mechanism of their people, including the family and extended family, the neighbourhood and community structure, religious and cultural organizations, the working community, and the public school system. If these social control agencies are functioning properly and interacting together crime control is effective, and the formal control system of police, courts and corrections will not be overburdened in dealing with residual crime. But even the formal control agencies, to be maximally effective, need strong community support and participation within the social, cultural and economic context of each nation.

Crime exists in all societies. Throughout the ages, institutions for crime prevention have existed. The history of mankind evidences that crime and crime prevention are symbiotic and a challenge to each other. Socio-economic development in every nation is a natural phenomenon. Man is in search of more and more resources to make his life comfortable and more luxurious, and nature provides men these facilities and resources, to be made accessible through his efforts and hard work. This is a basic law which elevates societies to higher and higher levels of socio-economic growth and affluence. Along with this development, as a natural consequence, certain evils crop up which ultimately lead to crime. Then crime prevention systems are mobilized to respond to the problem. It cannot be said that at any time in history any society was not conscious of crime, or that it failed to resort to crime prevention methods. We are currently looking at a stage in the development of crime and crime preven-

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tion methods which are no longer mentioned specifically. Rather, crime and prevention methods have out-grown national levels and are in a stage where we must call them transnational or international. Thus, instead of viewing them with a microscope of national range, we must scrutinize them with the help of an international telescope. The best instrument which humankind is fortunate to have in its possession is the United Nations. The foremost duty of every nation is, therefore, to strengthen, as far as possible, the organs of the United Nations. If we are able to do that, we would have at our disposal the most innovative and effective measures to counter crime.

We thus turn to present day crime prevention measures which are already in practice and which need improvement.

These can be briefly classified as:

- (a) Exchange of experiences with respect to crime and crime trends;
- (b) Improvement of data collection, analysis of crime-related statistics;
- (c) Rationalized and humanized criminal justice operations;
- (d) Incorporation of crime prevention policies and strategies into overall national development plans; and
- (e) New technologies.

In this context we see that the kind of existing co-ordination mechanisms that are successful in reducing crime and improving the quality of justice are the following:

- (a) Co-ordinated implementation of crime prevention policies and strategies by all departments of the criminal justice system within all nations towards the common objective of crime reduction;
- (b) Close rapport and good public/police relations, soliciting public co-operation and support to deal with criminals, since police initiatives alone cannot wholly be effective;
- (c) The existence of good co-operation and

mutual understanding of all criminal justice agencies responsible in the context of crime prevention and control;

- (d) Participation in crime prevention programmes by government as well as non-government mass media and electronic media to assist in educating citizens and to make them aware of crime problems and to help them in their resort to self help measures, such as neighbourhood watch schemes and the use of security devices, in order to safeguard their lives and property successfully;
- (e) International and regional police co-operation.

What has been said above is in accord with Article 36 of the Guiding Principles for Crime Prevention and Criminal Justice in the Context of Development and a New International Economic Order (1985), which states that all states and entities should co-operate through the United Nations in the prevention and control of crime. It is an indispensable element for contributing to the promotion of peace and security of mankind and for enhancing the effectiveness, viability and fairness of criminal justice. Such co-operation depends primarily upon the commitment of states and their willingness to make progress in that regard.

In addition, attention should be paid to studying the cost of crime; a field in which little work has been done so far. If proper studies and research were to be undertaken, the results would awaken nations and governments to the fact that crime is the greatest and most devastating force pitted against economic and social programmes. These studies would be helpful in preparing budgets and allocating proper amounts of funds in this respect at the time of budget making. Admittedly, it is a difficult job, because no perfect design to study the cost of crime in its totality has proven feasible to date. Some studies have indicated a relationship between crime and unplanned development that takes place as a result of sudden industrialization.

However, it has also been shown that there is a certain interrelationship between economic growth and criminality. The study of the cost of crime would definitely contribute as an innovative measure to crime prevention.

#### 4. Regional and International Co-operation in Combatting Criminality

##### (1) *Establishment of a Global Crime and Criminal Justice Network*

In light of the serious consequences of criminality, adequate policy responses and appropriate measures must be instituted at national, regional and international levels, by both developed as well as developing countries to combat contemporary transnational criminality. Developing unified model codes to combat crimes of transnational and international dimensions, and practical arrangements, such as extradition assistance and exchange of information, are found to be effective in certain cases.

##### (2) *International, Scientific and Technical Co-operation*

The effectiveness of international co-operation in the field of crime prevention and criminal justice can be improved by:

- (a) Ratification and implementation of existing international instruments;
- (b) The development of bilateral and multilateral instruments; and
- (c) The preparation and elaboration of model instruments and standards for use at the national, bilateral, regional and international levels.

In the formulation of international instruments, standards, and norms, specific attention has to be paid to:

- (a) Judicial assistance treaties, in particular between countries with different legal systems, dealing with measures for ob-

- taining evidence by a requesting state;
- (b) The development of standardized requests for extradition and mutual assistance;
- (c) The development of a means of providing assistance to victims of crime and of providing adequate protection to witnesses;
- (d) The further consideration of issues of transnational jurisdiction in order to assist in the process of responding to requests for extradition and mutual assistance and in the implementation of international instruments; and
- (e) The elaboration of standards on international assistance with respect to bank secrecy. Banking organizations should be urged to standardize their reporting requirements and documents so that these can be used more rapidly and effectively as evidence. A study should be made to propose more effective standards to inhibit money laundering and investments connected with criminal activities, such as narcotics trafficking and terrorism.

Appropriate measures should be undertaken to strengthen the programme of international technical and scientific co-operation in the field of crime prevention and criminal justice on a bilateral and multilateral basis.

In order to formulate and develop proper regional and interregional strategies of international, technical and scientific co-operation in combatting crime and improving the effectiveness of prevention and criminal justice activities, the programmes of technical and scientific co-operation should be specifically oriented towards:

- (a) The improvement of the technical expertise of criminal justice agencies;
- (b) The improvement of the human and technical resources in all sectors of the criminal justice system in order to stimulate technical assistance, model demonstration projects, research activities and training programmes, in close co-operation

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with the regional and interregional institutes of the United Nations for the prevention of crime and the treatment of offenders and appropriate non-governmental organizations;

- (c) The further development and improvement at the national, regional, and inter-regional levels for the collection, analysis and dissemination of data on crime trends, on innovative ways and methods of crime prevention and control and on the operation of criminal justice agencies, and criminal policy programmes in order to provide an appropriate basis for policy making; and
- (d) The promotion by education programmes and training activities of the implementation of United Nations norms, guidelines and standards in criminal justice.

The United Nations' Crime Prevention and Criminal Justice Branch of the Centre for Social Development and Humanitarian Affairs, as the only professional and specialized entity within the United Nations system with overall responsibility for crime prevention and criminal justice programmes, should be strengthened in terms of human and financial resources.

### (3) *Bilateral or Multilateral Co-operative Law Enforcement Task Forces*

Another proposal for strengthening the machinery of criminal justice in order to deal with international criminality is the use of co-operative law enforcement teams. Though this approach has been tried on numerous occasions, it is yet to be codified or sanctified by international standards. Friendly and co-operative adjoining countries within the same cultural region could establish joint task forces under joint command, to resolve crime problems transcending their international boundaries. However, the success of such ventures has been rather limited due to their *ad hoc* nature and the concern about sovereignty. It is therefore advisable to convene an international panel to elaborate

guidelines for such operations, which will assure full respect for national sovereignty and the success of such operations.

### (4) *United Nations Law Enforcement Task Forces*

It is envisaged that United Nations law enforcement teams police "hot spots" of international crime affecting regional or world interests and involving crime problems beyond the control of individual nations. This is to be done only at the request or with the consent of nations whose sovereignty is affected, and by ensuring the protection of national and international law, and under the flag of the United Nations.

### (5) *The International Criminal Court*

Most of the major international criminals are likely to be economically and politically powerful persons. As such they are elusive and could be taken into custody only after dramatic political upheavals. In such cases, the option of surrendering such international criminals to an international tribunal, whether constituted regionally or worldwide, may prove acceptable to nations concerned.

The creation of an international indictment chamber attached to the international criminal court(s) could hear *ex parte* testimony against any criminal suspect, and, on the establishment of a *prima facie* case, could issue an indictment, accompanied by warrant of arrest, which would be recognized and executed by any signatory nation, thus severely restricting the movement of wanted international criminals, and ultimately leading to their arrest and prosecution.

### (6) *A Strengthened Role of Inter-Governmental Organizations (I.G.O.)*

The role which I.G.O.s, within and outside the United Nations system, have played in dealing with transnational criminality, cannot be underestimated. Yet, for the most part, their activities are severely restricted, due to past notions of sovereignty. Unless

the world community recognizes the common threat of transnational criminality, such outdated notions of sovereignty will not be overcome.

As transnational criminals recognize no sovereignty, the international law enforcement community must be ready to adjust accordingly. The International Criminal Police Organization (INTERPOL)—the foremost I.G.O. in the field—now numbers 147 Member States, and is moving toward universality. It is time to consider upgrading the international capabilities of the United Nations which, so far, are still restricted to (basically) the exchange of information. A joint U.N.-INTERPOL conference is called for to design a new role for international control of transnational crime for the third millennium. Such a strategy could contribute significantly to the prevention of transnational crime.

*(7) A Strengthened Role of Non-Governmental Organizations (N.G.O.) at the Regional Level*

Non-governmental organizations in consultative status with the Economic and Social Council have long played a significant role in the field of crime prevention and criminal justice. Some have emphasized the crime prevention and control elements of criminal justice. Others have emphasized the human rights aspects of criminal justice. Together they have made significant contributions, especially at the universal level. Their impact has been less significant at regional levels. If national professional organizations, e.g., societies of criminology or police associations could combine forces with those of neighboring countries, in order to create a spirit of understanding and co-operation, the effectiveness of the regional apparatus for the prevention of transnational crime could be improved. Thus, the members of the Canadian and American Societies of Criminology have long co-operated with each other, as have the societies of the German-speaking countries, and those of the Nordic countries, re-enforcing a spirit of mutual understand-

ing and respect, and a willingness to join forces in combatting common problems.

**5. Conclusion**

The development of effective crime prevention policies and strategies requires action-oriented research on policy issues, the establishment of a sound data base and an international information network for a better understanding of trends and patterns of criminality, and a more sound formulation of policy. The role of academic institutions is essential. Effective crime prevention not only depends on the availability of resources, but also on adequate numbers of trained criminal justice personnel and national mechanisms for manpower development.

In consideration of crime prevention in the context of development, the formulation of crime prevention policies within the overall framework of economic and social planning necessitates an integrated approach in which urbanization, population movements, social welfare programmes, education and employment opportunities, can be taken into account. Such an approach also necessitates a certain amount of physical planning for crime prevention by way of improved town planning, the development of appropriate living space and the provision of a social infrastructure. There is a need to develop new styles of action in crime prevention in keeping with the social system of each country. In ensuring the rule of law, priority attention should be given constantly to safe-guard the rights and liberties of individuals.

It has become necessary to reduce opportunities for committing crimes, especially property crimes. Crime prevention planners have to be fully alert to the changing realities of the social environment, so as to be in a position to anticipate factors likely to generate crime. The community must be made aware of the seriousness of crime to the extent that they will reject crime and illegality, as a threat to the quality of life, reduce opportunities to commit crime by the crea-

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tion of conditions unfavourable to crime, formulate effective rehabilitation policies so as to avoid problems of recidivism, and encourage public participation.

An integrated approach to crime prevention policies and strategies necessitates a criminal justice system that is responsive to the external environment; such as changing social and economic trends, demographic patterns, and the emerging needs of society. There is a need to ensure that the criminal justice system is operating as effectively as possible and in accordance with existing standards and norms of human rights. It should also contribute to the objective of maintaining peace and order for equitable social and economic development by redressing inequalities and protecting human rights. The criminal justice system should also play an essential role aimed at the containment of crime and creating a climate of stability and peace, thus ensuring the protection of the rights of the individual against any violation. While the system has so far stressed the guarding of society's values through the protection of rights and liberties, it should also contribute to the translation of those values and rights into social and political realities.

A humane criminal justice system, while drawing a line between the use and abuse of rights and freedom, should consistently aim at ensuring a just balance between the enjoyment of such rights and the enforcement of law. The real challenge for criminal justice personnel is to provide such a balance.

### **Session 2: Criminal Justice Policies in Relation to Problems of Imprisonment, Other Penal Sanctions and Alternative Measures**

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### **1. Introduction**

Topic II is an extension of Topic 2 at the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders "Criminal Justice Processes and Perspectives in a Changing World" which covers the role of criminal justice agencies, the desirability and importance of their coordination and the involvement of the public with the view of encouraging the flow of information within the concerned agencies. The use of new information technology has been particularly emphasized.

The problems in this field cannot be treated as isolated issues, nor can they be resolved by simplistic and superficial approaches. They have to be considered as a whole complex structure, encompassing wide ranging activities which require systematic strategies involving legislation and innovative approaches.

In this context, highlighted here are the major issues and problems relating to imprisonment and other penal sanctions, with special reference to alternatives to imprisonment available in the countries represented. A comprehensive list of such alternative measures is attached as appendix "A."

### **2. Overview of the Problem**

The problems associated with imprisonment have long been recognized by the international community. At the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1980, it was clearly stated that "the goals of a humane system of criminal justice and therefore also of a humane society, were best served if the bulk of the offenders were to

be resocialized, integrated and rehabilitated by means other than incarceration." The Seventh United Nations Congress likewise recommended the promotion of community-based correction, and called for further discussion by the forthcoming Eighth United Nations Congress.

In many instances, the efficacy of imprisonment as a deterrent for reducing recidivism or controlling criminal behaviour has been placed in doubt. Inherent in imprisonment are problems relating to the prisoners' resocialization, formation of prison sub-cultures, and prisoners' stigmatization. In a closed society such as prison where the day-to-day activities are rigidly fixed (sometimes arbitrarily), the offenders are not free to develop their own potentials for leadership, responsibility and excellence. Prisoners tend to form a "sub-culture" to counter the effects of economic, social and psychological deprivations of imprisonment. It is not uncommon for prisoners to be rejected or alienated from friends, the community or even by some members of their families, thus, making it more difficult for them to socially reintegrate upon release. This element of stigmatization of ex-prisoners for having been associated with a group that is generally condemned by society has often been found to be a cause of recidivism.

These problems are further compounded by prison overcrowding which today has become a most serious problem for most countries. Its ill effects both on the correctional system and the prisoners not only increases expenditures but also normally results in unwieldy and ineffective rehabilitation programs, whether they be for educational, vocational or spiritual purposes. At its worst, the dehumanizing effect of overcrowding has been a major cause for prison riots, escapes and disregard of prison rules and regulations. Construction of additional jails appears to be the most logical suggestion. However, many countries cannot financially support such a measure, as welfare programs for prisoners are not on the priority list of budget alloca-

tions.

Overcrowding in prison is not only the result of increasing crime rates but is also an indication of some imperfections or defects in our policies and procedures with respect to the prosecution of offenders, application of criminal laws, sentencing, and the management of imprisonment itself. Sentencing courts in many countries, for instance, are likely to impose imprisonment as a penalty in the belief that imprisonment alone is the major deterrent factor. Severity of punishment is usually associated with greater deterrence. In some cases imprisonment is imposed because of lack of non-custodial sanctions as alternatives.

The rationalization of sentencing policies requires due consideration by the courts, especially from the viewpoint of the rehabilitation and reintegration of offenders into society. Imprisonment should be used only as a sanction of last resort within the whole range of options open to the court. Such a course is likely to reduce the problem of overcrowding as well, particularly in countries where imprisonment has been used indiscriminately.

Among other problems of imprisonment are: lack of proper classification of prisoners and diversification of institutional resources, inadequate services for education, vocational training and socio-cultural uplift of prisoners, restricted facilities for the specialized treatment of youthful offenders, women prisoners and mentally ill persons in prisons, shortage of trained manpower to manage prisons, and absence of appropriate linkages with welfare and rehabilitation agencies in the open community. These problems need to be solved to maintain the status of prisons as a part of correctional systems.

### 3. Alternatives to Imprisonment

#### (1) *Crime Trends and Policy for Alternatives to Imprisonment*

A consistent increase in the crime volume

and in crime rates has been noted in many countries. While many reasons have been advanced, the rapid population growth and the collapse of informal social controls in the wake of modernization are being pointed out as the primary factors. Ironically, while it is generally believed that socio-economic growth is the answer to most of the problems confronting a nation, the same development in its explosive, unguided and unguarded pace, has brought about or contributed to the emergence of more crimes, including several new forms not known before.

The globalization of crime has cast its shadow on the effectiveness and adequacy of traditional policies, practices and procedures, not only in corrections, but also in the other components of the criminal justice systems. As a result of the ever increasing crime rate in many countries, penal institutions have become overcrowded, thereby endangering the success of rehabilitation programs for offenders. Confinement in overcrowded jails not only imperils the enjoyment of the basic rights afforded to a prisoner but also, in many cases, intensifies or hardens his criminal tendencies. A penal institution is often described as a "school for crime."

It has therefore become imperative that more emphasis be given to non-custodial or community-based treatment programs in handling offenders. Such an approach would not only be more humane but also more conducive to rehabilitation efforts. Their success can be increased by involving the public or community. Moreover, it will not only drastically reduce the use of imprisonment and remove its negative effects but will also serve as a necessary device for the rationalization of criminal justice policies from the standpoint of human rights, social justice, and social defense.

The alternatives to imprisonment as practiced by different countries in varying degrees may be categorized generally as those that find application before the trial, at the trial, and after the trial of offenders.

## (2) Pre-Trial Stage

At the pre-trial stage the most common forms available as alternatives to imprisonment or confinement are 1) bail, 2) release on recognizance/personal guarantee, 3) suspension of or exemption from prosecution, 4) village court/Barangay/Hupong Tagapayapa, 5) cautioning (warning).

Temporary release of an offender through *bail* is popular in many countries. It saves the offender from the unnecessary discomfort or inconvenience usually accompanying imprisonment, while at the same time relieving the state or government from its financial obligation for continued confinement of the offender. Except for some restrictions imposed by some countries in certain cases, commission of crimes are generally bailable.

For those who cannot afford the amount of bail that may be fixed, some countries, like the Philippines and Indonesia, *release on recognizance/personal guarantee* is resorted to, subject to certain requirements and qualifications.

A good number of cases are also prevented from reaching the trial stage through the practice of *suspension of prosecution or exemption from prosecution*. Such is the practice adopted in many countries like Japan, Fiji, China and Nepal. As practiced in Japan, the public prosecutor is given broad discretionary power not to prosecute a case even if there is ample evidence of the offender's guilt, if in his opinion, such a measure will promote the offender's re-integration into society. In assessing whether prosecution will be suspended or not, the public prosecutor considers the nature of the offence, the background of the offender, the character, age and situation of the offender and the gravity and circumstances of the offence. This system which dates back more than a hundred years has been very successful in reducing the cases brought for trial in Japan. In 1987 alone, prosecutions were suspended in about 36.5 percent of all the Penal Code offenders.

For minor crimes where the impossible penalty is a minor fine or very short-term im-



prisonment, several countries require that the case be referred first to a mediation committee (including the *Barangay/Lupong Tagapayapa* in the Philippines) for settlement, to avoid unnecessary and expensive court litigations. Generally, no courts will entertain these cases unless there is a certification by the mediation body that the dispute was brought before it for settlement at their level. This innovation was brought about with the enactment of Presidential Decree 1508 in 1979. From 1980 to 1987 the barangay or village courts throughout the country settled 569,633 cases out of 636,006 disputes submitted to them for settlement.

*Cautioning* or warnings are widely practiced through the discretionary power of the police not to prosecute offenders committing less serious offences, especially those involving minors. This inexpensive and immediate approach (usually done by a uniformed senior police officer) has been found to be more effective than court litigations. It was reported that since 1980, the number of juveniles sentenced for indictable offences has fallen by over 58 percent from 90,000 to 37,000 in 1988 by adopting cautioning.

In Nepal, under the Drug Control Act 2033 (1976) the Chief District Officer can order the release of a drug user by giving him a *Warning* only, provided he can prove that the amount of drugs used was minimal and for treatment purposes. In 1988, forty-one offenders were released and were made only to promise in writing not to commit the same offence in the future by invoking the foregoing law and identical provision under the Public Offence Act 2027 (1970).

In India, Sri Lanka, Bangladesh and Pakistan, as in many other countries, admonition has been extensively used in dealing with minor offences, and especially in cases of juvenile offenders.

### (3) Adjudication or Trial Stage

At this stage of the process in prosecuting offenders, the common alternatives to imprisonment are 1) imposition of fines, 2) sus-

pending sentence/suspended execution of sentence, 3) probation, 4) conditional sentence/discharge, 5) community service order, 6) compensation/indemnification.

Imposition of *finer* instead of imprisonment is widely applied in a number of countries, including Japan where in 1988, approximately 94 percent of all convicted defendants who went through summary order procedure were sentenced to fine. Generally this practice is also adopted by other countries.

*Suspended Sentence/Suspended Execution of Sentence* is adopted by many countries in the region, like Thailand, Sri Lanka, Indonesia, Fiji, Japan, China and Brazil. Normally, the court may, after passing judgement that the accused is guilty, suspend the sentence or after the determination of punishment, suspend the execution of the sentence and release him with or without conditions for controlling his behaviour. Revocation of suspended execution of sentence normally follows upon commission of another offence or for violation of condition as required.

*Conditional Sentence/Discharge* is generally applied to first time offenders. Usually this alternative may be used if the court is of the opinion that it is inexpedient to inflict any punishment on the offender, after taking into account his character, age, health, mental condition, nature of the offence and to other extenuating circumstances under which the offence was committed.

*Community Service Order* likewise are widely used. Under this alternative, the court may, in lieu of imposing a sentence of imprisonment on conviction of an accused or in lieu of imposing a sentence of imprisonment of an accused person in default of payment of fine, direct the accused to perform stipulated service at a named place in a State or State-sponsored project.

*Probation* as a community-based treatment of offenders has gained wide acceptance and application in many countries of the world. Some have systematically started with it more than seventy years ago while others

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have introduced it only recently. The strategies for its implementation usually vary from one country to another. Some countries have separate probation laws for juveniles and adult offenders while others have only one or either of them.

In the Philippines, probation for adult offenders is primarily governed by Presidential Decree 968, Probation Law of 1976 while juvenile offenders are governed by Presidential Decree 603, the Child and Youth Welfare Code of 1974 as amended. Some of the salient features of PD 968 include availment of probation for one time only (usually to first time offenders) and only for penalties of imprisonment not exceeding six years. Probation is considered a privilege and not a matter of right. Consequently, the offender normally has to apply for it before the court upon his conviction. Youthful offenders upon apprehension are likewise mandated by law to be physically and mentally examined and committed to the care of the Department of Social Service Welfare and Development.

More and more countries provide probation for both juveniles and adult offenders. Family courts have jurisdiction in cases involving juvenile offenders. Offenders sentenced to imprisonment may be granted the privilege of suspension of execution of sentence with or without probation. The better functioning probation system relies heavily on the involvement of the community in the rehabilitation of offenders and for this purpose retains the services of volunteer probation officers. Japan itself deploys 50,000 volunteer probation officers, who work with 1,077 professional probation officers. Japan's success rate in probation is very high. The basic governing laws related to rehabilitation services in Japan are a) the Offenders Rehabilitation Law (1949); b) the Law for Probationary Supervision of Persons under Suspension of Execution of Sentence (1954); c) the Law for Aftercare of Discharged Offenders (1950); d) the Volunteer Probation Officer Law (1950); and e) the Amnesty Law (1974).

In Malaysia, the institutions for the treatment of juvenile delinquents are managed by the division of Probation and Approved School Service of the Department of Social Welfare under the Ministry of Welfare Service. These institutions are divided into three types, the remand home, probation hostels and approved schools.

The probation system of Thailand was adopted from the original English System as a result of western educational influence spreading throughout the country. It started in 1952 but was used only for juvenile offenders despite the authority granted to the courts for the suspension of imprisonment either with or without supervision. In Bangladesh, probation is also practiced for juvenile offenders but not for adult offenders. Kenya started implementing juvenile and adult probation as early as 1946. The probation supervision period may vary from a few months to several years. In a number of countries hostels have been established to serve the needs of male and female probationers. In addition two vocational training schools have been established and special category criminals are supervised by the Kenyan Probation Department.

*Compensation/Indemnification* to victims of crime is also practiced in many countries. As commonly adopted, the court on finding the offender guilty can, without convicting him, order the offender to pay a certain amount, as compensation or indemnification for the damages or injuries inflicted. In instances where the law itself provides some restrictions on settlement of criminal cases for reasons of public interest or policy, courts normally impose official sanctions. However, where the party litigants have agreed to compensation or indemnification as settlement for the case, the courts also generally offer no objection and proceed to dismiss the case for lack of interest to prosecute or absence of sufficient evidence without necessarily using compensation or indemnification as the reason for the dismissal.

(4) *Follow-Up Stage of Disposition (Post Trial Stage)*

At this stage, the common alternatives resorted to are 1) open institution, 2) pardon, 3) parole, 4) remission of good conduct, time allowance, 5) work release.

*Open Institution or Open Prison Programs* have been created in most countries and have proven cost-beneficial and humane as well as effective alternatives to incarceration. As the name implies, open institutions are characterized by the absence of walls which are normally found in a penitentiary. By allowing deserving prisoners to stay in a colony outside of prison, the reintegration of the prisoners into the community is enhanced. At Iwahig and Davao Penal Colony, many of the prisoners' families are actually living with them already. Prisoners may be allowed to cultivate a piece of land, to raise poultry and livestock, and to engage in handicraft making, so as to provide for their own sustenance. In some countries, open institutions take the formal "penal settlements," where prisoners are allowed to stay with their family. They are to build their own house and may settle there for life.

*Pardon*, which is the act of forgiving the wrongdoings of an offender is practiced in many countries. In certain cases, it is even used as a major countermeasure to prevent overcrowding in prison. It is a very humane way of dealing with offenders. Pardon may be absolute or conditional. Generally it is exercised by the head of State or through a board or committee created for the purpose.

*Parole* as practiced by many countries is applied only upon service by the offender of a portion of his sentence for imprisonment in the institution. Eligibility for parole varies from one country to another, but usually ranges from one-third to two-thirds of the sentences.

In Indonesia and Brazil, parole or conditional release may be granted after the offender has served two-thirds of his sentence and under the supervision of a probation officer. Juvenile probation programs

usually stress aftercare service in the form of guidance, counselling and material assistance by the State in co-operation with non-governmental organizations including volunteer probation officers.

In Japan, the inmate has no right to file an application for parole as such prerogative is exercised only by the superintendent of the prison, training school or women's guidance home. It is also necessary that the offender should have served at least one-third of the sentence or ten years of life sentence and that he should have proved repentance and progress. The parole board screens all candidates for release on parole and an inquiry into conditions at the place where the inmate is expected to come back upon release is initiated as soon as he is committed to prison, training school or women's guidance home.

In the Philippines, parole may be granted to an offender who has already served one-third of his sentence in prison. Effective November 24, 1989, supervision of parolees has been transferred from the court to the Probation Administration which is now renamed Parole and Probation Administration. The power to grant parole to qualified inmates is however retained by the Board of Pardons and Parole.

*Remission of Good Conduct/Time Allowance* has been adopted, to varying degrees, by many countries of the region like Sri Lanka, Indonesia, the Philippines, Thailand, Nepal, Fiji and Bangladesh. It is generally accorded to those prisoners who have demonstrated good conduct in prisons. The reduced term varies among prisoners taking into account the length of their prison service. Remission provides the prisoner with an incentive to demonstrate good behaviour and to contribute to prison discipline.

Under the *work release* scheme, selected prisoners (usually minimum security prisoners) are allowed to obtain employment in the open community, unescorted during day. They return to prison for the night. The advantage of this program is that it allows the prisoners to earn a living for himself and his

family while at the same time enhancing their reintegration into the community. This is practiced in some countries of the region like Indonesia and Sri Lanka.

#### **4. United Nations Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules)**

In considering alternative measures to imprisonment, the draft Tokyo Rules on non-custodial measures assumes a profound significance.

The Draft "Tokyo Rules," like all United Nations Instruments, are expected to have a deep impact on the policies towards crime prevention and treatment of offenders and to mark a milestone in the development of criminal justice standards among the Member States, once these are adopted by the United Nations.

The rules were prepared by UNAFEI in accordance with the decision of the United Nations Committee on Crime Prevention and Control, responding to the request of the Economic and Social Council (resolution 1986/10). These have been formulated with the perspective that non-institutional treatment measures are conducive to rehabilitating and resocializing offenders more effectively and efficiently as compared with costly institutional treatment. Community-based treatment could be applied to a large number of persons coming into conflict with the law, on a selective basis. It should be the policy of the Member States to make every attempt to avoid subjecting individuals to unnecessary incarceration and thereby depriving them of liberty and positive contact with the community. The theme should be that confinement should be considered as a last resort and reserved for dangerous persons who have committed serious crimes against society. It is considered necessary that non-custodial treatment measures should be incorporated into the national policies of the member states to provide a foundation for its understanding and public support in the

implementation processes.

The adoption of the draft Tokyo Rules at the Eighth Congress will serve as a catalyst for renewed efforts to improve not only the international co-operation to reduce overcrowding in penal institutions worldwide but will also improve the operation of the criminal justice systems in the Member States. The participants, therefore, strongly called upon the international community to adopt the draft Tokyo Rules at the Eighth Congress and appealed to all the Member States to support the draft.

#### **5. Conclusions and Recommendations**

In a rapidly changing world where the commission of a crime is no longer considered an ordinary threat to a country's national security, peace and stability but more as an international criminological event, it has become imperative for all nations to join in the institution of such measures as may be necessary or required to counter the destabilizing effects of crime. The emergence of worldwide drug trafficking, terrorism and other "transnational crimes" in unimaginable proportions is a major challenge that calls for international unity, co-operation and action.

The problems of imprisonment, other penal sanctions and alternative measures are among the major issues of crime prevention and criminal justice. In this regard, the participants of the 84th Seminar of UNAFEI on Crime Prevention and Treatment of Offenders were unanimous in their view that imprisonment is not the sole means of controlling criminal behaviour. Imprisonment should be applied only as a sanction for serious offences and as a punishment of last resort, and the full range of non-custodial or community-based alternatives should be made available and applied in lieu of imprisonment.

The existing non-custodial measures need to be revitalized and progressively strengthened. Through the passage of time, even the

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most advanced prison systems and alternative measures to imprisonment are liable to become obsolete. The search for solutions to the problems of imprisonment and its alternative measures must be a never ending process.

The discussion of this topic among participants and experts was characterized by a multi-sectoral approach. On the basis of a detailed consideration of the relevant points, the following recommendations were made:

- (a) Agencies and organizations concerned with social planning, crime prevention policies and criminal justice practices should effectively co-operate in providing the widest possible range of dispositional alternatives in dealing with offenders, with a focus on strengthening community ties as the basis of their rehabilitation.
- (b) An integrated approach to the criminal justice system should be encouraged in order to facilitate greater co-ordination of policies and practices for crime prevention and the treatment of offenders, within the overall framework of social development.
- (c) Non-custodial measures should be developed by the Member States within the context of legal, political, economic, social and cultural conditions, not only as alternatives to imprisonment but also as an imperative for the rationalization of criminal justice policies from the standpoints of human rights, social justice and social defence.
- (d) An integration of the expertise necessary to reintegrate offenders into the social mainstream as law-abiding individuals should be encouraged at all levels of criminal justice administration.
- (e) In order to reinforce non-custodial measures, the participation of volunteers should be sought in the broader perspective, with due regard to their proper screening, training and co-ordination with professional workers.
- (f) The authorities responsible for non-custodial measures should be given sufficient financial support from public funds.
- (g) The personnel engaged in the criminal justice system should be trained and provided with a broad and clear understanding of the essential areas of their responsibilities concerning the rehabilitation of offenders, the protection of human rights and the safety of society.
- (h) Efforts should be made to promote scientific research, information gathering and compiling reliable statistics, and to make them available to the concerned agencies for the purpose of improving the criminal justice administration.
- (i) The United Nations and its Regional Institutes including UNAFEI should assist the Member States in research, training and program development, through a well-rounded program of advisory service.
- (j) Sentencing policies and practices should be so developed as to provide for imprisonment as a sanction of last resort, only when community-based treatment programs or other non-custodial alternatives are found inappropriate or inadvisable.
- (k) Member States should review and develop their criminal justice policies, processes and procedures on, with a view towards decriminalization and depenalization of acts which result only from situational circumstances, do not indicate perversity, and create no significant harm.
- (l) Member States should give full support to the implementation of the United Nations Standard Minimum Rules for the Treatment of Prisoners, in consonance with their socio-cultural and economic conditions.
- (m) The Draft Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules) should be adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders.

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(n) Non-Member States should be encouraged to participate in the activities of the United Nations, on matters of the prevention of crime and the treatment of

offenders and implement all relevant United Nations instruments to the fullest extent possible.

Appendix A

Inventory of Alternatives to Imprisonment

Country	Pre-trial Stage	Adjudication Stage	Follow-up Stage of Dispositions
Argentina	Bail	Conditional sentence	Work release, home leave, pardon, remission, amnesty, day release, scheme, release under supervision, conditional discharge, open institution
Bangladesh	Bail, release in guarantee	Probation (minors)	Parole, remission
Brazil	Admonition by the police, suspension of prosecution, bail	Conditional sentence	Work release, home leave, pardon, remission, amnesty, release under supervision, open institution, public work allowance, parole, commutation
China		Probation	Parole
Equador	Bail	Conditional sentence	Work release, home leave, pardon, remission, amnesty, day release scheme, release under supervision, open institution
Fiji	Admonition by the police, suspension of prosecution, bail	Suspended sentence, probation, good behavior bond, conditional sentence	Parole, pardon, remission, amnesty, conditional discharge
Indonesia	Admonition by the police, suspension of prosecution, bail, provisional release	Suspension of sentence, suspended execution of sentence, probation, good behavior bond	Home leave, pardon, remission, amnesty, release under supervision, open institution, public work allowance
Japan	Suspension of prosecution, bail	Suspended execution of sentence with or without probation	Parole, special amnesty, commutation of sentence, remission of execution of sentence
Kenya	Bail, bond, security	Probation, to keep peace for a period	Amnesty, remission, release on license

(To be continued)

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Country	Pre-trial Stage	Adjudication Stage	Follow-up Stage of Dispositions
Malaysia	Bail, release on guarantee	Probation, suspended execution of sentence	Parole, remission, pre-release program
Nepal	Bail, provisional release	Conditional probation, good behavior bond	Pardon, day release scheme, remission, amnesty
Nigeria	Admonition by the police, suspended prosecution, bail	Probation, conditional sentence	Pardon, amnesty
Pakistan	Admonition by the police, suspension of prosecution, probation	Probation, community service order	Parole, pardon
Paraguay	Bail	Conditional sentence	Work release, home leave, pardon, remission, amnesty, day release scheme, release under supervision, conditional discharge, open institution
Philippines	Bail, village court/Barangay court	Probation	Parole, pardon, open institution, good conduct allowance
Solomon Islands	Bail, caution	Suspension/withdrawn	Remission, release on license
Sri Lanka	Bail, primary court caution/advice by the police	Suspension of sentence, suspended execution of sentence, probation, community service order, good behavior bond, warn and discharge, probation	Work release, pardon, release on license, remission, amnesty, home leave, open institution
Sudan	Bail, personal guarantee	Probation	Prison holiday
Thailand	Bail	Suspended sentence, suspended execution of sentence, probation	Parole, remission, public work allowance, penal settlement, pardon
Tonga	Bail, warning by the police	Suspension of sentence, suspended execution of sentence, conditional sentence	Work release, home leave, pardon, release on license, remission, release under supervision, conditional discharge, open institution

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### **Session 3: Effective National and International Action against Organized Crime and Terrorist Activities**

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#### **1. Introduction**

Several years ago, crime was viewed as a localized event that could be tackled by local agencies, or with minimal assistance from outside, without great difficulty. This is no longer true. The social and economic changes that accompanied the process of development of developing states gave rise to parallel changes in criminal patterns. Conditions conducive to the articulation of new crimes emerged and were exploited. It became an international phenomenon transcending national boundaries.

Crime prevention and criminal justice must be equally dynamic to be effective, and be ready to respond to the changing patterns in criminality by evolving a comprehensive network of policies and strategies to deal with it. A concerted international approach is therefore required. By necessity almost, the notion of sovereignty, the right of undisturbed jurisdiction, must be ready to accommodate this change. An integrated national strategy, consisting of policies for crime prevention and criminal justice within the overall social and economic framework, must therefore be accompanied by cooperation at the regional and interregional levels. It means that any effective action against organized crime and terrorism cannot succeed without these changes.

#### **2. The Situation of Organized Crime and Evaluation of Counter-measures**

The relative sophistication and the trans-

national character of organized crime and its capacity to take on new forms is particularly disturbing to the international community which must now promulgate and implement a commensurate response in order to avoid irreversible harm to its economies as well as to its social and political life. Organized crime is carried out collectively by members who in some way share a strong family of ethnic ties or similar social and economic backgrounds and subscribe to a rigid patriarchal system governed strictly by enforceable norms and expectations which demand strong adherence and commitment. Members of organized crimes syndicates have in recent years infiltrated political and corporate structures without great impunity. The "strong arm" they wield and the unlawfully acquired wealth, but they now have in their possession, demonstrates a high level of management skills and shrewd business practices and shows a high level of efficiency and risk avoidance typical of successful corporate executives.

The character and volume of their unlawful operations are constantly extended to take advantage of every available opportunity and are quite often interconnected; that is, the player in illicit drug trafficking and arms sale for example may be the same, the one activity furthering the other. The present list which includes trafficking of illicit drug, smuggling of arms and industrial secrets, money laundering, bank robbery, slavery, and unlawful transmission of precious metals and currency is therefore by no means exhaustive. New forms are bound to appear in response to economic and technological advances. Organized crime is expected to make inroads into such areas as computer technology and other areas of the tertiary sector of the economy.

The disposition of the offenders is inextricably linked to their deprived social economic background and the desire to make amends thereto; ambition to acquire wealth and status; desire to control and subjugate others, "or get back at society"; the preva-



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lence of conditions compatible with the groups objectives and which make participation attractive; and the availability of others with the same criminal disposition.

Illicit drug trafficking and drug abuse generally has reached disturbing proportions in the developing countries of Africa, South America, Asia and South Pacific to an extent that a global cooperative approach is demanded. A unilateral approach alone cannot deal with the problem. Developing countries realize this. Technological advances in transport and communication coupled with a certain amount of ingenuity have meant accessibility to the markets, and opportunities for avoiding detection. Because of their strategic placements in international travel routes they become ideal transit points for hard natural drugs moving between for example the so-called "golden triangle" and "golden crescent" and the more affluent western countries for the synthetic pharmaceuticals from the west. Their benevolent climate and fertile soil favour a year-round cultivation of high potency drugs. The international drug trade, which appears to be beyond the control of national and international authorities, is regulated by the narcotics syndicates which constantly evolve new methods of trafficking to evade detection. They also take advantage of the shortcomings of national laws particularly in the areas of taxation and banking, to enable them to launder their proceeds. To name a few of these syndicates: the Tongs, Triad and Yakuza. Together they transact about 500 billion dollars worth of illicit drug, which represent about two-thirds of the gross national product of most countries. The power gained by this enormous wealth and which can now be wielded by these syndicates can seriously threaten or wreck the normal functioning of some of the basic social institutions and processes. In total it can have a deleterious effect on economic and political stability. Their development programmes can be weakened considerably. The effect on the physical and mental health of the addicted population is

potentially daunting, particularly to the ordinary user who is already impoverished but must desperately find means, which are in a large number of cases illegal as well, of obtaining money to sustain his habit. His family suffers, and so does the environment of which he is a part. The capacity of public institutions and democratic processes to sustain themselves in the face of orchestrated violence, threat of violence and intimidation against uncooperative officials, widespread drug abuse, bribery and corruption in some national administrations and lawlessness cannot be overestimated. These undermine the effectiveness of public services and the performance of their administrative tasks and lead to greater impunity and inevitably greater criminality. In addition, the demoralization and weakening of traditional substantive values like honesty may result in reducing the degree of effective social control. If a large number and important segment of the population has been profiting directly or indirectly from the network of organized crime, some degree of social disruption will inevitably result. In some cases certain sectors of the Government may become accomplices and therefore have vested interest in protecting its multifarious operations. Often associated with drug trafficking is money laundering. It consists of illegally acquired money, about 300 to 500 billion dollars in illicit drug sales alone, which are eventually laundered in foreign banks. After the money has been laundered several times, it is channelled into the mainstream of financial circles often through simple real estate deals or more complex stock market takeovers, to corrupt governments or fund terrorist activities. This is done by way of foreign transfers, which allows them to ellude the imposition of tax. Money is often laundered using high tech facilities such as telefax or computers, making it difficult for the authorities to trace their transactions.

Other forms of organized crime need only be discussed briefly. With the advent of super oil tankers and large containerized car-

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go ships, thousands of old vessels became obsolete and redundant. To be rid of them, many were "lost" at sea and fraudulent insurance claims were made in respect. The arms-trade is a further instance of organized crime. In many cases these arms are bought from the proceeds of drug sales and used for the protection of the syndicates, or for furtherance of their political objectives. The unlawful export of gold and currency, and transmission of negotiable instruments are other common forms of organized crime. To tackle the situation of organized crime in developing countries, various countermeasures have been evolved by the relevant state Governments. In the majority of cases it appears that aside from the programmes of rehabilitation, preventative detention, community based aftercare, education and publicity, almost invariably the first state reaction to the problem of drug abuse and trafficking has been the amendment of drug legislation and introduction of deterrent sentences. In Asia for example, the maximum penalties range from mandatory death penalty in Malaysia, Bangladesh and Singapore; death penalty or life imprisonment in Indonesia, South Korea, the Philippines and Sri Lanka; life imprisonment and a fine of 5 million dollars in Hong Kong; and hard labour and imprisonment for an indeterminate period up to life in Japan. Whilst these penalties might have had some impact on trafficking cases, long-term measures and sanctions intended to extend beyond mere mundane considerations need to be enacted. Illicit drug trafficking hides behind the facade of legitimate operations, and offenders "repatriate" their earnings offshore where they are laundered in safe bank accounts. Whilst this matter will be analyzed in the latter part of this report dealing with proposed solutions, the lead that Japan has taken in this area cannot be overlooked. Property and assets which are used or intended to be used in the commission of offences; produced or acquired by means of the criminal act or acquired as a reward may be forfeited; this includes property in the

hands of a person other than the accused party who knowingly acquires the same after the offence.

The relevant provision is contained in Article 19 of the Penal Code. If the property or assets cannot be seized, the court can order the convicted offender to pay a sum equivalent to the value of the forfeitable property. A further provision designed to deprive the offenders of their illicit gain is the imposition of a fine of up to 5 million yens concurrent with other penalties. The assessment of a fine does not constitute a bar to concurrent orders of forfeiture or supplementary collection. In addition, the offender is liable for the income tax on the profits he has made from his unlawful activities. As offenders do not normally file tax returns they are liable for an additional charge of tax evasion. It has been reported that the combination of these measures has proved relatively successful in depriving narcotic offenders of their illicit profits.

Singapore has developed a novel procedural rule which deems admissible the evidence of a state witness, who fears retaliation by the drug syndicate, recorded in confidence and supported by his own deposition, as long as they are corroborated. In other states of the region, namely India and Pakistan, the burden of proof which traditionally rests on the state has now shifted to the accused person in respect of property and assets acquired from the proceeds of illegal drug sales. In Japan, the Yakuza are reported to have invested a considerable amount of their illegal earnings in real estate and construction companies. In Malaysia, preventative laws are invoked to remove members of secret societies involved in organized and serious crimes which are not reported to the authorities and to rehabilitate them at Jerjak Island for a certain length of time. This scheme is reported to have been relatively successful even to an extent that some of the rehabilitatants have requested an extended stay at Jerjak in order to avoid returning to societies. Countermeasures against the other

forms of organized crime have been mainly in the area of improved security measures and the imposition of deterrent sentences by the courts.

### 3. The Situation of Terrorism and the Evaluation of Countermeasures

The frequency and impact of terrorism in its varied forms is not likely to diminish. Those who indulge in internationally organized terror have exposed the world to the dangers of indiscriminate violence and have threatened the continuance of economic and political stability in the developing states. No state is immune from this scourge. The availability of modern arms through international arms dealers, ease of travel and instantaneous communication ensure this. The international dimension of contemporary terrorism manifests itself in a few distinct albeit related ways: weapons and explosives are transported across national borders; preparation for terrorist attacks may be made in one country with its violent conclusions in another; and there is evidence of cooperation and operational coordination between different terrorist groups. The collaboration between the German revolutionary cells and terrorists from a certain part of the Middle East in the hijack of the Lufthansa Airline in 1977, and between the Japanese Red Army and the PFLP between 1972 and 1977 serve as illustrations. In addition, "internationalization" is demonstrated in what has become known as state-terrorism where terrorist operations are either sponsored, encouraged, directed, or materially and logistically supported by a state in order to intimidate another person or persons. They are often secret and covert. In developing countries there is evidence of the involvement of certain states, but this has always been strenuously denied by them. It is often seen by countries in the region as part of a design to extend their influence. The General Assembly of the United Nations has expressed itself, in recent years on contemporary forms

of terrorism, which consist of acts of violence against innocent, random targets, especially population groups, and civil public utility installations. It has unanimously condemned such acts of terrorism and exhorted governments to withhold support from terrorist groups. The General Assembly has not denied the right of people oppressed in violation of international law, to continue their struggle against illegal acts of oppression, consonant with international law. The participants noted, with satisfaction, that Member States have taken measures to implement the General Assembly resolution. Yet some forms of terrorism continue to persist, often supported by professional terrorists without any opposition to just causes, whose services are available to the highest bidder. The participants endorse the view that, because of this lethal, violent and indiscriminate nature, all acts of terrorism are essentially criminal, whether consisting of assassinations, and other homicides, bombing, hijackings, air and maritime piracies or hostage taking.

Maritime crime had by 1985 reached unprecedented levels. The resurgence of piracy against the boat people in the South China Sea and against commercial vessels in the Malacca Straits and the port of Lagos, exposed the lack of national and international control. It appears that the states surrounding the strait do not know who should properly deal with the problem. Because the offenders are not apprehended it is difficult to determine their nationality. In any case the resources of these states individually are too small to allow adequate policing of this busy waterway. The threat of maritime crime and terrorism also exists in the Pacific in relation to the protection of their fish resources and potentially rich sea-bed minerals.

Assassinations, homicides, bombings and threats of violence are the more common forms of terrorism in developing states in the region. Even the small island states of the Pacific are no longer immune to the threats

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of international terrorism. The target for terrorist activities in some countries has not only been public officials, officers of the judiciary and the general population, but also economic infrastructures such as tea and rubber factories. Firearms and explosives available to the terrorists in the South East Asian and Pacific region may have come from pro terrorist-groups and organizations. Any programme designed to suppress terrorism must therefore include a scheme directed at controlling the production and outflow of such firearms and explosives.

Hijacking, thankfully, has not occurred with the same frequency in the region. Its violent and lethal consequences such as loss of life and property can have a devastating impact in the minds of the public and the sensational way it is reported in the media ensures this. Governments can promulgate guidelines to be observed by the media on an occasion of a terrorist threat or attack. Hijack has occurred several times in the region: the hijack of the Indonesian G.I.A. airline in 1983 by Indonesian terrorists; the Japan Airlines "Yodo-go" hijack at Haneda in March 1970 by the Sekigun-ha (one of radical leftist group in Japan); and the attempted hijacking of the Air New Zealand 747 jet at Nadi in the once tranquil islands of Fiji.

In some cases terrorists from this region have travelled abroad to carry out or collaborate with others in clandestine operations. The Japanese Red Army for example carried out a number of hijackings, kidnappings and embassy takeovers. As a result of these activities they obtained large sums of money in ransoms and had terrorist colleagues released from prisons. Between 1977 and 1985 the J.R.A. members carried out covert operations under the cover of other terrorist organizations, in Jakarta in 1985, Rome in June 1987 and Naples in April 1988.

Whilst the difficulty of defining the term "terrorists" remains a setback in formulating an adequate antiterrorism legislation in some jurisdictions, the other states of the region aside from introducing new security

measures, have enacted in reaction to the problem legislations imposing deterrent sentences or giving the police and security officers special emergency powers for the duration of the threat. These new laws have *inter-alia* provided special powers of detention. In Sri Lanka, for example, the Emergency Regulation gave the Inspector General of Police or an officer of or above the rank of Assistant Superintendent, the power to detain a suspect for a maximum period of 90 days. The Minister of Defence may authorize a further extension up to an aggregate period of 18 months, and can issue a Restriction Order limiting the movement of the suspect. During this time of detention the suspect must be produced before a Magistrate every 30 days. Although bilateral and multilateral extradition agreements exist, the apprehension of the offender remains a difficult exercise particularly if he is offered political asylum in a country willing to do so and with which his home state has no mutual extradition treaties. In addition, the process of extradition which is cumbersome is also seriously impeded by the political offence exception, denial of extradition of own nationals or in relation to offences for which the death penalty can be imposed in the requesting state.

Notwithstanding these obvious shortcomings, the states in the region have been able to derive valuable information, technical assistance and practical support from their membership of regional police organizations such as the South Pacific Islands Criminal International Network (SPICIN) in the Pacific and ASEAN in South East Asia. These bodies in turn maintain a close relationship with counterpart agencies and regional government forums.

### 4. Possible Solutions

As suggested previously, because of the transnational and dynamic nature of current criminality, with emergent and sophisticated forms appearing at every stage of devel-

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opment, the international community has to seriously consider a commensurate response and coordinated international action. At a time when the curtains formerly drawn by competing ideologies begin to crumble, there is promise for international cooperation to make inroads, perhaps modest at first, into the realm of criminal justice administration and crime prevention. In this connection the following recommendations were proposed for national, regional and international action.

(1)(a) Review national legislations with a view to introducing provisions allowing seizure, freezing and forfeiture of the objects used in trafficking as well as the proceeds of illicit drug sales. This is in line with the proposal contained in Article 3 of the draft of the New Convention against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances. In this connection a certain amount of international cooperation and the control of inter-country transactions may facilitate detection of capital transfers and disclosure of the source of those funds, and thereby discourage massive money laundering operations. These recommendations, made with respect to drug trafficking could conceivably be extended to other areas of organized crime.

(b) The review of the Banking Laws with a view to narrowing the scope of bank secrecy which presently appears to go beyond the protection of confidentiality due to bona-fide customers, thereby allowing investigation into those accounts suspected of possessing laundered money.

(c) The enactment of an exception to the traditional standard of onus of proof in the Penal Laws, by the states which have not already done so, shifting it onto drug traffickers in relation to the property and assets acquired allegedly through drug proceeds.

(d) Creation of a new offence, which is to form part of the existing drug legislation, which acknowledges punishment for those who knowingly receive, acquire or use assets

derived from illicit drug trafficking. This is in line with the recommendation of the First Interregional Meeting of Heads of National Drug Law Enforcement Agencies at Vienna in 1986.

(e) The establishment of an integrated programme aimed at encouraging alternative crop schemes with equally attractive markets supported by adequate technical and financial assistance from developed states.

(2)(a) The development and conclusion of conventions for the region designed to control terrorism. (There is hope yet for an international convention with the recent changes in the political milieu.)

—They must strengthen the obligation of states to prosecute or extradite offenders under the Tokyo, Hague and Montreal Conventions. Alternatively, a general agreement should be considered, defining the offence of international terrorism; requiring states either to prosecute an accused person or to extradite him to another jurisdiction for prosecution. They must also force states which fail to comply liable for damages and to make those states which condone or cooperate with international terrorist liable for payment of damages to the victims. A grant of asylum must be considered subsequent to prosecution and on different terms.

—Define the "political offence" exception in extradition and practice. The proposed convention should exclude internationally recognized crimes from this exception.

(b) Encourage the conclusion of special agreements with states that deny extradition of their own nationals, or other persons because of the likely imposition of the death penalty.

(c) Development of a code of ethics governing the granting of diplomatic immunity by foreign embassies to fleeing offenders.

(d) Strengthen cooperation in the areas of extradition and mutual legal assistance gen-

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erally in an effort to simplify and rationalize the presently cumbersome extradition procedures

(e) Encourage the promulgation of national legislation aimed at discouraging immediate publication of terrorist threats and violence and tactical police information, for example hijacking, kidnapping, extortion, and acts of terrorism until the incident has been resolved or at other time deemed suitable. A lack of control may prevent effective law enforcement, the apprehension of offenders, and may endanger the lives of innocent civilians and law enforcement officers.

(f) Development of a convention designed to protect nuclear plants and offshore structures against terrorist attacks.

(g) Request states to introduce measures controlling the sale abroad of weapons, destructive devices and their components. Countries which manufacture arms which have found their way into terrorist hands should realize that whilst they might not have delivered them directly, they owe it to the innocent victims of terrorism, the orphaned, the maimed and the world at large to impose strict conditions on their sale or redistribution.

(3) Strengthening the role of the International Criminal Police Organization (INTERPOL) by upgrading its international capacity. It could extend its function to the provision of assistance in investigation, research and training, and implementation of new security measures. Regional police organizations could also undertake similar programmes, participating in the constant exchange of information, using modern technology where possible, developing fraud control programmes and anticorruption mechanisms, etc.

(4) Establishment of a bilateral and multi-lateral law enforcement task force consisting of countries in the same region to police the "hot spots" of transnational crime, operating under comprehensive but strict

guidelines to tackle transnational crime problems common to them all. Acting as an international police force under the United Nations flag, the force could be deployed into those areas, with the consent and participation of the states affected by the problem, ensuring *inter-alia* the safety of lives and property.

(5) Establishment of an International Criminal Court, or regional divisions thereof with the appropriate jurisdiction and criminal code to adjudge international criminals, thereby considerably easing the pressure on the country having original jurisdiction. Attached to this court, an international indictment chamber could be constituted with jurisdiction to consider *ex parte* testimonies against any international criminal, and on the finding of a *prima facie* case, issue an indictment and an arrest warrant.

(6) Nongovernmental organizations which have long assisted in selected areas of criminal justice could, with each other and counterparts in the region, develop policies and strategies jointly, thereby ensuring, with a new spirit of understanding and cooperation, a greater impact.

(7) As an immediate measure, the mandates of the Secretariat's Crime Prevention and Criminal Justice Branch must be broadened, and its staff must be expanded so as to be able to respond effectively to the needs of the world community in dealing with the world-wide threat of crime, as outlined in this report. In the long run, the creation of an entirely new United Nations structure for dealing with transnational crime, as it effects the world and individual nations, should be accorded high priority. This new structure should also have special expertise for dealing with international economic, wartime, aviation, environmental, international-corporate, and terrorist crimes. It should have the capacity as well to respond swiftly to emerging situations, with technical assist-

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ance and other support, as requested by Member States.

Member states should be encouraged to second experts for attachment to it and thereby reduce the constraints imposed by the lack of funds.

(8) Encourage states to develop suitable educational and promotional programmes designed to raise public awareness and enlist public support against these crimes, highlighting the potential social and economic harm.

(9) That the year 1992 be declared "International Year for Prevention of Crime."

### 5. Conclusion

In making these recommendations for the formulation of international guidelines and implementation of certain measures, it is important to make the appropriate adjustments to suit the varied socio-economic and political conditions prevailing in each state. The version reflecting these conditions then ought to be adopted as a national code as part of an integrated programme of crime prevention and criminal justice. Each state must utilize the other sectors of public utilities in this campaign with the aim of removing certain conditions and reducing the demand for commodities which are the subject of the new crimes. In the final analysis, the programmes to be implemented must be acceptable in international law.

### **Session 4: Delinquency Prevention, Juvenile Justice and Protection of the Young: A View from Developing Countries**

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### 1. Introduction

The problem of juvenile delinquency has existed in all societies since the beginning of time. It is very disheartening to see, children being exploited in society. This problem has two facets; first, that the community suffers at the hand of the juveniles and, secondly, the juveniles are themselves victimized and are exploited by the adults. Environments are created in a society which lead young souls to the world of crime and when they are too advanced in this field to go back, they are exploited.

However, it is heartening that in almost every country measures are being adopted and the most effective of these measures are always kept under consideration to cope with this problem. Although crime is no doubt a threat to the peaceful conditions in every society and should never be neglected, the crime of the younger generation must never be overlooked because of its "less serious" nature. It is necessary to nip the evil in the bud as the future of society depends on the proper care of the young coming in conflict with the law.

Before embarking on the discussion on the main theme it would be proper to define juvenile delinquency. Legally speaking, a juvenile delinquent is a person who has been adjudicated as such by a court of proper jurisdiction though he may be no different until the time of adjudication by the court at any rate from children who are not delinquent. In the wider sociological perspective, however, juvenile delinquency may include a wide range of anti-social behaviour patterns, some of which may not even be brought within the purview of the law.

## 2. Scope and Concept of Juvenile Delinquency and Juvenile Justice

The problem of definition flows in part from the contrasting views of those who deal with juvenile delinquents. Broadly, two general approaches may be observed: the judicial or legal view and the administrative or casework view. Conception of delinquency has largely been derived from these views and they in turn tend to reflect the two main phases of juvenile court work: adjudication of cases and their social mainstreaming. In the legal approach to misconduct it is customary to describe offences and penalties in specific terms in order to protect the citizens from arbitrary or unjust acts of the police and the judicial authority and at the same time to secure the community against those whose conduct has been shown in court to be dangerous. Lawyer and judge are inclined to stress as a precondition of treatment through criminal court the following requirements:

- (a) That a specific charge be alleged against the defendant;
- (b) That it be defined in definite terms by law;
- (c) That the offence be proved rather conclusively;
- (d) That protection be given to the accused during trial against conviction by false, misleading, prejudicial, irrelevant or immaterial evidence.

The combination of conflicting concepts of delinquency is fully revealed in the definitions of juvenile justice that appear in the relevant statutes. The disparity may be seen in the provisions in various countries.

Age levels of delinquency in common law are: i) the infant is held to be non-responsible for crime up to the age of seven years, as he is thought to be lacking in the mental capacity to entertain the intent that is required for criminal behaviour; ii) from 6 to 16 years the infant is presumed to be incapable of com-

mitting a crime intentionally because of his immaturity (but this presumption might be countered by showing that he had sufficient capacity to distinguish between right and wrong); and iii) from 14 to 16/21 years there is a presumption that the individual possesses the capability of performing criminal acts. After this age, the presumption becomes conclusive in so far as age might affect his capacity. Distinctions in responsibility are based upon the notion of age among individuals to possess free will in their power to distinguish right from wrong and thus to form the mens-rea or culpable intent required in crime. Such a use of chronological maturity as a basis of discriminating between criminal and non-criminal behaviour has evolved into modern statutory law with the underlying ideology preserved to a great extent. A major change has been the pushing upward of minimum age. Also, the presumption of the juvenile's non-responsibility has been made absolute.

This use of chronological age as a criterion of delinquency may seem odd, arbitrary and out of place in an era of individualization. From a psychiatric or casework point of view, the individual's diagnosis and treatment should depend not on his age *per-se* but on numerous factors such as emotion, temperament, experience, and physical condition. Despite the apparent excessive arbitrariness in the criterion of age, particularly in borderline cases where the child is just under or over the age set by a statute, it should be recognized that the law must rely upon systems of rather definite classification to cover large numbers of cases. Arbitrariness is implicit in any system of classification, yet science as well as law is based upon classificatory devices. For the most part, legal categories have evolved their value for the purpose at hand.

Chronological age is a relevant criterion for distinguishing between anti-social juveniles and adult criminals, for it is a factor subject to verification and one which is highly correlated with specific items of maturity, phys-



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ical condition and psycho-social growth of the juvenile with which the correctional system is concerned. Moreover, though it is impossible to individualize completely a system of justice, it is possible within the framework of these age categories to separate and subclassify treatment methods to meet the particular needs of different cases. The establishment of somewhat rough and viable age divisions, does nevertheless promote a greater evenness of justice than would be possible under a legal system attempting to operate with a wide open discretion for judges and treatment experts. The requirements of justice are often enough diserved in the discretionary latitude now permitted where gross variations among authorities and their ideologies result in treating similar cases in radically dissimilar ways. A fair measure of just uniformity is ensured by the classification norm such as age. Under the statutes of a majority of the countries today, a child may be adjudicated as a delinquent if he is over the age of 7 and under 16/21, which confer either complete or partial jurisdiction over juvenile delinquency up to that age. Some countries extend jurisdiction to age of 21 but in each of these, the criminal courts have concurrent power to try serious cases such as homicide, robbery, burglary and rape. And in some countries, jurisdiction over the juvenile is terminated wholly or in part by the age of 16. In addition to the age factor, another significant change relates to the establishment of the status of delinquency distinct from that of crime, dependent in part on age and in part on conduct. According to the modern statutes, a criminal charge against an infant must be dismissed by reason of immaturity. Nevertheless, such a person may be held as a juvenile delinquent and treated for his protection as a ward of the state. The status of delinquency has evolved from an appreciation of the danger that the young offender may easily become an adult criminal if no deterrent or rehabilitative influences play upon him. Adjudication of delinquency does not establish a criminal re-

cord against the individual. Reports and records of the juvenile court may not be used against the child later in criminal trials. He loses no rights to citizenship, to hold public office or to secure employment. Nevertheless, these laws have evolved from earlier criminal statutes governing incorrigible and wayward behaviour.

In contrast, with the procedural and motive formalism of the legal approach, casework brings to behaviour problems a distinctly different set of methods and values. Its aims generally are therapeutic: to aid in the resolution of the individual's maladjustment by seeking out the social roots of his difficulties and to attempt at mitigating the conflicts that have caused disturbance. Casework then essays to deal with a wide assortment of personal and group problems that represent failures in the juvenile's social adjustment. Largely these are maladaptations in behaviour: dependence, domestic conflict, desertion, drunkenness, unemployment, avoidance of responsibility, delinquency, etc. Treating presumed causes and symptoms with methods devised to meet the particular needs of the individual situation is the essential function of the caseworker. His approach is non-moralistic, because he either denies the freedom of the will or recognizes the profound significance of external forces in impelling conduct, over which the individual has little or no control. He observes, moreover, that an understanding, sympathetic, non-moralistic reaction encourages more confident cooperation from the client, which facilitates treatment. His approach is non-punitive, because the attribution of blame and the application of retributive measures are inconsistent with the recognition of the causes of conduct extraneous to the individual "will." The social worker's approach is less formal than that of the legal mind, since categories and qualities of problem conduct are not so precisely established in the content of casework theory, nor are methods of treatment so definitely organized and equated in general to the problems of the case. In

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social work, it is recognized that a given type of conduct may in different cases reflect quite different causes, and that the treatment required to deal with the given behaviour should depend on the factors that underline the particular case rather than the behaviour itself.

It follows from this, that there must be a far wider province of administrative discretion in the practice of casework than is employed by the judge in attempting to allocate responsibility for deviant behaviour and to prescribe treatment suited to the subject. Moreover, interpretation and technique may differ considerably from one social agency to another or even, within an agency, from one caseworker to another. In contrast to the law's preoccupation with miscreants who have violated specific and official legal norms, social work is concerned with a multitude of problems of behaviour that deviate from psychological, social, economic, and sometimes legal normality. In so far as the caseworker may deal with the law violator, he does so with the same non-moralistic and non-punitive assumptions that are applied to other deviants. The young anti-social child may be referred to any one of a variety of social agencies rather than to a court. In a proper case, where official authority appears to be needed, law enforcement agencies may be called into operation but much of the problem conduct that is handled by the caseworker in the agency is identical with the illegal behaviour that confronts the courts. The agency in the fulfillment of its purposes, makes no attempt at a specific definition of the type or degree of law violation or at a carefully controlled determination of the individual's innocence or guilt of the prohibited conduct.

### **3. Contemporary Phenomenon of Juvenile Delinquency**

The term of juvenile delinquency may be new but the problems of children are as old in history as the children themselves. Every

society has treated its children in accordance with its religious, social and political beliefs. Several socio-economic changes such as the breakdown of feudalism, industrialism, colonization, migration and urbanization have influenced social attitudes towards children. These attitudes were also shaped by calamities such as epidemics, wars and social upheavals. It is generally felt that the incidence of juvenile delinquency in developing countries is on the increase and without proper countermeasures the rate may become even more rapid. In some countries, the increase is pronounced in violent behaviour, sexual deviation and drug related offences. The nature of delinquency in other developing countries shows the traditional pattern of dominance of property related offences such as minor thefts. In certain countries, it also indicates the involvement of juveniles in underworld activities such as gang fights.

### **4. Factor Associated with Juvenile Deviance**

While the population of children and youth has been increasing disproportionately, employment prospects are not increasing at a corresponding rate. The economic stresses and strains of the industrial and urban life, coupled with a large scale migration of the poor from villages to cities mostly in search of livelihood, have adversely affected the quality of the care and nurture of juveniles. The children of poor families in urban slums uprooted from their natural milieu and faced with poverty, hunger, and destitution continue to be exposed to the situations of human degeneration, deviance and delinquency.

In some developing countries, researchers have associated juvenile delinquency with:

- Lack of parental control and guidance,
- Rural-urban migration resulting in the emergence of a new sub-culture of slums,
- Poverty,
- Too much emphasis on material goods or

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- items beyond the juvenile means,
- Broken homes,
  - School drop outs,
  - Boredom and lack of recreational facilities,
  - Breakdown of social and moral values, and
  - Handicap due to biological defects.

### (1) *Family*

Family being the nucleus of a society plays a crucial role in the care control and socialization of children. The child's emotional, physical and mental needs can be satisfied best only in the home. The absence of a proper atmosphere within the family may lead to problematic behaviour among children. At present in many countries which have experienced rapid growth through industrialization, urbanization and modernization, the extended family has been breaking down, yet the remaining nuclear family is also imperiled. More families are leaving traditional professions such as agriculture and crafts and are moving to urban industrial centres in search of gainful occupation. These families live under adverse circumstances in urban slums and unplanned congested localities, deprived of the basic amenities of life, which surely has an adverse effect on the growing children. In rural areas, traditionally the child used to take up the occupation of his family, but now a new trend has emerged in which an increasing number of young people flock to towns to make a livelihood or easy money and to have a taste of city glamour. The result is that family bonds are becoming weak.

### (2) *Economic Hardships*

Economic hardships are a source of frustration for all members of the family, more so for children. Due to the drift of poor families from rural to urban areas, many children have to start working from an early age to contribute to their family income. Once a child goes out to work, he is exposed to all types of hazards in the world of adults. Due to a lack of supervision, the child is easily attracted towards vices and anti-social be-

haviour. He feels frustrated and becomes aggressive and revolts against the set order. Social and economic stresses result from parental neglect, family discords and tensions which constitute an important factor in pushing the child towards deviant and delinquent behaviour. Both over-indulgence and harsh treatment can produce counter productive results.

### (3) *Change in Social Norm and Value*

Apart from what is taught in the home and the school, at the level of social interaction, children often realize that dishonesty pays. A man's worth is often being judged on the basis of the possession of material goods and not in terms of adherence to positive values. Such an environment is highly conducive to juvenile delinquency. Violence as portrayed in the mass media like cinema and television also perpetuates deviance amongst youth.

### (4) *The Group and the Community*

The child growing up in a modern large city is exposed to a variety of conflicting stimuli, interests and patterns. Conflicting demands on the growing child's loyalty are the source of much of the difficulty he faces. This situation leads to the formation of gangs. Membership in such gangs often results in unhealthy activities. It is known that young people in general have little resistance to suggestion. Fashions of thought just as fashions of dress, may spread rapidly through conversation and imitation of any form of behaviour may be normalized through conversation and participation in the group. Fashions in crime may follow the same pattern.

### (5) *Mass Media*

The influence of some movies, television programmes, comic books and pornographic literature is often cited by a surprisingly large number of children as a major factor in delinquency. However, parental responsibility has generated more controversy than the role of mass media in delinquency, es-

pecially to violent forms of deviance and sexual offences. Extreme claims have been made for and against this interpretation of delinquency, but very little evidence has been forthcoming to support it either way.

## 5. Modalities of Preventive Measures

### *(1) The Informal Social Control Agencies*

Juvenile delinquency is a complex problem. In many parts of the world, it has been observed that with the advancement of industrialization and urbanization, juvenile delinquency is becoming more acute.

The struggle against juvenile deviance, delinquency and crime is a constant one; it has to be waged, if not to be won, at least to ensure that it is not entirely lost. Each country has to devise a strategy in consonance with its prevailing levels of socio-economic development, political thinking and public awareness. Indeed, there is much to learn from one other, as the basic problem of survival and destruction are common to the entire human race and juvenile social maladjustment is one of the problems that impinges upon the very quality of life.

These considerations do not, in any way, undermine the need to initiate, promote and develop programmes for the strengthening of basic social organs concerned with the growth and development of juveniles, such as the family, the education system, the religion and the community. Under the impact of socio-economic changes and technological developments, the traditional role of the family as the principal agency for the protection and transmission of values has diminished, especially in developed countries. As the joint family is now being replaced by the nuclear family, children soon become independent and out of control. In most developing countries, though much of the problem of juvenile social maladjustment is still largely tackled by the family, a variety of socio-cultural and economic pressures tend to erode its protective umbrella and ability to guide and determine the style of its young

members. The social control functions of family are being gradually taken over by the more complex public structures particularly the educational system.

The process of rapid industrialization and consequential urbanization, resulting in the shifting of large population groups from backward to affluent areas, has thrown the traditional family structure off-balance in many countries. The nature of interrelationships within the family is undergoing changes with far reaching implications for child rearing and nurturing practices. This has resulted in the loosening of bonds among members of the family and the weakening of religious and conventional values to maintain family integrity. Nowadays, the young generations are far away from their religion and the changing attitudes towards sex and morality are becoming the common features of such a state of influx. It is generally accepted that efforts to secure social justice for children in need of care and protection from the viewpoint of social defence could be most beneficial when centred around the family as the primary unit of society. In the contemporary world, the educational system has acquired a unique position among various agencies affecting the lives of children and youth. The educational system has to cater progressively to the varying needs and problems of juveniles in the face of prevailing socio-cultural and economic realities.

In developing countries, religious organizations respond at the time of crisis in the society. The religious community can play a vital role in the activities of youth, particularly in the spirit of religion. Religious education would have a tremendous impact on a juvenile to help remould his character to the extent acceptable by society. Hence, more emphasis should be placed on education aimed at humane values in the school curriculum. It is universally accepted that public educational and religious guidance should be enlisted for the prevention and control of juvenile social maladjustment.

It is widely felt that education should be

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related more closely to the specific social and economic requirements of a country, on a dynamic basis. The effectiveness of the family, the religion and the school, as the primary agencies for the care and socialization of erring children, depends heavily on the active support of the community and its institutions. Each community has its own network of interrelationships, communications and corrective measures to regulate the behaviour of young persons. Particularly in developing countries, where a majority of juveniles coming within the purview of the juvenile justice system consist of non-delinquents, community action is of vital importance in the process of their reintegration. However, community services are more effective when administered without invoking legal sanctions. In many countries, diverse forms of community participation in delinquency prevention are seen to operate through voluntary organizations, social groups, educational institutions, professional bodies, public agencies, business houses, youth groups, women's organizations, etc. There is no doubt that any project planned, formulated and implemented on the basis of democratic participation at the community level is assured of much greater success than one imposed by a distant authority.

### *(2) The Formal Mechanisms*

All the components of the juvenile justice system, including the police, courts and correctional agencies, are required to assume a differential approach towards treatment of various categories of juveniles coming within the purview of law. The treatment process has to be based on a thorough study and diagnosis of each case in terms of the personality traits and behavioural patterns of the juveniles involved, the nature of and the circumstances in which the crime was committed and the assessment of their correctional needs and rehabilitative requirements. The process begins with the handling of the juvenile by the police and the manner thereof considerably influences and guides the

course of correctional treatment and responses thereto.

In several countries, special police units, with a separate set of criteria for selection, training and a separate code of ethics, have been set up to deal with juvenile cases. In certain countries, they are also empowered, formally or informally, to dispose of cases involving trivial offences through caution, counsel, instruction or guidance. It is necessary that adequate safeguards be built within the juvenile justice system to ensure the juveniles the protection of their basic rights while in contact with the police. Otherwise, the entire approach towards care and protection is liable to become counter-productive from the very beginning, besides lowering the image of the police itself.

Juvenile laws in most countries provide for, in varying degrees, specialized settings, procedures and powers for the prescription and administration of treatment. In the Asia and Pacific region, most laws allow for the constitution of juvenile courts, with a variety of options including the management of juveniles within their family, placement with foster parents, probation and other forms of community-based treatment, with institutionalization open of them for selective usage. Some systems provide special requirements in the selection, training and appointment of Magistrates/Judges on juvenile family courts. The overall approach adopted by the competent authority can be characterized generally as more flexible, humane and treatment-oriented than that in adult courts. The proceedings are conducted in an informal manner, mostly on camera and in the presence of parents. The juvenile accused of an offence has all the rights of due process in most of the countries.

In India, the Juvenile Justice Act, 1986 provides for the establishment of juvenile welfare boards, as distinct from juvenile courts, for the processing, disposal and placement of non-delinquent categories of children. Despite such legal provisions, position in many countries reflects a wide gap

between cherished standards and actual practices.

Among the other modes, community service orders are being experimented within certain countries. In developing countries, a variety of open institutions for juveniles have been promoted both through official and non-official agencies to function as the basis for community-based treatment.

At the international level, the basic issue before the juvenile justice system is that of ensuring fair treatment to juvenile offenders within the overall framework of law and justice.

## 6. Other Related Issues

### *(1) Implementation of the "Beijing Rules"*

The "Beijing Rules," laid down by the Seventh United Nations Congress in Milan, are very extensive and wide in scope dealing with all stages of juvenile cases which include the investigation, prosecution and disposition of such cases in a formal/informal manner, and their treatment in institutional, non-institutional and semi-institutional manner. Acknowledging the evidence of fund-constraint, poor institutional arrangement, insufficient training facilities, limited number of trained manpower, lack of public awareness etc., in many third world countries, it has been observed categorically that these rules should be implemented in the context of economic, social and cultural conditions prevailing in each member-state. The future of juvenile justice is bound to be considerably guided by these rules.

The adoption of the S.M. Rules for the problem of juvenile delinquency are necessary and would effectively tackle the problem as it exists in contemporary society. Of late, in various national, regional and international forums the idea seems to have converged into a set of clearly defined norms for national governments to progressively evolve their formal systems in keeping with the principles of human rights of children coming within the purview of the law.

### *(2) International Cooperation in This Field*

The United Nations and other international agencies can play a very significant role in this regard. They can arrange international and regional conferences of member-states for exchange of views and consequent decisions, assist them in training and research and call upon the developed countries and international/multinational agencies to extend material help to developing countries, where it is required.

## 7. Concluding Remarks and Suggestions

Having identified some of the major causes of juvenile delinquency, one has a clear indication of the magnitude of the problem and of the plans and programmes formulated to deal with it in the most effective manner. The Constitution of every country envisages commitment to social justice and the development of human resources. Children should be accorded the highest priority in social and economic development plans. While there are many legislative enactments dealing with children, juvenile crime is on the increase. Juvenile delinquency being a social problem, no amount of government policy for social control or correctional method can prove as effective as community participation. The family being the nucleus of the society, has a vital role to play. The child's emotional, physical and mental needs can be satisfied best only in the home. As a preventive measure, delinquency must be curbed at the initial stages. The absence of a proper atmosphere at home, which is essential for an overall development of the child, leads to problematic behaviour in children. In many countries, the inability of the family to take full care of its children is found to be a major factor in juvenile delinquency. Constant efforts should be made to provide children every opportunity for development and entrance into adult society. But any effective child development and welfare programme has to be based on the needs of the community. Each

delinquent child has to be studied and mainstreamed in relation to his own situation.

Juvenile delinquency prevention efforts should be aimed at the community and the community must participate fairly in these efforts. A rapidly growing industrial society raises the expectations of all persons. Slum dwelling youth feel alienated and neglected. Society can integrate them only through the efforts of local institutions—the family, the school and the work place. As the criminal justice system is limited in what it can do towards delinquency prevention, the real battle will have to be fought in the community, by several public and private agencies and more by the citizens themselves.

On the basis of the above considerations, the following recommendations were made:

- (a) Prevention and control of juvenile delinquency, juvenile justice and the protection of the young should be pursued as an integral part of national development plans.
- (b) Delinquency prevention programmes should be developed around the strengthening of the family as the principal agency for the care, control and socialization of the growing child.
- (c) The United Nations Standard Minimum Rules for the Administration of Juvenile Justice should be adopted progressively by all member-states.
- (d) The draft Standard Minimum Rules for the Protection of Juveniles Deprived of Their Liberty, prepared as a follow-up of the recommendation of the Seventh Congress on the Prevention of Crime and the Treatment of Offenders should be considered for adoption by the Eighth United Nations Congress.
- (e) The draft Standards for the Prevention of Juvenile Delinquency prepared in consonance with the resolution of the Seventh Congress on the Prevention of Crime and the Treatment of Offenders should be considered for adoption by the Eighth Congress.

- (f) The progress in the implementation of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice should be evaluated by UNAFEI and other regional institutes.

### **Session 5: United Nations Norms and Guidelines in Crime Prevention and Criminal Justice; Implementation and Priorities for Further Standard Setting**

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#### **1. Introduction**

While there have been many positive effects of rapid socio-economic change, there also have been some negative ones. These negative effects require an adequate response at the national, regional and international levels. Development is a dynamic process, and crime is a dynamic phenomenon. Crime may be influenced by socio-economic changes and associated factors. In many developing countries the growth of crime has been attributable to deteriorating social and economic conditions, to poverty and social injustice, the denial of basic needs, unemployment, the lack of proper housing, the absence of educational opportunities and health services, and the struggle for a better standard of living.

Among the most important policies to be adopted in order to deal with crime effectively, an integrated approach to crime prevention and criminal justice policies and strategies ranks foremost among them and should be stressed by all countries. Moreover, crime is not solely a national problem, it has become an international problem respecting no

national frontiers. The application of modern technology makes it possible for offenders to move themselves and their operations swiftly across frontiers and to take advantage of differences in law and law enforcement amongst jurisdictions. To perpetrate their crimes, offenders are utilizing high technology and increasingly sophisticated strategies to which a single state is unable to respond adequately. National resources will remain insufficient for achieving an effective response. The need for a concerted international approach is obvious.

Consequently, prevention of crime requires a deep commitment and co-operation at the national, regional and international levels. The United Nations should play a pivotal role in multilateral co-operation in the field of crime prevention and criminal justice.

In order to facilitate the prevention of crime, criminal justice systems must be strengthened, improved and co-ordinated. For this purpose the United Nations has promulgated various instruments for crime prevention and criminal justice, such as standard minimum rules, norms, guidelines and model treaties relating to crime prevention and criminal justice administration. These provide useful guidance to member states. The various standards and guidelines bear different titles, such as:

- General principles,
- Codes,
- Standard Minimum Rules,
- Declarations,
- Procedures,
- Principles,
- Guidelines,
- Recommendations, etc.,

indicating the degree of significance they are to be accorded.

These instruments can and should be adopted or adapted in each country, with due regard to its own culture, traditions and social conditions, so as to provide for their effective implementation.

## 2. United Nations Norms and Guidelines in Crime Prevention and Criminal Justice

For the most part the United Nations principles, guidelines, norms, standards and model treaties, relating to crime prevention and criminal justice administration, have already proven to provide useful guidance for member states, because they were drafted with due regard to differing systems and social conditions found in countries with different cultural heritages. This is a prerequisite for their implementation at the national level.

In the Universal Declaration of Human Rights, of 10 December 1948, Articles 3, 7, 8, 9, 10, and 11 are of the greatest significance, as the umbrella provisions for crime prevention and criminal justice. These fundamental human rights provisions govern the protection of the dignity and integrity of all mankind, constituting the foundation, and thus the fundamental premises of criminal justice. They must be respected when responding to the global threat of crime affecting all countries.

The quinquennial United Nations Congresses on the Prevention of Crime and the Treatment of Offenders are the principal forum for promoting, strengthening and developing international and regional co-operation in the fight against crime. For achieving this purpose, further appropriate model instruments could contribute to the formulation of comprehensive co-operation among the states.

In order to assist member states in their capacity to deal with international and national law enforcement, a strengthening of international co-operation is needed. Particularly important are instruments and means of international co-operation in penal matters, such as those pertaining to extradition, investigative and judicial assistance, transfer of proceedings, transfer of foreign prisoners, and execution of sentences abroad. These should be thoroughly considered and



elaborated, and augmented by special norms and guidelines, covering these and related subjects in conformity with the International Covenant on Civil and Political Rights (G.A. Res. 2700A (xxi) of 16 December 1966, in force since 23 March 1976).

Beyond implementing the principles, norms and guidelines of the United Nations, technical co-operation in various forms should be increased, especially so as to enhance the training of personnel in all branches of the crime prevention and criminal justice system, including research and information exchange. Especially important are technical assistance on bilateral and multi-lateral levels, as well as technical co-operation among developing countries at regional and interregional levels, to preserve and stabilize social control and to increase national capacity in dealing with the threat of crime.

### **3. Incorporating the United Nations Instruments in National Legislation**

The United Nations, since its foundation, drawing on its Charter and the International Bill of Human Rights, has developed an entire network of international instruments in the field of crime prevention, criminal justice and the treatment of offenders, and has thus greatly enhanced the national capacity to deal with the problem of crime. Among these standards are the Universal Declaration of Human Rights and a variety of other United Nations principles, standards, norms and guidelines in the field of crime prevention and criminal justice, promulgated for the purpose of protecting human rights in criminal justice.

As for crime prevention, the Guiding Principles for Crime Prevention and Criminal Justice in the Context of Development and a New International Economic Order, 1985, is the most important instrument. The Resolution on Implementation of United Nations Standards and Guidelines in Crime Preven-

tion and Criminal Justice, 1988, is of the greatest relevance for all other instruments, as it is concerned with their effective implementation.

The first United Nations Congress on the Prevention of Crime and the Treatment of Offenders, in 1955, adopted the Standard Minimum Rules for the Treatment of Prisoners, the first of all standards. Other important instruments have been adopted thereafter, such as the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel or Degrading Treatment or Punishment; the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty; the Procedures for the Effective Implementation of the Standard Minimum Rules for the Treatment of Prisoners; the Code of Conduct for Law Enforcement Officials; the Convention against Torture and Other Cruel Inhumane or Degrading Treatment or Punishment; the United Nations Standard minimum Rules for the Administration of Juvenile Justice; the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; the Basic Principles on the Independence of Judiciary and the Model Agreement on the Transfer of Foreign Prisoners; and Recommendations on the Treatment of Foreign Prisoners.

All of these principles and guidelines have been adopted by the United Nations for purposes of achieving the globalization of crime prevention and criminal justice responses to the problem of internationalized crime due to the globalization of life on earth itself. Member states can co-operate with each other in responding to the global threat of crime, on the basis of this network of instruments. As virtually every crime, anywhere in the world, has become an international criminological event, it becomes necessary that all nations have the willingness and capacity to co-operate with each other in responding to crime.

With these ideas on the globalization of life and on global crime prevention as a starting

point, it now becomes necessary to implement, as far as possible, these United Nations instruments for crime prevention and criminal justice by incorporating them into national legislation. In the process of transformation of the United Nations instruments into the laws of nations, careful attention must be given to their adjustment so as to meet the conditions of each country. As for international conventions, these should be ratified by all countries in accordance with their constitutional provisions. They then become binding, as an integral part of domestic law.

“Incorporation” of a norm or guideline, or of a convention, into national law, must respect the nation’s Constitution, its political aspirations, the traditions of its people, and its economic and religious conditions. Many developing countries, by virtue of economic conditions, cannot comply with all of the Standard Minimum Rules for the Treatment of Offenders, or with other guidelines, while in yet other countries, temporary military dictatorships ignore the rules. Patience and understanding in this regard are necessary.

It would be particularly useful to emphasize those measures and policies for the effective implementation of the various standards, norms and guidelines, which concern the international community as a whole, which strengthen international co-operation, and which foster the participation of the international society in the international crime prevention effort.

The question is how to harmonize and to synchronize legal systems in spite of differential approaches, by fostering mutual understanding, co-operation among the states, and achieving a globalized approach to crime prevention. With the achievement of a global economy, new strategies, fully cognizant of the implication of the existing realities and consequent priorities, must be considered.

#### 4. Implementation of United Nations Instruments for Crime Prevention and Criminal Justice

Successful implementation of the United Nations instruments naturally requires international action, but is very dependent on the efforts made by the governments of individual countries, within their domestic jurisdiction. As the United Nations instruments, guidelines and standards in crime prevention and criminal justice have been unanimously accepted by all governments and thus have a base of broad international support, and since they express universal principles to which the international community has committed itself, it therefore is necessary to strengthen measures for their effective implementation, and to follow up on established policies which have been internationally agreed upon, so as to translate them into reality.

In the implementation of guidelines and standards based on the principles of human rights, national legislation should consider the standards, norms and principles which have already been internationally agreed upon, especially those of the Universal Declaration of Human Rights. The articles dealing with the criminal justice system are:

- Everyone has the right to life, liberty and security of person. (Art. 3);
- All are equal before the law and are entitled, without any discrimination, to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination. (Art. 7);
- Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law. (Art. 8);
- No one shall be subjected to arbitrary arrest, detention or exile. (Art. 9);
- Everyone is entitled equally to a fair and

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public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. (Art. 10);

- Everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which he has had all the guarantees necessary for his defence. (Art. 11.1);
- No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed. (Art. 11.2).

Consonant with Articles 3, 7, 9, and 11, the Code of Conduct for Law Enforcement Officials (G.A. Res.34/169 of 5, February 1980), promulgates eight basic precepts for law enforcement officials:

- (a) the fulfillment of law enforcement duties as imposed by law, adherence to highest standards;
- (b) the protection of human dignity and human rights;
- (c) restriction on the use of force;
- (d) confidentiality of information;
- (e) absolute prohibition of torture;
- (f) protection of the health of persons in custody;
- (g) total opposition to corruption; and
- (h) overall respect for law, and duty to report violations.

Even though this code was adopted unanimously by all countries, there are obstacles to its successful implementation, such as:

- lack of co-ordination in research, counselling and implementation;
- shortage of funds, both at national and international levels, for dealing efficiently with law enforcement questions;
- inadequate human and professional re-

sources; and

- lack of political will and public apathy.

It should not be forgotten that the principles are binding under international law, as contained in the International Covenant on Civil, Political and Cultural Rights. The Covenant mandates:

- equal treatment for every one before the law without any discrimination;
- arrests, detentions, searches and seizures may only be conducted on the basis of written warrants by officials who are authorized by law, and only in cases and by means which are regulated by law;
- anyone who is suspected, arrested, detained, prosecuted or brought before a court, must be regarded as innocent until there is a court judgment which declares his guilt and which has become final and binding;
- a person who is arrested, detained, prosecuted or tried without a basis in law and/or because of a mistake regarding his person or the law to be applied shall be entitled to obtain compensation; law enforcement officials who deliberately or because of their negligence have caused the violation of said principles of law shall be liable to prosecution, penalty and/or administrative discipline;
- adjudication must be carried out quickly, simply and at low cost in a free, honest and impartial manner, and must be accomplished consistently at all levels of justice;
- anyone who is involved in a criminal case must be given an opportunity to obtain legal assistance which is provided solely in the interest of his defense;
- a suspect, from the time of his arrest and/or detention, must be informed of the accusations against him and of the legal basis of what he is charged with, as well as of his rights, including the right to contact and obtain the assistance of legal counsel;
- a court shall try a criminal case in the presence of the accused;

—examination at trial shall be open to the public, except where otherwise regulated by law in the interest of justice.

The compilation of these principles constitutes an effort to compile the most important provisions of criminal procedure, intended to protect human rights. They likewise may be found in the codes of various countries, governing law enforcement and criminal procedure, where they serve as basic principles of humane law enforcement.

In the field of corrections, the international standards have been set by the Standard Minimum Rules for the Treatment of Prisoners, 1955, 1957, 1977. These standards are based on some fundamental principles. Thus, prisoners should be protected in their rights. Their confinement shall aim at their rehabilitation, so that they may become good and useful members of society. Obviously, correctional policies must be such that prisoners do not leave prison in a worse condition than before. Prison labor should benefit the prisoners and society. The Standard Minimum Rules should be implemented by national legislation, appropriately adjusted to meet national conditions.

For crime prevention itself, the United Nations has adopted some basic standards, contained in the Guiding Principles for Crime Prevention and Criminal Justice in the Context of Development and a New International Economic Order, 1985. Foremost is the principle that national crime prevention planning must proceed within the overall framework of socio-economic development. The principles stress the need for international co-operation for crime prevention.

Other instruments adopted by the United Nations include the Declaration on the Prevention of Cruelty and Torture. Concern for potential victims of the criminal justice system has been codified in the Declaration on the Protection of all Persons from Being Subjected to Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, 1975, and in the standards governing the use

of capital punishment. Juvenile justice has been fully dealt with by the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (Beijing Rules), and other instruments.

Member states are urged to implement these standards by national legislation and practice. For developing countries this can be achieved through programmes of technical co-operation, by advisory services in crime prevention and criminal justice, and by co-operation among the states.

## 5. Conclusions and Recommendations

On the basis of this report, which was unanimously approved by the participants, the following conclusions and recommendations were adopted, pursuant to discussions as indicated:

(1) What progress has been made in national legislation and practice related to crime prevention and criminal justice under the impact of United Nations norms and guidelines? How is such progress monitored and evaluated?

The participants agreed that, in general, progress has been achieved in the implementation of the standards set by the United Nations norms and guidelines, though not necessarily as a direct result of these instruments, inasmuch as many had not reached the operational level of law enforcement and criminal justice agencies. In Japan, the 84-year-old law governing prison administration is being revised, concordant with the United Nations Standard Minimum Rules for the Treatment of Prisoners. In Tonga, several laws have been amended in congruence with United Nations standards.

The participants appreciate the Secretary-General's efforts to monitor national progress in implementing the various standards and guidelines, through the use of quinquennial reports, as well as by the network of national United Nations correspondents, but recommends a more effective system of

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monitoring, unencumbered by diplomatic and bureaucratic bottlenecks. A means of assessing and assisting compliance by means of visiting teams of experts was mentioned as a possible way of enhancing the monitoring process.

(2) In what way could concrete changes at the national level be achieved and how could obstacles be overcome? What specific measures could be taken to this effect, based on the result of United Nations surveys?

It was recognized that national implementation of the various United Nations standards and guidelines in crime prevention and criminal justice depended largely on national will, and the commitment of professional and political leaders, to do so. An effort on the international and national levels to reach policy makers, therefore, is called for. Even though the participants of this seminar felt that they could reach policy makers in their governments with a view toward fostering the standards and guidelines, it would be well for the regional institutes to convene criminal justice administrators at the highest level, in order to promote the implementation of the standards and guidelines.

(3) By what means could the United Nations assist countries in implementing norms and guidelines in crime prevention and criminal justice? What are the obstacles to providing such assistance?

The participants fully appreciated the efforts of the Secretariat of the United Nations to assist Member States in the implementation of United Nations norms and guidelines in crime prevention and criminal justice, but noted strongly, that the level of assistance is totally inadequate to the task. As national economies, especially in developing countries, are being seriously affected, and sometimes devastated, by international criminality associated with traffic in narcotic drugs, illegal money transfers, organized criminal activities, and destruction of the environment by international illegal activities, the

United Nations effort to deal with these problems can no longer be relegated to one of its lowest priorities. It deserves the highest priority.

In this regard, it is recommended that the interregional advisory service be substantially upgraded. Moreover, a cost-beneficial regional advisory service should be established, with teams of specialists in crime prevention and criminal justice, to be stationed at the regional United Nations institutes for crime prevention and criminal justice, working in close association with the regional United Nations Centers (Social and Economic Commissions), and, of course, being guided by the Secretariat's Crime Prevention and Criminal Justice Branch.

The participants are fully cognizant of the financial implications of their recommendations. They strongly urge Member States in arrears with their obligations under international law to make their overdue contributions. Moreover, in the wake of the easing of tensions among East and West, the participants strongly urge the major powers to divert some of their budgets from military defence to social defence, namely crime prevention and criminal justice.

(4) How could the level of support to programmes of technical co-operation and advisory services in crime prevention and criminal justice be increased to permit more effective implementation of United Nations norms and guidelines? Have specific projects been designed and carried out at the country level? What efforts could be made to involve international funding agencies more actively in these tasks?

It is the view of the participants that support for programmes of technical and advisory services in crime prevention and criminal justice, for the purpose of effective implementation of United Nations norms and guidelines, is largely a budgetary question, as noted. But it is not purely a budgetary question. To some extent it is a question of granting the necessary mandates to respon-

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sible United Nations agencies. Thus, if the regional United Nations Institutes for Crime Prevention and Criminal Justice were authorized, or even mandated by the Economic and Social Council, to support the implementation of United Nations standards and guidelines on crime prevention and criminal justice, they might well be able to do so with the support of governments of their regions.

The participants also wish to encourage the Secretariat unit, as well as the regional institutes, to explore the potential of funding support from enterprises and foundations of the various regions, inasmuch as the economic sectors stand as much to gain from crime reduction as the private or social sector.

Lastly, the participants strongly recommend that the governments of developing countries include crime prevention and criminal justice aspects in their development programme under terms of the United Nations Development Programme (UNDP), inasmuch as it is recognized that crime severely affects economic development, and that retarded or unbalanced development produces crime.

(5) In what way could continuous and even closer regional co-operation in implementing United Nations norms and guidelines be promoted? What measures could be taken to strengthen the regional United Nations institutes in crime prevention and criminal justice in this regard?

It was recognized that regional co-operative arrangements of nations have a major role to play in co-operatively implementing United Nations norms and guidelines. The infrastructure for such regional co-operation is in place. It simply has to be extended to matters of crime prevention and criminal justice. In short, the agenda of regional co-operation has to be extended to issues of crime prevention and criminal justice, affecting all Member States, as a matter of priority.

The participants are of the view that the

regional United Nations institutes should play a primary role in this regional approach, guided by the Crime Prevention and Criminal Justice Branch of the Secretariat, and assisted by UNICRI, the interregional institute in Rome. Care should be taken to avoid overlapping of functions and duplication of tasks in this process of co-ordinating the activities of United Nations bodies charged with responsibilities in crime prevention and criminal justice.

(6) How could the need for further research on more effective ways and means of implementing United Nations norms and guidelines in crime prevention and criminal justice be met at the national, regional and international levels? What would the role of the United Nations Interregional Crime and Justice Research Institute be in this respect?

The participants are of the view that effective implementation can be assessed and promoted only on the basis of evaluation research. Such research is costly and presently not within the means of the budget of developing countries. Consequently, technical assistance is urgently needed. The United Nations Institute in Rome (UNICRI) could be charged with the responsibility of co-ordinating worldwide implementation reports, but the fact remains that individual countries may not have the budgetary or professional capacity to supply the required data.

(7) What are the priority areas in which particular attention should be given to the formulation of new norms and guidelines?

Before looking toward new standards, the participants were of the view that the existing standards should be appropriately compiled, published, and distributed to the responsible agencies in all Member and non-Member States, and that provision be made for their translation into the predominant language of each country.

As far as the existing instruments are concerned, priority in their implementation

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should be accorded to those concerned with two issues:

- (a) those concerned with international co-operation in crime prevention and criminal justice, inasmuch as the internationalization of crime can be countered only by an international, co-operative response; and
- (b) those concerned with juvenile justice and the prevention of delinquency, inasmuch as the world's crime rate is fueled by delinquency.

As for the development of new standards and guidelines, the participants strongly urged flexibility to allow for accommodation for regional cultural variables without compromise to the overall objective of achieving the global aim of crime prevention in accordance with universal standards of human rights. In the formulation of such new standards community sentiments should always be considered. In fact, these observations may well prompt the Committee on Crime Prevention and Control to devise a set of guidelines for the promulgation of guidelines in crime prevention and criminal justice.

The participants singled out three areas in which new guidelines should be developed:

- (a) Appreciative of the fact that existing guidelines guarantee the human rights of those who come into contact with the criminal justice system, the participants felt that there is a void with regard to guiding law enforcement officials and other criminal justice administrators in coping with the occurrence and prevention of crime. Consequently, the Committee on Crime Prevention and Control may wish to consider the codification of worldwide good practice in dealing with issues

of crime prevention and law enforcement at the operational level.

- (b) Most criminal justice systems have ignored the unhappily increasing role which women have played in the commission of crime, as well as ignoring the role which women are playing at an increasing level in the criminal justice system. Consequently, the Committee on Crime Prevention and Control may want to devote attention, in its standard setting capacity, to the issue of women in crime and in criminal justice.
- (c) In furtherance of the Caracas Declaration of the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (1980) and the Milan Plan of Action, as well as the Guiding Principles for Crime Prevention and Criminal Justice in the Context of Development and a New International Order, of the Seventh United Nations Congress (1985), it is strongly recommended that the United Nations develop a set of Guidelines on the Role of Informal Social Control for the Prevention of Crime.

(8) What is the role of the United Nations, in particular, the Committee on Crime Prevention and Control, in promoting the implementation of existing standards and the setting of priorities for the formulation of new standards? How could existing implementation mechanisms be strengthened?

The Committee on Crime Prevention and Control will have to play the lead role in all standard-setting and implementation activities. It must act as catalyzer in the effort to have greater priority accorded to matters of crime prevention and control, within the United Nations framework. It should meet regularly once a year.

## **PART II**

**Materials Produced during  
the 85th International Training Course on  
“Wider Use and More Effective Implementation  
of Non-custodial Measures for Offenders”**



## SECTION 1: EXPERTS' PAPERS

**Expanding the Use of Non-custodial Measures<sup>1</sup>***by Matti Joutsen\**

There is a strong interest throughout the world in replacing imprisonment with non-custodial sanctions. The repeated resolutions and declarations of the United Nations Congresses on this subject, adopted by consensus, show that all countries are agreed—in principle—on the need to reduce imprisonment and to develop more effective “alternative” sanctions.

Even so, when the United Nations inquired into developments in preparation for the discussions on this subject at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Havana, 27 August-7 September 1990), many countries replied that appropriate non-custodial sanctions are simply not available, or that the available non-custodial sanctions are used far less than they might be or, when used, are used as substitutes for other non-custodial sanctions and not for imprisonment (the so-called net-widening effect).<sup>2</sup>

At the same time, the replies received by the United Nations suggest some reasons for this apparent inconsistency between policy and practice. The main reasons are to be found in *law, sentencing constraints, resources and attitudes*.

These problems cannot be dealt with in isolation from one another. The use of non-custodial sanctions can be expanded effectively only if all the problems are recognized and dealt with. The following presentation outlines what measures can and should be

taken on different levels and by different agencies.

**1. Statutory Amendments***1.1 Sentencing Provisions*

There are few jurisdictions in which the courts have wide discretion in developing new non-custodial sanctions. In most systems, the courts can only impose sanctions that are expressly defined in statutory law. Moreover, in some countries, the range of non-custodial sanctions is quite restrictive, and limited to a number of “classical” sanctions, such as fines, suspension of imprisonment and probation. In these systems, the first step is therefore to *ensure that the law provides for an adequate range of non-custodial sanctions*.

The difficulties with having an insufficient range of non-custodial sanctions are obvious. However, there may also be problems with having an *excessive* number and variety of sanctions. For example, a plethora of measures would increase the difficulties in maintaining uniform sentencing practice. Also, judges would have difficulties in becoming familiar with the respective procedures, conditions and restrictions associated with each sanction. Finally, if a totally new sanction is introduced, judges may be reluctant to use it before it has “proven itself in practice,” which—because of this very reluctance—may take long to happen.

Introduction of new sanctions is not the only way to expand the use of non-custodial sanctions. Since judges are already familiar with the use of the “old” sanctions, and might be inclined to prefer them over any-

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thing new, the possibility of increasing the effectiveness of these sanctions should also be considered, for example through the adoption of legislation permitting new requirements and conditions to be placed on the offender.

One example of how an "old" sanction can be made more credible concerns the fine, the most common sanction in most, if not all, jurisdictions. If steps are taken to ensure that the collection of fines is made more effective, judges would consider it to have a stronger "bite," and its use could be expanded. At the same time, the risk of imprisonment for non-payment of fines would be reduced.

In some countries there is a *lack of clear provisions* in law on both the conditions for imposition of non-custodial sanctions and the methods of their implementation. If the courts do not have a tradition favourable to active interpretation of statutory provisions, this ambiguity about the imposition and implementation of sanctions will mean that the courts are reluctant to impose these sanctions.

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### STEP 1

#### Ensure that the law clearly provides an adequate range of sanctions

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The fundamental statutory measure for promotion of non-custodial sanctions therefore is legislation making a range of such sanctions available to the criminal justice system and clearly outlining the procedures and conditions for their imposition and implementation. The legislation should specify the purposes of the sanction and the expectations of the legislator. This would help judges in determining the proper place of the measure in the scale of penal values.<sup>3</sup>

Another statutory measure would be a *statutory requirement of justification for the use of imprisonment*.<sup>4</sup> Such a measure would compel the court to justify why none of the available non-custodial sanctions are appro-

priate in the case at hand. For example, in England and Wales, the recent White Paper on "Crime, Justice and Protecting the Public" proposed that courts be required not only to consider a report by the probation service before giving a custodial sentence, but also to give reasons for imposing a custodial sentence (should it decide to do so) except for the most serious offences.<sup>5</sup>

*Restrictions* on the use of non-custodial sanctions could be eliminated or relaxed. These restrictions generally refer to (1) the type of offence, (2) the length of the sentence, (3) the criminal history of the offender, and (4) other attributes of the offender. For example, the maximum length of imprisonment that can be replaced by a non-custodial sanction could be raised, and existing absolute prohibitions against the use of non-custodial sanctions in case of recidivism could be replaced by statutory provisions allowing the court to exercise discretion.

In some countries and for some offences there is a call for harsher punishment. Instead of responding to this by expanding the use of imprisonment, the demand may be satisfied within the framework of non-custodial sanctions by *allowing for combinations of such sanctions*.<sup>6</sup> It may also be satisfied by making the existing non-custodial sanctions more attractive as sentencing options, for example by allowing for the possibility of inserting additional requirements or conditions in, e.g., probation orders.

In several jurisdictions, the *elimination of imprisonment below a certain length* has been proposed.<sup>7</sup> (Generally, sentences of up to three or six months are regarded as "short-term.") The rationale for this is that the courts would be compelled to seek alternatives to short-term custody. The elimination of short-term sentences of imprisonment is also often justified on the grounds that short custodial sentences have the negative effects of imprisonment, but do not allow time for a reforming effect. Proposals have been advanced in both Belgium and Switzerland, for example, for the elimination of prison sen-

tences below six months. Other restrictions on the application of imprisonment could also be embodied in legislation.<sup>8</sup>

In Australia, a general instruction to use imprisonment sparingly has been embodied in the legislation of some jurisdictions. For example, section 11 of the Victorian Penalties and Sentences act 1985 requires that "a court must not pass a sentence of imprisonment on a person unless the court, having considered all other available sentences, is satisfied that no other sentence is appropriate in all the circumstances of the case."

### 1.2 Amendment of Substantive Criminal Law

Substantive criminal law, as opposed to the law on sentencing and procedural law, essentially concerns the definition of the various offences and the basic provisions on, for example, imputability and guilt.

A survey carried out by HEUNI has shown that there is almost universal agreement that imprisonment is necessary for those guilty of grave offences, including those involving serious danger to life, health and well-being, trafficking in drugs, serious theft, serious fraud, serious economic crime and crimes against the environment, and offences that endanger national security.<sup>9</sup>

However, the definition of these broad categories of offences varies considerably. It remains for the legislator and, in practice in many jurisdictions, also the judge to determine which offences are sufficiently serious so as to merit imprisonment. If the goal is to restrict the use of imprisonment, it would therefore follow that some *offences could be (re)defined in order to specify*, as precisely as possible, where *the line between imprisonable and non-imprisonable offences* should be drawn.

At the same time, the *possibility of imprisonment for certain offences could be abolished*. Changes in society are often reflected in changed attitudes towards certain behaviour. A review of criminal law may show that existing penal provisions on certain offences were passed at a time when these

offences were deemed particularly reprehensible; in the light of present attitudes, a non-custodial sanction may well be deemed more appropriate. The public attitude towards the use of imprisonment may have changed; in many countries, its "penal value" has increased. Where imprisonment at one time was imposed in decades, it may now be imposed in years; where it was once imposed in years, it may now be imposed in months or even in weeks.<sup>10</sup>

At the lower end of the scale of offence seriousness, the possibility of custodial sanctions could be eliminated entirely through *decriminalization and depenalization*. Such "offences" as vagrancy and public drunkenness have been decriminalized in many countries. Although these offences were rarely imprisonable offences in themselves, it should be noted that the persons fined were usually unable to pay the fines. Such nonpayment often led to imprisonment. In this way, decriminalization reduces the use of custodial measures.

A similar result can be achieved in many jurisdictions by transferring certain "offences" from the purview of the courts and of criminal law to other sectors, such as social welfare and administrative (criminal) law. Here, however, the danger should be noted of merely relabelling "imprisonment" so that it is henceforth, for example, "treatment while in forced custody."

### 1.3 Amendment of Procedural Law

In addition to the amendment of substantive criminal law and sentencing law, reform of criminal procedure may contribute to an expanded use of non-custodial sanctions.

This can be done, first of all, by allowing greater use of *diversion* at the various stages of the criminal process. The police and the prosecutor may be granted greater discretion in deciding on the waiving of measures. The law can also be amended to allow wider use of offender-victim *reconciliation and mediation*; the results of such processes could not only benefit the victim, but could also "earn"

the offender a reduction in sentence.

A parallel strategy would be to delegate the decision-making power in judicial matters to lower court levels, in those jurisdictions where the court of first instance depends on the seriousness of the charge. For example, in some jurisdictions certain lower level courts do not have the power to impose sentences of imprisonment. Channelling a greater number of cases to such courts, for example on the basis of the type of offence and/or with the consent of the suspect and/or victim, would clearly encourage the greater use of non-custodial sanctions.

#### *1.4 Amendment of the Law to Strengthen Legal Safeguards*

Non-custodial sanctions have been and are being developed primarily with consideration to the position of the offender, for example to improve the likelihood of social reintegration. Given this basic premise, the attitude may be taken (and has been taken) that any non-custodial sanction is preferable to imprisonment, and legal safeguards are not a matter of great concern.

However, even though non-custodial sanctions are less restrictive than imprisonment, they remain a sanction. Many sanctions, such as probation, community service and contract treatment, involve temporary restrictions on the freedom of the individual. Guarantees should be provided in order to ensure that authority over offenders is properly exercised in adjudication and implementation, in order to prevent cases where the human, civil and political rights of the offender are restricted beyond what is inherent in the sanction itself. (In some countries, for example, there has been an extensive debate on whether or not community service could violate basic rights.)

Furthermore, if non-custodial sanctions are indeed taken seriously, they shall be used to an increasing degree for what are considered to be "serious" offences. This will require that *increased attention* be paid to *legal safeguards*.

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## STEP 2

### **Develop legal safeguards in order to ensure proper exercise of authority**

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Among the more important safeguards are:

- there shall be no discrimination in the use of non-custodial sanctions (see Rule 2.2 of the draft Tokyo Rules);
- the application of the sanction shall be based on law and established criteria (Rules 3.1 and 3.2);
- the discretion shall be implemented by a competent authority (Rule 3.3);
- the imposition and implementation of the sanction shall be subject to review on the application of the offender (Rules 3.5, 3.6 and 3.7);
- the right of privacy of offenders and their families shall be respected (Rules 3.11 and 3.12);
- the offender should be properly informed of the conditions to be observed and the possible consequences of non-compliance with such conditions (Rule 12.3); and
- in the case of an alleged breach of the conditions, the offender should have the right to be heard before a decision is taken on the consequence of such breach (Rules 14.2 and 14.6).

Work on guidelines and standards in the area of non-custodial sanctions is underway in several countries, as well as on the international level. Examples include the work in Australia, Canada, the United States, and, on the regional level, the Council of Europe. The International Penal and Penitentiary Foundation is considering a draft set of rules. The main international effort, of course, is the work within the framework of the United Nations on the standard minimum rules on non-custodial sanctions ("the Tokyo Rules"), which shall be considered by the Eighth United Nations Congress.

## 2. The Development of Sentencing Practice

A further problem lies in *the establishment of the penal value of the non-custodial sanction*. With existing sanctions, the penal value has become well established. Thus, for example, a fine is generally deemed a lesser penalty than a suspended sentence, which in turn is deemed a lesser penalty than imprisonment. Established practice further guides the measure of each individual sanction: a fine of an "X" amount for theft under certain circumstances, for example, and imprisonment for "Y" months for robbery under certain circumstances.

When a new custodial sanction is introduced, it may be difficult for the legislator and/or the court to assign it its appropriate place in the scale of punishment.<sup>11</sup> Is 40 hours of community service the equivalent of one month of imprisonment, for example? Is it more or less severe than a suspended sentence of a certain length?<sup>12</sup>

In sentencing, therefore, the court must make a choice among a number of sanctions using multiple criteria which relate the seriousness of the offence to what are deemed to be the relevant characteristics of the offender and the penal value of the non-custodial sanctions available, either singly or in combination.<sup>13</sup> Even in ideal conditions, this is hardly a simple task. It is made more difficult if the court has no past experience on which to rely when using new non-custodial sanctions.

Moreover, since courts frequently work under pressure of time, they tend to favour sanctions which do not require time for the collection, presentation and assessment of social enquiries about the offender and his/her situation. Judges tend to find it easier to assess juridical information rather than data drawn from the social sciences.<sup>14</sup>

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### STEP 3

**Ensure clear guidance on sentencing practice through precedents, judicial conferences or published guidelines**

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The introduction of non-custodial sanctions is therefore not enough. The courts should be given *clear guidance on how the new custodial sanctions fit in with present sentencing policy*. The form in which this guidance can be given will vary from one jurisdiction to the next, and it will depend largely on the role of superior courts, and on the sharpness of the separation of the judiciary and the executive branch of government.<sup>15</sup>

*Measures Related to the Courts:* In response after response to the United Nations questionnaire, emphasis was given to the role of *court precedents* in guiding the practice of lower courts. This method was preferred over legislated guidelines in order to maintain the division of power between the executive and the judiciary. However, precedents remain decisions on *individual* cases, and the extent to which general conclusions can be drawn from them depend not only on the legal system but also on the case. The effectiveness of precedents in guiding practice also requires that a sufficient number of cases are appealed, thus giving the superior courts the possibility of adjusting decisions and sentences.

In some countries, the Supreme Court has the power to issue *sentencing guidelines* that extend beyond the scope of cases at hand. Such guidelines provide the judge with information on the usual sanction given for a specific type of offence. They are generally also binding on all lower courts.

Also *judicial conferences* or professional associations can assist in clarifying sentencing objectives and guidelines. For example, they could specify the criteria and principles which permit the comparison of various sanctions and the standardization of their use.<sup>16</sup> The conferences and associations need not

be limited to judicial personnel; they could be expanded to include corrections personnel and other persons responsible for the administration of sentences.

Other strategies focus on drawing the attention of the courts to the official policy of favouring non-custodial sanctions, for example through the adoption by the legislature or the executive of *an official statement of the purposes and principles of sentencing*. Such credibility can be increased by providing the courts with information on a systematic basis regarding the effectiveness of sanctions.<sup>17</sup> It can also be enhanced through closer control over the enforcement of the sanction.

Where this would not be deemed a violation of the principle of the separation of the executive and the judiciary, the executive branch could consider the possibility of providing the court with *annotated information on current court practice*. This can be done in the form of a publication giving the "normal" sentences for the basic types of offences, with indications of how aggravating and mitigating circumstances have affected the sentence. Such information would simply be provided to the courts as a tool, showing the judges what other courts have done in similar cases.<sup>18</sup>

*Measures Related to Prosecution:* The selection of the sanction is often determined by the motion of the prosecutor, or by the way in which the case is presented. For this reason, *prosecutorial guidelines should also be developed* on the presentation to the court, on the prosecutor's proposal for sentence (where this is possible), and on whether or not the prosecutor can and should appeal decisions to a superior court.

### 3. Training and the Development of Attitudes

Even if the law provides for a wide range of non-custodial sanctions, and even if the courts have clear guidelines on how these sanctions should be imposed, non-custodial

sanctions will not be used as long as the courts—and other key groups—do not consider them effective and appropriate for dealing with offenders. The preamble to the draft Tokyo Rules lists as such key groups law enforcement officials, prosecutors, judges, probation officers, lawyers, victims, offenders, social services and non-governmental organizations involved in the application of non-custodial measures.

The *credibility* of non-custodial sanctions is therefore an important consideration. Non-custodial sanctions will not be imposed if the court regards them as ineffective or inappropriate. The sanctions will not be implemented properly if those responsible for their implementation (such as the supervisors) regard them as inappropriate. (If this is the case, then the courts will adjust their sentencing policy accordingly.) The opinion of the public will be instrumental both at the time when new sanctions are being considered by the legislature, and when they are being incorporated into the general sentencing policy. Finally, depending to a great extent on the system, the opinion of the victim (and, indeed, of the offender) may be of significance in deciding the selection of the sanction in the individual case.

Of all these groups, it is the courts and the practitioners who occupy the most important position, as they decide on the imposition and implementation of the sanction. Some research has been carried out in the effect that their attitudes have on sentencing and the implementation of sentences.

In Belgium, for example, it has been concluded that judges who are more oriented towards resocialization or reintegration of delinquents will be more favourable to non-custodial sanctions. In contrast to judges who represent the "classical" (punitive) way of thinking, they are prepared to spend more time with the defendant, with his or her lawyer, and with representatives of the probation services. They attach importance to the need of the court for full (not only juridical) information as a means for the individuali-

zation of the sanction. Moreover, judges who grant probation will less automatically resort to imprisonment in case of recidivism or violation of probation. More classically-oriented judges regard non-custodial sanctions as a favour to occasional delinquents with less serious crimes—a favour which can seldom be granted twice.<sup>19</sup>

Research on attitudes towards community service has been undertaken for example in the Netherlands. According to the results, it was considered "real" punishment by two thirds of the prosecutors, judges, probation officers and offenders interviewed; 85% of the places in which community service was carried out had a positive view of the sanction; and 90% of the prosecutors, judges, and probation officers considered the experiments reasonably successful.<sup>20</sup>

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#### STEP 4

#### **Key groups should be provided with information and training on the functions and use of non-custodial sanctions.**

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Ensuring that judges and other key groups understand the purpose and rationale of non-custodial sanctions and that they are favourably disposed towards using them requires providing them with information and training.

The scope of such information and training is wide. Firstly, the key groups should be made aware of the *general benefits of non-custodial sanctions* and the general drawbacks of wide use of custodial sanctions. Secondly, they should be made familiar with *the existing non-custodial sanctions and their specific purposes*; they should be made familiar with sentencing and enforcement. Thirdly, they should be trained in the *basic principles of law, criminology and psychology* (as well as other disciplines) required in their respective roles. Finally, they should be trained in the *rules, procedures and practices of the various other*

*services involved*. This would make it easier for them to understand the problems involved in non-custodial measures, and the possibilities of working together to solve these problems.

The judicial conferences referred to above provide a special form of training. Other forms include the arrangement of special courses and seminars at which new legislation is introduced, or at which the court personnel is acquainted with research on the effectiveness of various sanction options.

Since the use of non-custodial sanctions depends on the professional legal culture of judges (as well as prosecutors and other practitioners involved in the imposition and implementation of the sanctions), the promotion of non-custodial sanctions to become the "norm" should start with the process of professional socialization. Consequently, for example the curriculum of law schools should reflect these concerns.

Demonstrating the appropriateness of non-custodial sanctions to the courts and the practitioners is an on-going process which by no means ends with the adoption of the requisite legislation and the arrangement of an initial training phase. Some experiments with non-custodial sanctions succeed because they are run by highly motivated individuals. Once the programme is placed on a more general footing, there is the danger of falling into routines or meeting with unexpected difficulties in implementing the sanctions in the light of local circumstances or with the help of persons who are not so committed to the original purpose of the programme. Broad policy premises must be translated into practice in a number of different environments, and by a number of practitioners who may have their own reasons for implementing the programmes in a local context.<sup>21</sup>

Because the success of many non-custodial sanctions depends to a large extent on the interaction between the community and the offender, special measures should be adopted to sensitize the community to the bene-

fits and crime control potential of non-custodial sanctions. Examples of such measures include the provision of information on non-custodial sanctions and the situation of offenders, greater use of the existing mediation or dispute settlement mechanisms or institutions in the community, and increased reliance on volunteer and citizens' associations in the implementation of non-custodial sanctions (this may also decrease the costs of such implementation).

The credibility of custodial and non-custodial sanctions can be tied to two factors: their success in achieving certain pre-defined practical goals, and their symbolic (expressive) function.<sup>22</sup> Among the practical goals of non-custodial sanctions are the reduction of the prison population, the reduction of the costs of the system of sanctions, and the reduction of recidivism.

Often, these general goals are not made explicit when a new non-custodial sanction is adopted, and there is thus little that can be done to measure how "successful" these sanctions are. Since different groups may have different expectations—none of which need match those of the legislator—it can therefore be expected that some groups will criticize the sanctions as having been "failures" in the light of some unspecified criteria, and may refuse to cooperate in their implementation. In order to forestall this danger, realistic goals should be set, and the different groups should be informed of these goals.

The credibility of non-custodial sanctions can also be enhanced if they are not seen to be excessively lenient. Visibly punitive measures (such as electronic monitoring) might therefore be an attractive option in some jurisdictions. Even terminology might be used to enhance the perception of non-custodial sanctions as punitive. Instead of speaking of the "waiving of measures" or "absolute discharge," for example (both terms imply that "nothing happened"), one might speak of "punitive warnings" or "penal warnings."

#### 4. The Expansion of Resources

The success of non-custodial sanctions in practice depends on the availability of resources for their implementation. Just as imprisonment requires the prison facilities, personnel and a prison programme, for example probation requires a suitable infrastructure for the arrangement of supervision, and community service requires not only a suitable organization but also designated places of work.<sup>23</sup> In addition, the general economic and political circumstances in a country may have a role in determining the extent to which non-custodial sanctions are used in general.<sup>24</sup> Unless the necessary *manpower and financial resources* are provided at the outset, a vicious circle may arise: the new sanction is not supported by the necessary resources because, so far, it has not been used; it may then not be used by judges because there are not sufficient resources to ensure that the sanction will be implemented properly. For example in Portugal, when probation and community service were introduced, it proved difficult to set up a wholly new probation service. This led to an overburdening of the probation services which, in turn, decreased court confidence in these services.<sup>25</sup>

The implementation of a new non-custodial sanction will generally be assigned to an existing service, on the assumption that this service has already developed the necessary infrastructure. For example, in many jurisdictions that have introduced community service, this has been assigned to the probation service. However, such jurisdictions often suffer from prison overcrowding, and the probation service is already working at maximum capacity. Community service orders might thus receive insufficient attention.

One consideration in the adoption of new non-custodial sanctions is the effect that their implementation will have on the workload and resources not only of the services charged with their enforcement, but also of



the judges and courts themselves. For example, if the sanction requires detailed social inquiry reports that must be studied by the judge, this may lead to a disinclination to order such sanctions (or to read the resulting reports). The reality of the present heavy workload and of the severe time constraints must be kept in mind.

Some sanctions require greater use of court time and resources than others. For example, in many jurisdictions custodial sanctions only require one session of the court. In some jurisdictions that use community service, on the other hand, the offender may in fact have to appear before the court several times: when the original order is given, when the order is nominally completed, and perhaps also at various intermediate stages.

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#### **STEP 5**

#### **Secure a steady resource base for personnel, component and training**

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The most efficient route to increase the credibility of non-custodial sanctions and thus promote their use is that the state and local community provide the necessary resources and financial support for the development, enforcement and monitoring of such sanctions. Particular attention should also be paid to the training of the practitioners responsible for the implementation of the sanctions and for the coordination between criminal justice agencies and other agencies involved in the implementation of these sanctions in the community.

### **5. Research and Planning**

One area of concern relates to the possible dysfunction of wider use of non-custodial sanctions, in particular the so-called net-widening effect. Statistical evidence from various countries clearly suggest that non-custodial sanctions are either used far less than they might be or, when used, are used

as substitutes for other non-custodial sanctions and not for imprisonment. In addition, when suspended sentences are pronounced, the period of imprisonment imposed may be longer than if an unconditional sentence to imprisonment were to be used. In the event of activation of the original sentence, the offender can therefore go to prison for longer than would otherwise have been the case.

Furthermore, if greater use of non-custodial sanctions does lead to a reduction of the use of short-term imprisonment, this may mean that there will be a corresponding greater proportion of offenders serving longer sentences in prison. This, in turn may have an adverse effect on the security of the institutions. A "hard-core" prison population will lead to practical difficulties in prison management.

It is also possible that if non-custodial sanctions are taken into wider use, this may lead to a dichotimization of sentencing. Those who receive a non-custodial sanction instead of imprisonment will benefit from a less restrictive sanction. However, the courts may balance this out by sentencing those for whom imprisonment sentences are imposed to even longer terms. The net result may be that the over-all severity of sentencing will have remained about the same.

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#### **STEP 6**

#### **Ensure a continuous research component in planning**

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Such dysfunctions of the greater use of non-custodial sanctions may detract from the benefits, or even prove to be so serious that rational criminal policy is endangered. Research has an important role in forestalling and counteracting such tendencies. Unfortunately, research is lacking on several key areas related to the promotion of non-custodial sanctions.

Research is needed on the normative structure that determines the availability and ap-

plication of non-custodial sanctions. Non-custodial sanctions cannot be imposed where the law does not allow for their imposition. Furthermore, certain legal provisions related to non-custodial sanctions may unintentionally deter their use in practice. For example, the procedural requirements for the imposition of certain non-custodial sanctions may bar their imposition in simplified proceedings.

Another example is that the greater use of non-custodial sanctions may widen the statutory discretionary powers of certain authorities. This may be in conflict with other policy goals, such as the goal of ensuring due process.

In addition, the introduction of non-custodial sanctions through legislative action requires analysis of the proper place of the sanction in the normative scale of punishments.

In regard to sentencing, research is needed on the factors considered by the sentencing judge or tribunal. Unexpected factors may have a decisive influence on the sentencing process. The little research that is available has suggested, for example, that some judges will not consider non-custodial sanctions that require a social enquiry report.

Further in regard to sentencing, it is possible that the imposition of non-custodial sanctions is discriminatory, as has been argued to be the case with sentencing to imprisonment. For example, fines may be imposed only on those who are able to pay them; community service may be imposed only on offenders who have certain characteristics that were not necessarily envisaged by the legislator; or the milder forms of non-custodial sanctions may be imposed on offenders who have a high standing in the community.

One area of research that is related to is research on sentencing concerns attitudes. Clearly, the attitudes of the sentencing judge affect his or her decisions on what available options to use. As important as the attitudes of the sentencing judge are the attitudes of

other persons involved in the implementation of non-custodial sanctions. In particular, the degree to which a non-custodial sanction is "accepted" by professionals as well as by the community influences the probability that this sanction will actually be applied.

Research on changes in attitudes (showing the causes and extent of such changes) might be of assistance in the planning of the introduction or expansion of non-custodial sanctions.

A key factor in the "success" achieved with the use of any non-custodial sanction is the extent to which the policymakers, courts, other practitioners and agencies and the community are informed of the effectiveness of this sanction. Indeed, the effectiveness of non-custodial sanctions (and the effectiveness of sanctions in general) has long been a popular subject of research.

Regrettably, the research on non-custodial sanctions has so far yielded relatively meagre results. One review of the research points out the difficulties in, and shortcomings of, such research:

"First, the purpose of particular programmes are seldom specified in any authoritative way, and different people often have different purposes in mind . . . Second, it is difficult to disentangle cause and effect in assessments of most legal changes . . . Third, efforts to isolate the effects of specific policy changes . . . are complicated by the occurrence of other changes that may affect the implementation and consequences of the policy changes under examination . . . Fourth, although very few intermediate sanction programs have been evaluated carefully, many administrators believe their programmes to be successful . . . so that in a field, however, in which few rigorous evaluations have been conducted, the persuasive force of conventional but untested wisdom is great. And fifth, although there are important exceptions, much of the existing evaluation research is badly flawed . . . and cannot serve as a foundation for drawing meaningful con-

clusions. . .”<sup>26</sup>

The problems faced by evaluation research of the effectiveness of non-custodial sanctions, and of evaluative research in general, are thus great. Nevertheless, as noted, the promotion of non-custodial sanctions calls for research on effectiveness.

## 6. The Development of International Cooperation

*Publication and distribution of the Tokyo Rules and other guidelines:* The problems in expanding the use of non-custodial sanctions are largely the same throughout the world. Therefore, even though the imposition and implementation of these sanctions depend on the unique cultural, economic, legal and social features of each jurisdiction, the experience of other jurisdictions has considerable relevance.

This is a basic premise in the development of the international guidelines and rules referred to earlier. The process of developing such globally applicable rules as the draft United Nations Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules) in itself contributes to international understanding, since those involved learn about the different approaches to the same problem.

Merely adopting the Tokyo Rules, however, is not enough. Since the most important target group is the judges and the practitioners, the Tokyo Rules should be *published separately in the different languages and given wide distribution*. They should also be included in all future compilations of the main resolutions and recommendations of the United Nations in the field of human rights and criminal justice.

*Technical assistance, research and information sharing:* The draft resolution on the adoption of the Tokyo Rules requests the Secretary-General of the United Nations to assist Member States, at their request, in the implementation of the Tokyo Rules. This

technical assistance can, for example, take the form of training (including the promotion of study tours), the preparation of materials, and assistance in the development of specific projects aimed at the expansion of the use of non-custodial sanctions. Research and the provision of information on current developments and projects is closely tied to these activities.

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### STEP 7

**Develop international cooperation in:**

- training
  - the preparation of materials
  - assistance in projects
  - research
  - information sharing
  - establishment of an international focal point for following developments and providing assistance
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The regional commissions, the regional and interregional institutes in the field of crime prevention and criminal justice, the specialized agencies and other entities of the United Nations, and other intergovernmental and nongovernmental organizations are already involved in a wide range of training and other activity with a direct bearing on the issues raised in the Tokyo Rules. For example, all of the institutes organize training courses and other meetings at which the Tokyo Rules could be featured. They are also involved, both directly and indirectly, in research that could further the purpose of the Tokyo Rules. Furthermore, they could contribute to the international exchange of information on the operation of non-custodial measures, on difficulties inherent in their greater use, and on other, related, issues.

The United Nations Crime and Justice Information Network (UNCJIN) is a rapidly expanding component in this international exchange. Through it, Member States and other interested bodies can access different

data bases, some of which provide information on ongoing projects and planned meetings.

*Reports by the Secretary-General:* The draft resolution referred to above also requests Member States to report on the implementation of the Tokyo Rules every five years. The draft resolution further requests the Secretary-General to prepare periodic reports for the Committee on Crime Prevention and Control on the implementation of the Tokyo Rules.

These requests are standard in resolutions and recommendations of this type. At the very least, they serve to remind Member States, at five-year intervals, of the document in question. Ideally, they serve as a more continuous impetus for the gathering of national data, the promotion of discussion, and the development of activities and standards in the field in question.

The requests made by the Secretary-General should be designed to gather detailed information on recent developments in the use of both custodial and non-custodial measures, the possible problems encountered in the wider use of non-custodial measures, research and projects concerning these measures, and the wider criminal policy considerations underlying any developments. The request should be relatively clear and explicit in calling for information; only then would it be possible to use the reports for a study of the trend over time and for a cross-national analysis of the use of non-custodial measures.

*International group of experts:* The issues involved in the application of non-custodial sanctions are complex, and it is difficult for any Member State to keep abreast of all the developments. A similar situation is currently being faced in the implementation of the United Nations Basic Principles of Justice for Victims of crime and Abuse of Power. In this case, a proposal is being made to the Eighth United Nations Congress for the establishment of an international group of experts to serve as a "repository" of informa-

tion.

A similar approach should be considered in connection with the implementation of the Tokyo Rules, subject to the availability of the necessary resources. Such an international group of experts could serve as an informal centre for information on the use of non-custodial sanctions in the different Member States, as a source of technical assistance to Member States, and as an assistant to the Secretary-General in the preparation of his reports to the Committee.

At the same time, the group could monitor the possible need for further development of standards and norms in the light of experience, and for the development of new non-custodial measures.

## 7. Conclusions

The strong interest throughout the world in replacing imprisonment with non-custodial sanctions, noted at the outset of this paper, can be seen in various trends. The strength of these trends varies from one jurisdiction to the next:

- A diversification of non-custodial sanctions through, for example, adoption of new non-custodial sanctions, increased possibilities for adding conditions to existing non-custodial sanctions, and increased possibilities for combining different non-custodial sanctions.
- The diversification of non-custodial sanctions has been paralleled in some countries by an extension of non-custodial sanctions to a greater range of offences and offenders.
- A greater use of the classical non-custodial sanctions such as the fine (either as such or in the form of, e.g., day-fines) and probation.
- Development of non-custodial sanctions that include one or a combination of the following components: work (as in community service), compensation/restitution, and treatment.

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—A renewed interest in “traditional” sanctions, and on sanctions that rely on traditional infrastructures.

Despite these developments, a gap remains between policy and practice regarding non-custodial sanctions. This gap is reflected on several levels.

- On the statutory level, many states report that they do not have an appropriate range of non-custodial sanctions, or that the legislation does not provide clear guidance on the purposes, imposition or implementation of these sanctions.
- On the level of sentencing practice, the gap is reflected in the continuing predominance of imprisonment as the “norm,” as the main measuring stick in sentencing. Non-custodial sanctions are either used far less than the law would allow, or they are used as alternatives for other non-custodial sanctions.
- On the level of resources, the implementation of some non-custodial sanctions remains hindered in many areas because of the absence of the necessary personnel, support structures, and funds.

The gap can be diminished only through a change in attitudes. The legislator should be made aware of the need for legislation that supports the goals of non-custodial sanctions. The judge and prosecutor (as well as the other practitioners involved) should be made aware of the need to seek the appropriate non-custodial sanctions and to apply them whenever possible. Those who decide on resources should be made aware of the benefits to be derived through expanded use of non-custodial sanctions. Finally, the community should be made aware of the importance of the re-integration of the offender into the community for the benefit of the offender, the victim and the community as a whole.

This change in attitudes requires greater clarity regarding the goals of the increased

use of non-custodial sanctions. Non-custodial sanctions are expected to do many things at the same time. They are generally expected to help in reducing the prison population and in reducing the over-all costs of the system. They are believed to be more conducive to social integration, thus reducing recidivism, and enhancing the effectiveness of the criminal justice system. They are also believed to act as a deterrent and as a just punishment for a certain range of offences and for certain types of offenders.

Although non-custodial sanctions as a whole can help in reaching these purposes, some of these purposes are in conflict with one another. Furthermore, some of these purposes are not appropriate for all types of non-custodial sanctions. Some non-custodial sanctions may be more oriented towards treatment, some more towards reintegration, while others simply call for payment by the offender—a fiscal contribution to the State, compensation to the victim or compensation to the community as a whole.

The experience with various sanctions in the different countries cannot be taken as a clear-cut demonstration that non-custodial sanctions always necessarily have these benefits. For example, even when non-custodial sanctions do replace imprisonment, they generally replace quite short sentences, thus having little effect on the size of the prison population. The same negligible results are achieved if the non-custodial sanctions are used for a small number of offenders.

At the same time, other circumstances (such as increased crime) could lead to more, and/or more severe, sentences of imprisonment, thus giving the impression that the reform has on the contrary led to greater use of imprisonment. The evidence is also ambiguous as to whether or not the greater use of non-custodial sanctions succeeds in lowering the costs of criminal justice or in promoting rehabilitation.

This ambiguity in the evidence in support of non-custodial sanctions may make it difficult to convince key groups of the need to

replace imprisonment, wherever possible, with non-custodial sanctions. The ambiguity, and the possible risk of disillusionment when experiments with non-custodial sanctions do not succeed on all fronts, can only be dispelled if both decision-makers and practitioners have a clearer concept of the function of non-custodial sanctions, and of the goals of such experiments.

The planning and implementation of non-custodial sanctions has consistently met with much the same problems in jurisdictions around the world, such as problems in availability, sentencing, resources, attitudes and evidence of their effectiveness.

At the same time, there is an increased interest in national and international standard-setting, with an emphasis on legal safeguards. On the global level, the United Nations is preparing standard minimum rules for non-custodial sanctions (the "Tokyo Rules").

The efforts on the national front should therefore be supplemented and supported through international cooperation. Through its network of interregional and regional institutes as well as through its information network (UNCJIN), the United Nations can provide interested Member States as well as individual decision-makers and practitioners with information on current trends, proposals, projects and research results. At the same time, Member States should become more active in supplying the United Nations with such information, in order to ensure that the experiences of each Member State help colleagues throughout the world in the development of criminal justice.

### Notes

1. This paper is based on "Research Workshop on Alternatives to Imprisonment. Synthesis Report," prepared by Matti Joutsen in collaboration with Ugljesa Zvekic. The document shall be submitted to the Research Workshop at the Eighth United Nations Congress, organized by the United Nations Interregional Crime and Justice Research Institute

together with the network of regional institutes.

2. For example in Poland, restriction of personal freedom was introduced in 1969 in order to reduce the rate of imprisonment. In fact, it has replaced fines and suspended sentences. A somewhat similar situation has been noted in Portugal. In England and Wales, there has been extensive research on this phenomenon in connection with community service. See Norman Bishop, *Non-Custodial Alternatives in Europe*, HEUNI publication no. 14, Helsinki 1988, pp. 103-107.
3. The importance of this factor can be illustrated by the case of Cuba, where as a result of the new Penal Code of 1988, approximately 85% of offences are punishable by non-custodial sanctions. The response from Cuba to the United Nations Secretariat questionnaire on this subject notes that during the first year of the application of the new Penal Code, some 63% of the prison sentences pronounced have been suspended or replaced by non-custodial sanctions.
4. For example, section 12 of the Victorian Penalties and Sentences Act in Australia states that "Where a Magistrates' Court passes a sentence of imprisonment on a person, the Magistrates' Court (a) must state in writing the reasons for its decision; and (b) must cause those reasons to be entered in the records of the court."
5. Paragraph 3.9; *Crime Justice and Protecting the Public. The Government's Proposals for Legislation*, London 1990.
6. Some jurisdictions have decided to meet such demands by allowing for the combination of custodial and non-custodial sanctions. Such combinations shall not be considered in the present report.
7. A statutory prohibition against short imprisonment sentences would, however, meet with difficulties in countries where almost all sentences of imprisonment are quite short. For example in Finland, the median sentence of imprisonment is 3.2 months; in the Netherlands, it is 2.0 months.
8. Bishop, op.cit., pp. 113-114. Many countries noted that they have made efforts in their legislative provisions to ensure wider use of one particular sanction, the fine, as an alternative to imprisonment. Austria (section 37 of the Penal Code) and the Federal Republic of Germany (section 49 of the Penal Code) already emphasize the priority of fines over short-term imprisonment. Law 1419/1984 in Greece permits the commutation of any sentence of

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- imprisonment not exceeding 18 months into a monetary penalty.
9. Bishop, *op.cit.*, pp. 1 and 49-50.
  10. For example in Finland, the present Penal Code was drafted a century ago, when the country was still predominantly rural, and property was highly valued. Theft was made punishable by stiff sentences of imprisonment which, in practice, exceeded those given for crimes of violence. Following, e.g., the significant increase in the standard of living, theft was no longer considered to be as serious an offence. Accordingly, the law was amended several times to lower the sentence for theft.
  11. In some jurisdictions, the criteria for assessing the appropriate place of a non-custodial sanction are laid down in law. For example in Hungary, the provisions on community service introduced in 1987 state that one day of community service corresponds to one day in prison.
  12. A study in the Netherlands on the community service order found that judges and prosecutors consider 150 hours of community service to correspond to about three months of imprisonment, instead of six months as originally envisaged in the planning of the experiment. Peter Tak, report submitted to the Research Workshop at the Eighth United Nations Congress.
  13. Bishop, *op.cit.*, pp. 98-99.
  14. Bishop, *op.cit.*, p. 110; he cites Portuguese and Belgian studies on this on p. 112.
  15. As noted in the United Kingdom White Paper on "Crime, Justice and Protecting the Public" (*op.cit.*), "No Government should try to influence the decisions of the courts in individual cases. . . . But sentencing principles and sentencing practice are matters of legitimate concern to Government. . ." (paragraph 2.1)
  16. For example the Magistrates' Association of the United Kingdom has issued a provisional *Sentencing Guide for Criminal Offences (other than Road Traffic) and Compensation Table* (London, 1989).
  17. This was recommended in the report of the Canadian Sentencing Commission (*Sentencing Reform: A Canadian Approach*. Minister of Supply and Services Canada 1986, recommendation 12.06).
  18. An example here comes from England and Wales, where the Home Office regularly updates its handbook entitled "*The Sentence of the Court*" (HMSO London 1986). Guidelines have also been issued in Norway in connection with the introduction of community service. Belgium is considering the introduction of sentencing guidelines. Bishop, *op.cit.*, pp. 100-101. Other examples include the 1984 Minnesota Sentencing Guidelines and the 1987 Canadian Sentencing Guidelines.
  19. Christian Eliaerts, The use of non-custodial alternatives to imprisonment: the point of view of the court, in *Alternatives to Custodial Sanctions. Proceedings of the European Seminar*, HEUNI publication no. 15, Helsinki 1988, pp. 194-227, at pp. 202-203; he cites S. Snacken, L'application de la courte peine de prison en Belgique, *Revue de droit penal et de criminologie*, 1986, pp. 555-575, at p. 572.
  20. Menke, W. Bol, *CSO's in the Netherlands*, Report No. LXXVI, Research and Documentation Centre, Ministry of Justice, 1985.  
The development in France regarding community service is interesting in this connection: the sentences are becoming more severe with time. This makes the sanction a more attractive sentencing option for judges. J.P. Robert, *Alternative Measures to Imprisonment. Survey of the Present Situation and Prospects*, Council of Europe, 23 January 1989, p. 6.
  21. Michael C. Musheno, Dennis J. Palumbo, Steven Maynard-Moody and James P. Levine, Community Corrections as an Organizational Innovation: What Works and Why, *Journal of Research in Crime and Delinquency*, vol. 26, no. 2 (May 1989), pp. 136-167, at p. 137.
  22. Bishop, *op.cit.*, p. 118.
  23. France reports that all courts have access to an adequate number and variety of jobs which are far from fully utilized; this is due, e.g., to court reluctance to use the sanction and to the fact that prosecutors and counsel rarely request it. Even so, its use is spreading. In the Netherlands, work is available, although finding it may be time-consuming for probation officers. (Peter Tak, *Case Study on the Community Service Sentence in the Netherlands as an Alternative to Imprisonment*, report prepared for the Research Workshop at the Eighth Congress). In Hungary, however, the economic situation and the lack of suitable places has severely limited the use of "community service." Karoly Bard, *Work in liberty under surveillance in Hungary*, report prepared for the Research Workshop at the Eighth Congress.
  24. As noted in the case study for Hungary, the newly established community service order may face difficulties in implementation because the economic crisis and growing unem-

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ployment may result in firms being reluctant to provide jobs for those on whom a community service order is imposed. The case study for the Netherlands notes that the idea of the extensive use of fines was linked to the favourable economic situation. With the advent of the economic recession, there was an increase in the number of offenders defaulting on their fines. However, due to the shortage of places in remand centres, the enforcement of sentences of imprisonment for those defaulting on their fines was restricted, resulting in pressure to find other, suitable non-custodial sanctions.

25. Bishop, op.cit., pp. 112-114; Helena Parada Coelho, The Need for a Wide Understanding of Non-Custodial Sanctions Imposed by the Courts, in *Alternatives to Custodial Sanctions*. Proceedings of the European Seminar, HEU-NI publication no. 15, pp. 143-164, at pp. 146-147.
26. Michael Tonry and Richard Wills, *Intermediate Sanctions*, unpublished draft report, November 1988, cited in Annesley K. Schmidt, *An Overview of Intermediate Sanctions in the United States*, report prepared for the Research Workshop at the Eighth Congress.



# The Economic and Social Council

*by Joseph Acakpo-Satchivi\**

## I. Functions and Powers

The Economic and Social Council is the charter organ which, under the authority of the General Assembly, co-ordinates the economic and social work of the United Nations, the specialized agencies and UN programmes. The Council initiates activities with respect to international economic, social, cultural, educational, health and related matters. It makes recommendations on such matters to the General Assembly, to the members of the United Nations, and to individual specialized agencies. It also makes recommendations for the purpose of promoting respect for, and observance of, human rights. It prepares draft conventions for submission to the General Assembly on matters within its competence and calls international conferences on such matters. It enters into agreements with specialized agencies and makes arrangements for consultations with non-governmental organizations.

## II. Composition

The Council presently is comprised of 54 members, elected by the General Assembly on the basis of equitable geographical distribution. Its membership was increased from 18 to 27 by an amendment to Article 61 of the Charter,<sup>1</sup> in 1963 and in 1971,<sup>2</sup> the General Assembly again amended Article 61 to enlarge the Council's membership to its present total of 54.

The pattern for geographical distribution of seats for the Council is:

- 14 members from African States
- 11 members from Asian States
- 10 members from Latin American States
- 13 members from Western European and other States
- 6 members from Eastern European States.

Every year, eighteen members of the Council are elected by the General Assembly for a three-year term of office. Rule 72 of the Council's rules of procedure provides for the participation in the Council of Observer States with most of the rights of Members of the Council, except for voting privileges.

## III. Subsidiary machinery of the Council

The volume and the diversity of work of the Council has made it essential that it functions through subsidiary bodies. The Council has three sessional committees: the First (Economic) Committee, the Second (Social) Committee and the Third (Programme and Co-ordination) Committee, as well as a number of commissions, standing committees, intergovernmental expert bodies and expert groups.

The Council's auxiliary machinery falls into five categories.

- (a) Six functional commissions: the Statistical Commission, the Population Commission, the Commission on Human Rights, the Commission for Social Development, the Commission on the Status of Women and the Commission on Narcotic Drugs. States are elected on the basis of a fixed geographical distribution and they nominate experts to represent them at the functional commissions whose names

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\* Secretariat, the Economic and Social Council (ECOSOC), the United Nations

- must be confirmed by the Council at its organizational session.
- (b) There are five regional commissions, one each in Addis Ababa, Baghdad, Bangkok, Geneva and Santiago. The basic objective of the regional commissions is to assist in the economic and social development of their respective regions and to strengthen the economic relations of the countries in each region, both among themselves and with other countries of the world. The general Assembly in recent years has emphasized decentralization of the economic and social activities of the United Nations, and the regional commissions have assumed increasing importance. Their work has been expanded and they are deeply involved in carrying out development projects, particularly those of a regional nature.
- (c) The third category of bodies is standing Committees, such as the Committee for Programme and Co-ordination, the Committee on Natural Resources and the Committee on Transnational Corporations.
- (d) The fourth category of committees is the governing bodies of United Nations programmes in humanitarian and development fields. These include, for example, the governing bodies of UNDP, UNHCR, UNITAR and UNICEF.
- (e) The last category is standing expert groups such as the Committee on Crime Prevention and Control, the Committee for Development Planning, the International Narcotics Control Board or the Committee on Economic, Social and Cultural Rights. These Committees usually have a strict or at least *de facto* geographical distribution but experts are elected to serve on the Committees in their personal capacities and not as representatives of States.

Article 71 of the Charter provides for "suitable arrangements" for consultation with non-governmental organizations. The

Council, through the Committee on non-governmental organizations, a standing Committee, has established three categories in which NGO's, on their application, may be placed. Category I includes those organizations which have a basic interest in most of the activities of the Council; category II, those with special competence in some aspects of the Council's work; and the Roster, which includes those that by means of ad hoc connections are able to make significant contributions to the work of the Council. They are allowed to participate as observers in public meetings and those in categories I and II may present written statements. Those in category I are also allowed, if necessary, to present their views orally and propose agenda items. There are over 700 NGO's in consultative status with the Council.

#### IV. Sessions of the Council

Rule 1 of the rules of procedure of the Economic and Social Council provides that "the Council shall normally hold an organizational session and two regular sessions every year."

The Council organizes its work on a biennial basis. In February each year it holds its organizational session, when it reviews and approves the basic programme of work for the biennium, the agenda for the first and second regular sessions of the current year, and a list of questions for inclusion in its programme for the following year.

During the first regular session, which is traditionally held in May in New York and devoted to the consideration of social issues, the Council considers various questions related to social development, human rights, the advancement of women, population questions and racial discrimination, as well as a number of other issues that confront the Member States of the United Nations, like drug abuse and illicit trafficking and crime prevention and control.

At its second regular session, which traditionally is held in July in Geneva and consid-

ers economic matters, the Council conducts a general discussion of international economic and social policy, including regional and sectoral developments. At its second regular session of 1982 in its resolution 1982/50, the Council decided that, in formalizing its biennial programme of work, it should identify issues which would require its priority consideration and would organize its work in such a manner as to enable it to focus its attention on a limited number of carefully selected major policy issues to be studied in-depth, with a view to elaborating concrete action-oriented recommendations. In recent years, the Council has given priority consideration at its second regular session to the critical economic situation in Africa, to the interrelated issues of money, finance, resource flows, debt, trade, raw materials and development, and to the comprehensive policy review of operational activities for development, as well as human resources for development, the role of technical co-operation in strengthening public management capacities and the question of the multilateral response to the structural imbalances in the world economy, particularly in the light of their impact on the development of the developing countries. This year, the Council decided to focus, at its second regular session, in the general discussion of international economic and social policy, on the issue of resources for development and external indebtedness of the developing countries. (decision 1990/201).

Also at the second regular session, the Council is scheduled to consider issues such as transnational corporations, trade and development, the question of regional co-operation, food and agriculture, human settlements, development and utilization of new and renewable sources of energy, special economic, humanitarian and disaster relief assistance, operational activities for development and international co-operation and co-ordination within the United Nations system, among other issues.

In addition to these regular activities, the

Council may, in modification of its programme, decide on *ad hoc* arrangements—including in particular the convening of special session—to deal with emerging problems meriting special or urgent international attention.

At such times as may be decided upon by its members, the Council is empowered to hold periodic meetings, at the ministerial or other sufficiently high level, to review major issues in the world economic and social situation. Such meetings should be effectively prepared and should concentrate on important policy areas justifying high level participation.

## V. Efforts to Reform, Revitalize and Restructure

Over the years, there has been a sense that the Council has not been fulfilling the objectives established for it in its Charter mandate and there have been several efforts at reform. In 1977, General Assembly resolution 32/197 relating to the Restructuring of the Economic and Social Sectors of the United Nations system was adopted, aimed at making the UN system more capable of dealing with problems of international economic co-operation and development in a comprehensive and effective manner. This resolution made changes, among other things, establishing the office of the Director General for Development and International Co-operation, responsible for system-wide co-ordination of activities in the economic and social sectors.

With regard to ECOSOC, resolution 32/197 states that “in exercising its functions and powers and in fulfilling its role as set out in relevant General Assembly and Economic and Social Council resolutions, the Council is to concentrate, among other things, on its responsibilities, which include:

- (a) To serve as the central forum for the discussion of international economic and social issues of a global or inter-disciplinary

nature and the formulation of policy recommendations thereon addressed to Member States and to the United Nations system as a whole;

- (b) To monitor and evaluate the implementation of overall strategies, policies and priorities established by the General Assembly in the economic, social and related fields, and to ensure the harmonization and coherent practical operational implementation, on an integrated basis, of relevant policy decisions and recommendations emanating from United Nations conferences and other forums within the United Nations system after their approval by the Assembly and/or the Economic and Social Council;
- (c) To ensure the overall co-ordination of the activities of the organizations of the United Nations system in the economic, social and related fields and, to that end, the implementation of the priorities established by the General Assembly for the system as a whole; and
- (d) To carry out comprehensive policy reviews of operational activities throughout the United Nations system, bearing in mind the need for balance, compatibility and conformity with the priorities established by the General Assembly for the system as a whole.

In more recent years, there has been a continuing effort to revitalize the Council through streamlining, rationalization, simplification and shortening of documentation and biennialization of the work of the Council's subsidiary machinery. In 1984, the General Assembly adopted resolution 39/217 biennializing the Programme of Work of the General Assembly's second committee, including the identification of questions for substantive consideration by the Assembly in alternate years. This move enabled the Council to deal more effectively with its heavy workload and, combined with financial considerations, has led to increasing biennialization of the sessions of many sub-

sidary intergovernmental committees as well.

In 1985, the United Nations celebrated its 40th anniversary and Member States expressed their unanimous support for the organization. At the same time, however, and in a climate of increasingly severe financial constraints, there was also a call for greater efficiency and effectiveness in the work of the United Nations. In resolution 40/237, the General Assembly established a Group of High-level Intergovernmental Experts to Review the Efficiency of the Administrative and Financial Functioning of the United Nations. This Group appointed by the President of the General Assembly consisted of 18 members and met in the first half of 1986. It submitted a report to the 41st session of the General Assembly containing 71 recommendations for improvements in the administrative and financial functioning of the United Nations and its subsidiary bodies and covering the intergovernmental machinery, the structure of the Secretariat, personnel matters, monitoring, evaluation and planning and budget procedures.

The General Assembly in resolution 41/213 decided that the majority of the recommendations of the Group of 18 should be implemented by the Secretary-General and the relevant organs and bodies of the United Nations. This included recommendation 8, which called for a careful and in-depth study of the intergovernmental structure in the economic and social fields by an intergovernmental body designated by the General Assembly. The study was to include a comparative analysis of agenda, calendars and programmes of work of the General Assembly and the Economic and Social Council and related bodies as well as their support structures to identify, among other things, measures to rationalize and simplify the intergovernmental structure and avoid duplication. It was to consider consolidating and co-ordinating overlapping activities and merging existing bodies in order to improve their work and make them more responsive

to existing needs.

By its decision 1987/112 the Council, at its Organizational session for 1987, established a Special Commission of the Economic and Social Council on the in-depth study of the United Nations Intergovernmental Structure and Functions in the Economic and Social Fields in order to carry out this in-depth study.

The Special Commission was open to the full participation of all States Members of the United Nations and had held nine sessions. As I said earlier, the general objective of the exercise was to increase the efficiency and enhance the effectiveness of the United Nations intergovernmental structure and functions in the economic and social fields with a view to achieving the ultimate objective of improving the quality of human life worldwide.

At the end of the 14-month exercise, the Special Commission had completed a review of all the subsidiary intergovernmental machinery in the economic and social sectors. Throughout the exercise, delegations had demonstrated a genuine interest in the in-depth study and got involved in an intellectual and challenging process of scrutinizing a much proliferated and intricate intergovernmental structure. It was certainly a useful, informative and educating process for every one.

The final stage, that of formulating recommendations on the basis of the findings of the in-depth study, ran into serious difficulties, for several reasons:

- (a) Political considerations;
- (b) Difficulties within several groupings and delegations to agree on a solid position regarding the substantive recommendations and the modalities for their implementation;
- (c) One of the main stumbling blocks which impeded an agreement on a set of recommendations was the inability to make a clear-cut, logical and implementable division of labour between the General As-

sembly and a universalized Economic and Social Council.

Within this spectrum, trends ranged from converting the Council into an economic and social general assembly, even if such an arrangement detracted from the powers and responsibilities of the General Assembly as enshrined in the Charter, to having a strengthened and hopefully more effective Council with universal membership, without being specific on the impact that such an arrangement should have on the method and organization of work of the General Assembly. A third trend opted for introducing minor changes by trimming down a few intergovernmental bodies.

As the Chairman of the Special Commission stated in his closing statement, "the United Nations is and will always be what its Member States want it to be or to do. The political will on the part of all Member States is a *sine qua none* condition for an efficient and effective United Nations. If the Special Commission had been unable to approve a set of recommendations, it was the lack of agreement on the part of Member states on what they expect the United Nations to do." Obviously, there was a necessary prerequisite that everyone should rise above narrow interests and engage in dialogue on the merit of each element of a package of measures.

In conclusion, although the Special Commission had conducted the in-depth study entrusted to it, the Special Commission was unable to reach agreed recommendations for the above-mentioned reasons. However, on the positive side, there was a convergence of views among the members of the Special Commission on the following areas:

- The review of the functioning of the United Nations should be seen as a continuing process aimed at bringing about appropriate reforms to enhance the capacity of the Organization to meet the changing needs of its members;
- In order to enable the Council to fully and

- effectively carry out its Charter responsibilities, particularly in the field of co-ordination, Governments should harmonize their positions in the various governing bodies of the organs and organizations of the United Nations system;
- The recognition of the need to rationalize the subsidiary bodies of the General Assembly and the Council on the basis of agreed criteria;
  - Continued efforts should be made to biennialize the agendas and work programmes of the Council and of the Second and the Third Committees of the Assembly with a view to ensuring the necessary complementarity between the General Assembly and the Council;
  - A true revitalization of the Council would primarily mean progress on substantive issues on its agenda;
  - Finally, the Council should also adopt procedures which would allow it to devote more time to in-depth policy discussions of central issues, reduce mere routine or housekeeping activities and avoid the adoption of resolutions of repetitive nature.

It was in that perspective that the Council adopted in July 1988 resolution 1988/77, in which it adopted a series of measures aimed at revitalizing the Council, improving its functioning and enabling it to exercise effectively its functions and powers as set out in Chapters IX and X of the Charter of the United Nations.

At its second regular session of 1989, the Economic and Social Council adopted resolution 1989/114 and agreed on further measures for the implementation of its resolution 1988/77 and decided to consider at its organizational session for 1990, the establishment, on a provisional basis, of a multi-year work programme identifying major policy themes for in-depth consideration each year in accordance with Council resolution 1988/77. It should be recalled that the purpose of the thematic analyses, as set out in resolution 1988/77, is to provide the frame-

work for in-depth discussions by the Council on previously selected major policy themes each year, particularly major issues identified in the Medium Term Plan of the United Nations, in order to assist it in carrying out its responsibilities more effectively in policy formulation, priority-setting, co-ordination and monitoring of the United Nations programmes in the economic and social sectors. The thematic analyses should review existing activities. They are expected to be brief and forward-looking in identifying policy options. In that connection, the substantive entities of the United Nations concerned, particularly the Director-General for Development and International Economic Cooperation, should be actively involved in the process of the Council's in-depth consideration of major policy themes, including their identification, the preparation of the analyses, implementation and monitoring.

Given the scope of the thematic analyses, two years of lead time will generally be necessary for their preparation. For 1990 and 1991, however, the Secretary-General suggested that the Council, on an exceptional and experimental basis, confine itself to the in-depth consideration of one major policy theme for which some work has already been undertaken within the secretariat so that appropriate documentation can be prepared in sufficient time for submission to the Council. Consequently, the Council decided (decision 1990/205) to hold discussions in 1990 on the following issues:

“The impact of the recent evolution of East-West relations on the growth of the world economy, in particular, on the economic growth and development of the developing countries, as well as on international economic cooperation.”

The Council also decided to establish on a provisional basis, the following indicative multi-year work programme for the in-depth consideration of major policy themes during the period 1992-1994 which would be con-

sidered in the context of a high-level special meeting of the Council.

1992

The international trade system and its impact on the development of the developing countries;

Eradication of poverty in the developing countries, including the impact of structural adjustment programmes on vulnerable groups;

1993

Environment and development;

Population, development and socio-economic indicators;

1994

Technology and industrialization in the development process of the developing countries;

International cooperation against illicit production, supply, demand, trafficking and distribution of narcotic drugs.

It should be understood that this list of themes would be reviewed annually and adjusted on a roll-over basis as necessary and as stipulated in Council resolutions 1988/77 and 1989/114. In reviewing such a work programme, the Council should bear in mind the need to maintain a balance between social and economic issues, the work programmes of the organs and organizations of the United Nations system and the progress made in the revitalization of the Council.

### **Role of the Economic and Social Council in Crime Prevention**

As I stated earlier, the Council functions through subsidiary bodies. In the field of crime prevention and control, it was the General Assembly which first established an *ad hoc* Advisory Committee of Experts by its resolution 425 (v) of 1 December 1950. The Committee was subsequently renamed the Advisory Committee on the Prevention of Crime and the Treatment of Offenders by ECOSOC resolution 1086 B (XXXIX) of 30

July 1965. By Council resolution 1584 (L) of 21 May 1971, the name was changed again to Committee on Crime Prevention and Control—Its functions were further specified by Assembly resolution 32/60 and ECOSOC resolution 1979/19. As a matter of fact, in its resolution 32/60, the General Assembly requested ECOSOC to consider the question of crime prevention and control with a view to further co-ordination of the activities of United Nations bodies in this field, in particular the preparation every five years of a United Nations congress on the prevention of crime and the treatment of offenders and the provision of technical assistance to interested Member States, at their request. At the same time, the Assembly entrusted the Committee with the function of preparing the UN crime congresses by submitting appropriate proposals to the ECOSOC.

In its resolution 1979/19 on the functions and long-term programme of work of the Committee on Crime Prevention and Control, the Council significantly enlarged the scope of the committee's work and entrusted it *inter alia*, with the preparation of the United Nations crime congresses with a view to considering and facilitating the introduction of more effective methods and ways to preventing crime and improving the treatment of offenders, the preparation and submission to the competent United Nations bodies and to those congresses, for their approval, of programmes of international cooperation in the field of crime prevention and the promotion of lasting experience gained by states in the field of crime prevention and the treatment of offenders. The considerable imbalance between the workload deriving from the expanded mandates and the limited resources to fulfill them lead the committee to initiate a review of the functioning and programme of work of the United Nations in crime prevention and criminal justice. Numerous resolutions had been adopted by the Council and the General Assembly on the subject, but they had not yielded the expected results, for the simple reason

that the financial situation of the organization did not permit it to fully accede to all the demands of Member States to provide adequate resources for the crime programme.

It was against the background of the financial reality of the organization that the Committee, at its eleventh session, in February last had explored in a report addressed to the Eighth United Nations Congress, the following new approaches to handle the problem:

- (a) A basic restructuring of the United Nations mechanisms dealing with crime prevention and control, with appropriate qualitative and quantitative changes, including the requisite financing for the programme;
- (b) The elaboration—as a long-term goal—of a convention on crime prevention and criminal justice in order to provide a framework for the programme and to stipulate the obligations of state parties;
- (c) The establishment of a special crime prevention agency;
- (d) Greater leverage of the United Nations crime programme so that it could fulfill its essential tasks;
- (e) The convening of a summit meeting on crime and justice to mobilize high-level attention to the issue.

As stated in the report of the Committee at its eleventh session, ways of highlighting the programme and attracting support had to be imaginatively explored—However one cannot ignore that the current international financial climate is not propitious to the creation of a new crime prevention agency—Yet, the crime programme does not financially attract many governments.

By making the programme less ambitious and more realistic, I believe that it can be satisfactorily implemented.

### Conclusion

This is a general picture of the Economic and Social Council as it strives to revitalize itself. Whatever the final results of this undertaking, there is no doubt that Member States continue to consider that the United Nations has a very relevant role to play with respect to economic and social matters; and that ECOSOC must be reformed in order to enable it to perform the responsibility designated to it in the Charter.

### Note

1. General Assembly resolution 1991 B (XVIII).
2. Resolution 2847 (XXVI).



## Offender Accountability in the United States with Custodial and Non-custodial Measures

by Gilbert Lewis Ingram\*

### Introduction

Each year in the United States more than 11 million offenders become involved with the criminal justice system.<sup>1</sup> By the end of 1987, 362,000 persons were on parole and over 2.2 million were on probation.<sup>2</sup> More than 670,000 inmates are in prison, with an additional 340,000 in jail. From 1930 to 1973, the average annual rate of increase in prisoner population was only 1.7 percent, but from 1973 to 1987 it rose dramatically to 7.4 percent. This pattern continues to this day; the population has virtually doubled during the first eight years of the 1980s, and projections indicate that it will double again by 1995.

These unprecedented figures are severely straining the capacities of corrections officials to meet judicial mandates and offender needs. Thirty-eight states are operating under court-ordered "caps" limiting their prison populations. State and federal prison capacities have not kept pace with the increase. From 1972 to 1977, approximately 23,000 state prison beds were added while the number of prisoners increased by more than 81,000.<sup>3</sup> The Federal Bureau of Prisons (BOP) alone operates 64 facilities designed to hold 33,119 offenders, while the current population numbers 55,663.<sup>4</sup> The BOP is therefore operating at 168 percent of design capacity and the agency has embarked on a

massive prison construction program which will add more than 24,000 beds by 1995. It is expected that this will reduce the overcrowding level in the federal system to a more manageable 130 percent of design capacity.

As a whole, new construction has helped, but it has not kept pace with the demand for more bedspace and increased inmate services. From 1981 to 1985, 158 state and federal prisons were added at a cost of \$1.9 billion. However, this is still not enough. It is estimated that five 500-bed prisons would have to be opened each month until the year 2000 to accommodate the current and anticipated numbers of prisoners.<sup>5</sup>

The public's demand for stricter sanctions, increases in reported crime, the postwar baby boom, unaddressed social problems and new sentencing laws have been linked to the rise in the number of prisoners. The increased use of tax dollars to fund the costs associated with corrections has focused a new public awareness of corrections. Prisons are criticized because they cost too much and do too little. Community programs are perceived as too lenient and unsafe. The public wants more protection from crime and lower corrections costs.<sup>6</sup> In other words, the public is demanding accountability from offenders for their crimes and accountability from the criminal justice system for tax dollars spent.

At sentencing, judges must consider a balanced application of the public demand for accountability, the needs of the offender, and the requirements of the law. Federal criminal law requires the judge to consider the need for the sentence "A) to reflect the seriousness of the offense, promote respect for

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the law, and provide just punishment for the offense; B) [to] afford adequate deterrence to criminal conduct; C) [to] protect the public from further crimes of the defendant; and D) to provide the defendant with needed . . . [services].<sup>7</sup>

The massive increase in prisoner populations has exposed a void in the options within the sentencing process and those which may be used by correctional administrators. Many offenders are imprisoned because credible community punishments do not exist and judges view offenders' crimes as too serious to be sanctioned by an ordinary sentence of probation. Conversely, many judges do sentence offenders to probation for an offense they believe not serious enough to warrant incarceration, although they would prefer to utilize a middle ground.

This void between incarceration and probation can be filled by any single or combined series of intermediate sanctions<sup>8</sup> (i.e., community service, shock incarceration or boot camps, restitution, intensive probation supervision). Many have assumed that the use of intermediate sanctions would reduce overcrowding and satisfy the public need for offender accountability. This may be true in many jurisdictions; however, many elements of the intermediate sanction spectrum are still in the initial stages of implementation and little research is available that would indicate their probable success or failure if used on a broad scale.

One thing is clear. Currently, the limited use of intermediate sanctions has done little to reduce the serious levels of overcrowding. Additionally, until just recently, victims' rights have largely been ignored. The criminal justice system has been preoccupied with maintenance of public order and punishment of offenders.

This paper will describe many of the intermediate sanctions available today, and it will attempt to explain how they may be used to satisfy the accountability demands from the correctional constituency, the public. Several successful, innovative programs cur-

rently being used in federal, state, and local jurisdictions will be highlighted, beginning at the point of sentencing in criminal court and proceeding through the continuum of sanctions, from probation to secure confinement.

## Probation

### *History of Probation*

The father of modern probation in the United States of America was John Augustus, a successful Massachusetts shoemaker who was born in 1784. Augustus would appear in court and offer to bail a defendant on probation. If the judge agreed, the defendant would become the charge of Augustus, who would assist the person in finding employment or residence. When the defendant returned to court, Augustus would report on his progress toward rehabilitation and recommend a disposition. Augustus thoroughly investigated each person he assisted, taking into account the defendant's character, age, and outside influences. He kept a record of each case and was able to provide statistics on the persons he helped.<sup>9</sup>

Later, prisoners' and childrens' aid societies were established. The organizations worked in the courts primarily to rescue children from the inequities of the judicial process. Their work, although unofficial, was similar in practice to probation. For adult offenders, many states used the suspended sentence, an extension of English Common Law. Some states authorized fixing the conditions of the suspended sentence, and these were the forerunners to probation regulations.<sup>10</sup>

### *Modern Probation*

Today, probation in the United States is administered by hundreds of independent agencies operating under different laws and different philosophies within each state. There is continuing debate over whether probation should be administered by the judiciary or by an executive agency.

## OFFENDER ACCOUNTABILITY IN US

Those who favor judicial administration maintain that it is more responsive to court direction. Those who oppose it point out that judges are not equipped to administer the program. It is also noted that all other sub-systems for carrying out court dispositions, such as prisons and parole, are already under separate state jurisdiction. Proponents claim that a separate state agency would allow for better coordination with other correctional services.<sup>11</sup>

Most states have no restrictions on who may be granted probation for felony cases. Others restrict probation to those convicted of less serious offenses, making it unavailable for persons whose offenses are more serious (such as rape or murder), or for persons with prior felony convictions.

Many factors that influence whether a defendant will be granted probation, such as geographic location of the court, crowded court calendars, and attitudes toward particular offenses or offenders, contribute to the continuing controversy over differential punishment. However, there are factors that are considered in all cases relative to the grant or probation:

- the age and potential for change in the defendant,
- criminal record,
- defendant's relationship to his family,
- evidence of deviant behavior such as drug abuse or sex offenses, and
- the attitude of the community toward a particular offense or offender.

Other factors which may be considered include offender remorse, plea bargaining, ability to provide restitution, and the quality of service provided by a probation agency.<sup>12</sup>

Probation departments require a defendant to sign a form acknowledging familiarity with a variety of regulations that may or may not reflect the defendant's individual needs, including special conditions such as fines, restitution, placement in a halfway

house, or intensive supervision. Most standard conditions require the defendant to:

- live a law-abiding life,
- maintain employment,
- provide support for dependents,
- inform the probation officer of his whereabouts, and
- secure the permission of the officer prior to leaving the jurisdiction of the court.<sup>13</sup>

The length of probation terms may vary. Generally, they run from two to five years. Some jurisdictions allow for termination of probation prior to the end of the term. When the conditions of probation are violated, either through technical reasons or for new criminal conduct, probation can be revoked by a judge and the defendant may be sent to prison.

### *Intensive Probation Supervision*

A more attentive form of probation which is gaining widespread attention because of prison overcrowding is commonly known as "intensive probation supervision" (IPS). In 1988, 35 jurisdictions had IPS, and ten more were planning on implementing it. Most jurisdictions that operate IPS view it as an effective way to keep people out of prison. It costs much less than incarceration and is a "front door" alternative to prison. A highlight of the program's effectiveness is the balanced application of law enforcement and treatment. Other elements of intermediate sanctions used in conjunction with IPS include community service, restitution, and residential and non-residential treatment programs. House arrest and electronic monitoring can also be used as part of IPS.<sup>14</sup>

Most IPS programs incorporate a high level of contact between officers and participants, frequent random urine testing for drug detection, adherence to nightly curfews, compliance with prescribed treatment programs, and maintenance of full-time employment.

In 1988 there were over 25,000 offenders

under IPS. Twenty-seven systems use IPS for offenders who would otherwise be sent to prison. During the first three months of the program, one jurisdiction found a 10-percent reduction in the number of felons sent to prison; 59 percent of the IPS cases resembled cases normally sent to prison.<sup>15</sup>

Virtually all jurisdictions note a decrease in the cost of IPS as compared to incarceration costs. Most IPS programs operate at approximately 10 percent of incarceration costs. Money is saved in other ways, too, including restitution, community service, and full-time employment (resulting in payment of taxes) which helps keep families off welfare.<sup>16</sup>

Caseloads are low (average of 21 nationally) in order to provide "intensive" supervision. IPS officers generally had positive feelings about their jobs, reporting higher levels of job satisfaction and lower levels of stress and burnout than regular officers.<sup>17</sup>

#### *Effectiveness of Probation*

Estimates reveal that probation is successful in approximately 75 percent of the cases.<sup>18</sup> Probation is generally considered successful as a cost-effective mechanism for screening out offenders who do not require imprisonment. Increased levels of supervision and the combined use of other intermediate sanctions provide judges with the ability to fashion sentences that may satisfy the public demand for offender accountability in a humane non-custodial environment. Increased resources should be provided to the agencies involved with the operation of intermediate sanctions and probation administration if the continued and increased use of these sanctions in concert with probation is to be successful.

Because of recent changes in federal criminal laws, due in great part to the public's demand for more punitive sanctions for criminal behavior, projections indicate a 75-percent reduction in the use of federal probation. This highlights the need to examine sentencing statutes to discover ways to in-

crease the use of intermediate sanctions for low risk offenders, which may reduce the serious level of overcrowding in the federal system, while providing an acceptable level of perceived punishment.

### **Halfway Houses**

Halfway houses have, for a long time, been an integral part of the criminal justice system in many jurisdictions. A major benefit of using halfway houses is the reduction in the level of overcrowding in many prison systems. The Federal Bureau of Prisons currently contracts for placement of 3,477 offenders in privately run halfway houses.<sup>19</sup> Approximately two-thirds of this number are institution transfers. In 1988, the Bureau of Prisons spent almost \$40 million to house offenders in community treatment centers.<sup>20</sup> The average daily cost per offender in 1989 was approximately \$27<sup>21</sup> compared to approximately \$46 per day for secure confinement. The remaining one-third of offenders in community treatment centers are designated there to serve short sentences, or are sent there as a special condition of probation, parole or bond.

Many states and the federal government budget millions of dollars for halfway house contracting costs. However, the link to the correctional systems has not always been this direct.

#### *History of Halfway Houses*

The current halfway house movement in the United States of America started in the 1950s and 1960s when religious and private volunteer groups established facilities. High recidivism rates and awareness of the problems experienced by newly released offenders fueled the initial interest. The goal of these programs was to provide a buffer between highly structured institution life and life in the community.<sup>22</sup>

Over time, halfway houses moved from providing purely a place to live and sleep to offering an assortment of specialized pro-

grams, such as alcohol and drug treatment and employment counseling. Original residents were usually ex-offenders and parolees. The type of resident expanded to offenders on probation and those about to be released from prison. Thus, direct ties to corrections developed.<sup>23</sup>

Today, halfway houses are more sophisticated and more concerned with security. Most halfway houses have rigid sign-in/out procedures and curfews, and use urine surveillance and breathalyzer tests to detect and deter the use of drugs and alcohol. Part of this change has been dictated by the public demand for more supervision and accountability.<sup>24</sup>

### Federal Halfway Houses

The grandfather of the pre-release halfway house movement was the Federal Bureau of Prisons, which opened its first Community Treatment Center in 1961 in the city of Chicago. Other facilities opened soon thereafter in the cities of New York and Los Angeles. Until 1965, only juveniles and youthful offenders were authorized by law to participate and the initial programs were small, with limited placement from 60 to 120 days.<sup>25</sup>

The Bureau of Prisons was responsible for proposing legislation that permitted federal courts to utilize the CTCs as alternatives to incarceration. This legislation significantly expanded use of the CTCs and resulted in development of a model for state and local correctional systems.<sup>26</sup>

In 1965, the successful operation of the CTCs contributed to the passage of the Prison Rehabilitation Act, which permitted adult offenders to participate in the program. Program participation was further expanded in 1970 with the passage of the Probation and Parole Residential Community Treatment Center Act. This act allowed federal courts to direct that a defendant reside in a CTC as a condition of probation. Similarly, the U.S. Parole Commission could require a

parolee to participate in a CTC as a condition of parole.<sup>27</sup>

The Bureau of Prisons started contracting with private and non-profit halfway houses in 1967, both as a cost savings measure and because of the great demand for their use. In 1982, all federal community treatment centers operated by the Bureau of Prisons were closed.

Each CTC now provides two operational components, pre-release and community corrections. This procedure was implemented in 1988, because of judicial and correctional needs for differential handling of offenders placed in contract community treatment centers. The pre-release component assists offenders in making the transition from the institution to the community, or acts as a resource while they are under supervision. The community corrections center (CCC) component is designed as a more punitive sanction. Except for employment or other required activities, the offender in the CCC component must remain in the CTC, where recreation, visiting, and other in-house services are provided.<sup>28</sup> CCC services involve greater restrictions on personal freedom; that component is normally utilized for those serving short sentences of community confinement.

In an effort to enhance inmate accountability, impart responsible financial behavior, and defray contracting costs, inmates residing in CTCs are required to pay a subsistence expense of up to 25 percent of their earnings to the halfway house. During 1989, over \$5 million was collected (an average of \$4.41 per day collected from each individual).<sup>29</sup> This aspect of community corrections whereby offenders pay part of the cost of the program is very popular with the public, and helps justify the use of these sanctions.

A number of recent changes in the criminal justice environment are moving the Bureau of Prisons toward considering the reinstatement of its own community treatment center operations to be known as Federal Correctional Centers (FCC), in large metropolitan areas. Compliance with contractor

provisions, the increased emphasis on the use of home confinement and other intermediate sanctions as alternatives to confinement, and diminishing jail space for short-term commitments are the reasons for a return to this approach. The need to provide consistent rules and regulations that satisfy the public's need for inmate accountability while allowing for necessary space in large urban areas dictate such a move to the FCC concept.

FCCs will provide:

- detention space for those awaiting trial,
- residential programs for pre-release inmates transferred from institutions,
- a residential community corrections component for short-term confinement,
- a component for drug treatment, and
- a base of operations for home confinement operations.<sup>30</sup>

The use of community-based residential centers, regardless of name, (halfway house, community treatment center, community corrections center, or federal correctional center) is expected to increase in the future. They provide a viable alternative to inappropriate sentences of pure probation or secure confinement while ensuring offender accountability.

Halfway houses have developed into highly diverse programs because of political, public safety, and organizational concerns. Despite the current emphasis on supervision, treatment can still be provided in a manner which encourages change. The common denominator is a bed—the low cost residential dimension.

### Community Service

Community service is a means of accomplishing a variety of ends. Sentences to community service typically stipulate that offenders must perform uncompensated work for civic or non-profit organizations. In the beginning, the sentence was used prima-

rily to permit offenders who could not pay fines to work off their obligations by working at a minimum wage rate for the community. Community service was usually an add-on to probation, rather than a sentence in itself. The combination now is sometimes considered to be an alternative to a sentence of imprisonment.<sup>31</sup> Offenders usually pick up trash in public parks, clean roads, and provide manual labor. The recent U.S. Sentencing Reform Act lists community service as a condition of probation and supervised release and makes community service, a fine, or restitution a mandatory condition of probation for a felony.<sup>32</sup> The U.S. Sentencing Commission lists community services as a sentencing option, but does not structure its use. It is a required component of several intensive supervision probation programs.

After sentencing, before an offender can be placed in community service, an officer must assess the offender's skills, interests and abilities. An orientation is usually provided that explains the purpose of the community service order, the nature of the service, and assignment options. Offenders are then referred to non-profit, non-political organizations that serve valid community needs. A job description is prepared and the work to be performed should not displace paid civilians.<sup>33</sup> Once the referral process is complete, the offender provides a specified amount of service.

Noncompliance with the community service order generally calls for administrative action by the probation officer to help the offender reach compliance. Alternatives to revocation and imprisonment include admonition, addition of more stringent conditions, or residence in a community treatment center.<sup>34</sup>

Several jurisdictions report favorable results citing thousands of hours of community service being rendered. Those offenders who participate in these programs provide a significant cost savings to the alternative punishment of incarceration. These programs are well received by the public if they

include careful screening and sufficiently useful work requirements. Publicizing the existence of successful community service programs is a very important duty for the criminal justice system to perform in terms of educating the public and reinforcing the idea that non-custodial measures may be effective.

### Home Confinement

Another aspect of non-custodial supervision in the community involves restriction of certain types of non-dangerous offenders to their homes. This home detention approach is sometimes used in connection with electronic monitoring to assure compliance with program requirements. During 1987, 10,000 offenders in 42 states were in home detention programs. Surveys showed a dramatic increase in the use of electronic monitoring. In 1987, the number of prisoners subject to electronic monitoring and the number of programs grew by over 400 percent.<sup>35</sup> In 1988, 32 states were using electronic monitoring devices to supervise nearly 2,300 offenders.<sup>36</sup> Most of those monitored were sentenced offenders on probation participating in intensive supervision, or parole. Electronic monitoring provides greater control than probation while offering an alternative to imprisonment and overcrowding. Most programs require the offender to pay for the services.

The first program was implemented in Florida in 1984.<sup>37</sup> The devices are typically small plastic boxes that strap onto the wrist or ankle of an offender, and they electronically monitor the location of the offender.

Most offenders involved in the program are convicted of major traffic offenses such as driving while intoxicated, property offenses or other non-violent crimes.<sup>38</sup> Some jurisdictions gradually expand the programs to include higher risk cases, thereby using it as a tool to free up needed bedspace for the most serious, violent offenders.

Monitoring programs have been develop-

ed by all ranges of state and local criminal justice agencies. The State of Florida is a microcosm of the country as a whole in that monitoring activities take place in all areas, by all levels of government.<sup>39</sup>

In the federal system, the study of electronic monitoring is a joint venture involving the Bureau of Prisons, U.S. Parole Commission, and Probation Department. So far, under this program, over 170 selected offenders released from institutions with no need for services of a halfway house were released directly to the community with an advancement of their original release date. This group would have otherwise been released from prison to a halfway house. During the early release period, offenders have a strict curfew monitored electronically.<sup>40</sup> All risk levels are represented in the project.

This program has shown that offenders can be placed in home confinement with an acceptable degree of accountability. While the program is less costly than a halfway house, home confinement is labor intensive. The maximum caseload for each supervising officer appears to be no more than 25 offenders. The results of the project may have major policy implications for low risk offenders who are currently in prison.<sup>41</sup>

There is no evidence that the use of electronic monitoring will result in long-term crime prevention. However, the benefits are clear. Prison overcrowding can be reduced which will save money, and the devices satisfy concerns for both public safety and humane treatment. Offenders can be kept with their families and retain their jobs, while losing freedom of movement as punishment for their illegal acts.

### Financial Accountability

Throughout the evolution of the criminal justice system in the United States of America, victims' interests have received less attention than the rights of the offender. During the 1960s and 1970s, victims' rights received more attention because of the

realization that crimes were not being reported because victims believed that the system would not treat them fairly.

Public officials have recently realized that victims of crime experience crisis reactions similar to those experienced by victims of war, natural disaster or catastrophic illness. Mental or emotional suffering are the most frequent problems expressed by victims, while time and income loss are difficulties involved in the court process. Fear and emotional stress often extend to victims' families and friends.

### *Legislation*

Recognition of victims' interests contributed to legislative advancements at all levels during the 1980s. The Victim and witness Protection Act (VWPA) of 1982 was the first piece of legislation to protect the interests of victims and witnesses. Noteworthy provisions of the Act mandated the following:

- victim impact statements in all presentence investigations,
- protection of victims and witnesses from intimidation, threat or harassment,
- restitution to victims of crime,
- consideration for victims during bail determination, and
- guidelines for fair treatment of crime victims and witnesses.<sup>42</sup>

This latter provision resulted in development of guidelines for victims and witnesses of serious crime and their requests for notification prior to offender parole hearings, transfers, death, escape, participation in community programs, and release. Four hundred sixty-four federal prisoners are currently involved in the Bureau of Prisons' Victim and Witness Notification Program.<sup>43</sup>

The Federal Bureau of Prisons has established a Victim/Witness Community Relations Board composed of law enforcement officials and civilian victims and witnesses. Meetings are held which provide victims and witnesses of serious crimes with information

regarding governmental victims assistance programs. At the same time, methods of communication and other matters are discussed. The Board promotes an understanding of victim/witness programs within the community.

The Victims of Crime Act (VOCA) of 1984 authorizes federal funds for state victim compensation and victim assistance programs. The Act established the Crime Victims Fund (CVF) consisting of revenues from federal offenders; fines, assessments and bond forfeitures. The Criminal Fine Enforcement Act of 1984 increased federal fine limits and authorized assessment of interest on past due fines.<sup>44</sup>

More than 35 states have enacted legislation protecting victims' interests compared with four before 1982. Forty-three states and the District of Columbia now have victim compensation programs.<sup>45</sup> Thirty-two states have amended their constitutions to ensure victims' rights. Victims' rights groups, which number more than 5,000 nationwide, seek the right to restitution and a guarantee of participation in judicial proceedings.

### *Restitution*

Restitution as a criminal sanction is a fairly new development which may require the offender to pay money to the victim and/or justice system, or perform community service. In 1972, the State of Minnesota developed one of the first restitution programs which allowed property offenders a chance to avoid prison if they worked and paid restitution to the victims. Restitution is gaining popularity because it seems to fulfill humane sentencing goals including:

- retribution, which requires offenders to pay for their crimes,
- deterrence, which ensures greater accountability than probation alone, by involvement of recognizably unpleasant consequences,
- rehabilitation, because the offender works within the functioning economic system



while remaining socially responsible for his livelihood and the well-being of those hurt by the criminal act,<sup>46</sup> and —reintegration, by maintaining ties with the community.<sup>47</sup>

Some jurisdictions operate low-cost restitution centers as an alternative to incarceration, where offenders reside. Offender activities are monitored by center staff and the probation department. Offenders work during the day and use their wages to pay for room and board, court costs, and victim restitution. Community service restitution, which may be performed during evenings and weekends, results in a considerable monetary savings to the community.

The fine is one of the oldest forms of punishment and is widely used in the United States of America as an acceptable form of restitution. The amounts levied however, tend to be small, and they are usually combined with other sanctions, such as probation.

Proponents argue that this sanction can be adjusted to an appropriate level for the offender and the seriousness of the offense. Since it is a community-based punishment, it does not diminish the economic and social ties of the offender.

Critics cite class differentiation, in that lower class people go to prison and upper class people receive fines,<sup>48</sup> appropriate enforcement techniques are lacking, and additional court administrative burdens result.<sup>49</sup> Collection of monetary sanctions is primarily a judicial responsibility and judges are cognizant of the overall poor use of collection methods, thereby affecting judicial integrity and credibility.<sup>50</sup>

Despite these problems, there are courts which utilize innovative collection techniques including installment payments, credit cards, automated record keeping equipment, telemarketing, and collection agencies. The impact of collection agency activity on an offender's credit rating seems to be a positive factor in payment. Effective use of these

methods of collection can result in increased use of this sentencing option, thereby relieving prison overcrowding.

#### *Federal Inmate Financial Responsibility Program*

Federal legislation laid the groundwork for the Bureau of Prisons' Inmate Financial Responsibility Program. Conceived and tested at the Federal Prison Camp, Big Spring, Texas, in 1985, the program holds offenders accountable to society, and victims in particular, by monitoring their demonstrated level of responsible financial behavior. Many inmates had resources to satisfy financial obligations (i.e., fines, assessments, restitution) at the time of commitment, while others were capable of earning wages, portions of which could be used to satisfy obligations, while working in Federal Prison Industries or other institutional assignments.<sup>51</sup>

The offenders' level of financial responsibility was a primary consideration in determining suitability for privileges within the institution as well as for community activities, such as furloughs and halfway house transfers.

The Big Spring program was viewed as highly successful and since 1987, collections have increased steadily as the program expanded to a national scale. During 1989, collections tripled from 1987 with inmates contributing more than \$18,593,000 toward their obligations.<sup>52</sup> With the exception of direct restitution payments to victims, most funds collected are deposited in the Crime Victims Fund and distributed to the states for victims assistance and compensation programs.

During incarceration, the offender is held accountable to society and the victims. He is physically accountable through loss of freedom. He is financially accountable through institutional monitoring of the collection of all financial obligations. Finally, he is held psychologically accountable through participation in a program designed to encourage responsible behavior and to compen-

sate victims.

### Shock Incarceration

"Boot camps," technically called "shock incarceration" are currently attracting considerable interest in the United States as an alternative to traditional imprisonment for young adult offenders. These camps were started in 1983 in the States of Georgia and Oklahoma. At least fourteen states now operate boot camps and others are developing similar programs. The programs are designed to "jolt" or "shock" the offender into abandoning crime.<sup>53</sup> The idea is that young offenders, when confronted with the stark reality of institutional life, will choose to avoid a life of crime.

Boot camps are characterized by strict military-style discipline and physical conditioning, manual labor, education, and treatment. Participants in boot camps are generally separated from the rest of the prison population during incarceration and may be subject to continuing supervision upon return to the community. These programs are generally voluntary. Participating offenders are incarcerated for shorter periods of time than their sentences would potentially permit.

The programs generally accept young, non-violent offenders aged 18 to 24 who have no prior criminal records, although at least one state selects inmates convicted of violent offenses. Programs generally last from 90 to 120 days, although two states operate six-month programs. The longer programs are seen as necessary in some areas of the country to calm public fears about the early release of violent offenders and to do a better job of treatment.<sup>54</sup> In exchange for completion of the program, the sentence is shortened and offenders are placed on a period of intensive or regular community supervision.

Shock incarceration stresses discipline. Proponents claim it has the same results as military recruit training with respect to developing positive attitudes toward authority,

improved physical conditioning, responsible behavior, and improved decision-making abilities. Offenders have a chance to re-evaluate their lives by working with others and learning self-respect and self-discipline. They learn to seek realistic goals.<sup>55</sup>

Advantages of a well-designed boot camp include the following:

- an innovative intermediate sanction for offenders who pose high risks for probation,
- enhanced public safety through incarceration,
- deterrence and punishment,
- rehabilitation and treatment, and
- lower costs than traditional incarceration.<sup>56</sup>

The potential benefit of the boot camp sanction is significant. Boot camps do promote both the perception of punishment among offenders and the public, and the removal of the offender from the community for a period of time. However, early research indicates that programs may have early successes in terms of recidivism statistics but, in the long term, they may not do better than conventional methods.<sup>57</sup> Hence, there is a need to be cautious. The real test is performance in the community and it is too early to determine if boot camps have a significant effect on this criterion.

One of the most important differences in the administration of the programs lies in who selects offenders for this sanction—the judge or the corrections official. This factor may have impact on whether the programs include offenders who would not otherwise be incarcerated or whether the sanction is used as an alternative to long-term incarceration, thus reducing prison overcrowding.<sup>58</sup> Unrestricted judicial control of the selection process generally does not reduce prison overcrowding. Many judges are more concerned with deterrence or enhancing the severity of probation.<sup>59</sup> Thus, they tend to overuse shock incarceration apparently pre-

ferring to err in a conservative direction, with the choice in their mind between probation or boot camp.

### *Federal Boot Camps*

The typical boot camp concept is not an appropriate option at the federal level. First, the typical federal prisoner differs from his counterpart on the state level in that he is older, with more prior arrests, convictions, and commitments. Second, boot camps have been characterized as an appropriate alternative to probation, but sentencing guidelines have reduced the number of federal offenders sentenced to probation by a factor of 75 percent.

The Federal Bureau of Prisons, however, is developing a federal boot camp program which will incorporate many similar characteristics of a typical boot camp, but will emphasize work, physical health, treatment, and education. The program will include many low risk offenders who otherwise would serve short sentences in traditional confinement. The program is being developed to meet the public expectations that shock incarceration will be attempted at all levels of the criminal justice system, and to conduct a comprehensive evaluation of the utility of the concept for use by all levels of corrections in the United States.

### **Incarceration**

Completing the continuum of sanctions is incarceration, the secure and constant confinement of offenders. Ideally, incarceration is reserved for those who must be removed from society. These offenders are typically those who pose the greatest threat to the public safety.

The Federal Bureau of Prisons was formed by an Act of Congress in 1930. At that time, there were seven federal prisons. Each one was funded separately by Congress and each operated under policies and procedures established locally by each warden. During that period, there were approximately 12,000

offenders in those facilities, with an equal number in state and local facilities. Institutions were overcrowded and understaffed.

Congress supported the Bureau through authorization and appropriations for minimum security camps, construction of new institutions, and expanded program opportunities for offenders, including industrial employment.

With the Bureau's growth, its reputation as an efficient, professional service developed. It has been headed over the years by career prison administrators. The Bureau employs approximately 17,000 people and operates under a decentralized system of management, dividing its operations into six regions, each institution answering to a regional director. Other progressive state correctional systems operate under the same basic institution stratification system and management structure to ensure proper security for protection of the public safety.

At the headquarters level in Washington, D.C., management of the Bureau of Prisons is divided into six divisions including Administration, Correctional Programs, Health Services, Human Resources Development, Industries, and Program Review.

Today, the Bureau operates 64 facilities of varying security levels for its 55,663 offenders, including two converted military installations. The current offender classification system, which has been in effect since 1979, has resulted in efficient dispersal of inmates to appropriate institutions. The system incorporates factors such as offense severity, history of escape or violence, expected length of incarceration, and type of prior commitments.

Offenders are held accountable for their actions while confined in the Federal Bureau of Prisons. Those whose actions indicate predatory or escape-prone behavior are placed in the more highly controlled settings of a higher security level institution. Conversely, those whose actions indicate responsible, productive behavior are considered for placement in facilities that provide less so-

phisticated security measures.

The system groups offenders into six security levels, level one the least restrictive and level six the most tightly controlled. Thirty-seven percent of federal inmates are classified with level one security needs, 12 percent have level two needs, 15 percent have level three needs, 19 percent have level four needs, 4 percent have level five needs and 1 percent has level six needs. The remaining 10 percent are not assigned a security level. Institution security levels are determined by factors such as type of perimeter security, number of observation towers or external patrols, perimeter detection devices, security of housing areas, type of living quarters, and level of staffing.

The United States Penitentiary, at Marion, Illinois is the only security level six facility within the Federal Bureau of Prisons. It operates a unique program that is often the subject of critical comment and media attention. Marion manages inmates with maximum custody needs who have demonstrated an inability to satisfactorily adjust to the general populations at other lower security facilities. Movement and interaction among offenders is limited and controlled. Access is provided to basic needs, such as showers and recreation. Education and religious programs are provided through alternative means, including closed circuit television and individual star contact, and full medical services are available.

By operating Marion as a closely controlled facility, and confining there the most predatory, high security cases, other institutions can operate with a more open atmosphere. They can offer a wider range of programs or services without jeopardizing staff or offender safety. Despite the controversy surrounding the Marion operation, its program, policies, and procedures have been extensively reviewed by the federal courts and they were found to be in full compliance with all federal constitutional standards. The emphases are on security and safety, while providing programs and services in a controlled

fashion.

#### *Moving Offenders to the Institution*

Once designated, an inmate may reach the institution of confinement in one of two ways. Usually, the individual involved is transported by the U.S. Marshals, by car or contract carrier airlines, depending upon the distance.

The alternative method results in considerable cost-savings to the government. Non-violent, reliable defendants are ordered by the Court to surrender themselves at the camp or facility to which they have been designated. Few of those ordered to surrender themselves failed to do so. In 1989, approximately 500 of these self-surrenders were occurring each month, at an estimated savings of approximately \$18,000 per month.

#### *Orientation to the Institution*

The Bureau has, in each of its facilities, a generally standardized approach to managing offenders after they are committed. Upon arrival, and for the first week or two in the institution, an inmate is assigned to the Admission and Orientation (A&O) Program, which provides an introduction to all aspects of the institution and includes interviews with and screening by the case management, medical, and mental health departments. Inmates are immediately provided with a copy of the institution's rules and regulations, and the Bureau's inmate discipline policy, and learn about the programs, services, policies, and procedures of that facility. Also, they will hear presentations from the staff regarding the institution's programs and departments.

Inmates are advised of the institution's rules and regulations, and provided with a copy of them. Another part of the orientation explains the procedures for complaint resolution. The Bureau emphasizes and encourages the resolution of complaints on an informal basis. When informal resolution is not successful by contact with staff members, a formal complaint may be filed in writ-

ing, through the Administrative Remedy Procedure, this complaint initially is handled by the institution, but may be appealed to the Regional Office and, finally, to the Central Office, if attempts at resolution at the previous stages were unsuccessful.

#### *Unit Management*

Once the admission process is completed, inmates are assigned to a housing unit that also serves as the basis for delivery of many important services. The physical design of the housing unit (single or double cell, dormitory or other multiple-occupant room) is determined by the institution's security level and the inmate's custody. However, all Bureau institutions are organized using a unit management system. A unit, under this system, is a self-contained inmate living area that includes both housing sections and office space for unit staff, so staff and inmates can be accessible to each other. The Unit Team is directly responsible for those inmates living in that unit, and typically is composed of the Unit Manager, one or more Case Managers, two or more Correctional Counselors and one Unit Secretary.

Every inmate participates with the Unit Team in determining what his or her program will be during confinement. After orientation, each inmate meets with the Unit Team to formulate a plan for activities and programs while in the institution. These may include educational activities, as well as institution maintenance assignments or working for Federal Prison Industries. The Unit Team reviews the inmate's progress and makes appropriate changes in the program plan, reviewing each case as needed. Inmates' cases are reviewed at least every 6 months until they are within 2 years of release, and then every 90 days.

#### *Institutional Life*

A typical institution day begins with a "work call" about 7:30 a.m. By this time, each inmate is expected to have cleaned their personal living area, and made their bed (in-

cluding weekends and holidays when leaving the area). Lockers must be neatly arranged inside and out, and all shelving must be orderly.

The personal items which may be retained by an inmate are limited for safety and sanitation reasons. These limits also ensure that excess personal property does not accumulate to a level that would constitute a fire hazard, or impair staff searches of the living area. Toothpaste, toothbrushes, combs, razors, and soap are issued by the institution and are available in the housing units. Inmates may purchase personal care items through the commissary. Linen and other laundry items supplied by the institution are exchanged once a week.

Work is a very important part of institution management and offender programming, providing constructive activities and remuneration. All medically-qualified inmates who are able to work are assigned to a specific program or job. This requirement may be fulfilled by a program assignment, including participating in educational, job training and apprenticeship programs. Institutional operations provide jobs, such as cleaning, maintenance, food service and working in institution offices. A seven and one half hour work-day is standard, after which inmates can participate in organized and individual recreation, television, hobby craft, and a variety of other activities. Visiting, correspondence, access to leisure and legal libraries, access to telephones, and other programs are available as well.

#### *The Importance of Prison Industries*

Overcrowding, and the idleness it creates in many institutions, can lead to disorder and violence in the correctional environment, and can best be combated by providing inmates with meaningful work programs. The largest job placement for inmates is Federal Prison Industries (trade name UNICOR) which, during 1989, employed about 40 percent of the working inmate population. UNICOR is a wholly-owned Federal government corpo-

ration that does not receive a Congressional appropriation. The mission of UNICOR is to employ and train inmates through the operation of and earnings from factories. UNICOR produces high-quality products and services for the Federal government, its only market. Its products must meet all the specifications of the Department of Defense, the General Services Administration and the other agencies to which it sells. UNICOR must be competitive with the private sector in price, quality and delivery.

UNICOR provides an intentionally diversified range of products and services, in order to avoid adverse impact on segments of the private sector also doing business with the Federal government. UNICOR products include electronic cable assemblies, executive and systems furniture, metal pallet racks, stainless steel food service equipment, mattresses, towels, utility bags, and brooms. It also provides services, such as data entry, sign-making, and printing. The corporation operates Product Development Centers to ensure further diversification of its product and service lines. Additionally, to ensure that it does not compete unfairly with the private sector, UNICOR operates under product guidelines requiring a public announcement and hearing process regarding any new product that it proposes.

#### *Literacy Programs*

Literacy is the only mandatory Bureau education program, and is required for the approximately 20 percent of all Federal prisoners who test below the 8th grade level. By policy, with minor exceptions, those inmates must enroll in a basic education program for at least 90 days. After that required introduction, an inmate may choose to stop participating. However, throughout incarceration, all promotions in Federal Prison Industries, and to all institution assignments beyond the entry level grade, are contingent upon successful completion of a literacy program. Enrollments and completions in basic education programs have more than doubled since es-

tablishment of the mandatory literacy program. Similarly, enrollments in high school equivalency (GED) courses have also increased as more inmates complete adult basic education programs. Beginning in September 1989, attainment of a GED was required for any inmates to be promoted to the highest pay level in industrial or institutional support work.

#### *Other Education and Training*

The literacy programs are only a small part of the offerings of the Bureau's Education programs. They also include extensive academic and occupational education activities. In addition, a wide range of social education and other supportive programs are also available to interested inmates.

A variety of instructional techniques and approaches are used to make all of these educational activities responsive to the needs of adult students. In addition to traditional classroom presentations, among the methods used are tutoring, apprenticeships, computer-assisted instruction, and interactive video.

As an example of the breadth of educational activity in fiscal year 1989, there were more than 10,000 completions in Adult Basic Education, more than 17,500 in General Educational Development and Continuing Education courses, and more than 8,000 in post-secondary education courses. There were more than 1,500 completions in English as a Second Language and more than 11,000 completions in occupational training.

The training programs completed were in a wide variety of occupational areas. Traditional programs, such as building trades, heating and air-conditioning, and automotive mechanics, have been augmented by many new "high tech" programs, such as computer-assisted drafting and electronics. Training in service occupations, such as commercial building maintenance, food preparation, horticulture, and business education, was also available.

Leisure activities and recreation programs

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are also supervised by the Education Department. These include indoor and outdoor activities, and range from individualized arts and crafts programs to intramural team sports such as baseball, basketball, and volleyball.

Wellness programming is an important part of the activities directed at both staff and inmates. Nutritional education includes information on a Heart Healthy Food plan. Physical fitness and weight reduction programs are also available.

### *Programs for Female Offenders*

Because of the expansion of the female inmate population in recent years, the Bureau has enhanced programs and institutional services for women. The number of female inmates continue to grow faster than the number of male prisoners.

Females are housed in a variety of institutions in many parts of the country. Many Metropolitan Correctional Centers and Metropolitan Detention Centers have a female unit, and there is a small female detention unit at the Federal Correctional Institution, Tucson, Arizona. In addition, the Bureau currently houses low security female offenders in Federal Prison Camps at Alseron, West Virginia and Bryan, Texas. Low security facilities are also attached to the Federal Correctional Institutions at Danbury, Connecticut; Marianna, Florida; and Phoenix, Arizona. Some medium security females are housed at the Federal Correctional Institution, Pleasanton, California. In addition, the Federal Correctional Institution, Lexington, Kentucky is an administrative facility housing females with various security classifications. Females requiring higher security and maximum custody are housed at the Federal Correctional Institution, Marianna, Florida. Female inmates with special medical needs are sent to the Federal Correctional Institution, Lexington, Kentucky, or the Federal Medical Center, Rochester, Minnesota.

The Bureau of Prisons ensures that pro-

grams and procedures in place at female facilities are fully equivalent to those at male institutions. Typical educational and recreation programs are available to all female inmates. In the area of job training, the Bureau's apprenticeship training programs have been accredited by the Women's Bureau of the U.S. Department of Labor, Bureau of Apprenticeship and Training. These programs assist in preparation of women for traditionally female occupations and such non-traditional jobs as auto mechanics, electricians, plumbers, painters, and bricklayers. Approximately 60 apprenticeship programs are offered for women in 40 different trades.

### *Juvenile Cases*

Persons adjudicated under the Juvenile Justice and Delinquency Prevention Act of 1974 may not be confined in facilities where they have regular contact with adults. Because of the very small number of Federal juveniles, the operation of a separate facility is not practical. Therefore, Federal juvenile offenders are housed in state, local, and private juvenile facilities. The Community Corrections Manager ensures that each juvenile offender is appropriately placed.

### *Religious Programs*

Chaplains are available at all institutions, and in addition, contract religious clergy and volunteers from the community augment Bureau staff in order to make available a wide variety of programs. These include group worship services, individual religious counseling and spiritual guidance, and scripture study. Among the inmate faith groups meeting on a regular basis are Catholic, Jewish, Muslim, Native American, Protestant, Rastafarian and Sikh. Programs and activities also are offered in Spanish if there are sufficient numbers of interested Spanish-speaking inmates. In addition to Protestant and Catholic services, Islamic and Jewish activities are offered at many institutions. Several facilities also offer a Native American sweat lodge for ceremonial use.

## Other Institutional Issues

Many offenders have special needs or problems. These may be due to health issues or family concerns. Others are non-readers, need job training or misbehave in the institution or need to be separated from other offenders.

### *Health Problems*

The Bureau's Health Services Division staff provides quality medical, dental, and psychiatric care to confined offenders. In addition, they assure that the meals are nutritious and appetizing, and that each institution provides a safe living and working environment for both staff and inmates. Providing food and caring for the medical and environmental safety needs of 55,000 inmates and 16,500 staff, as of early 1990, are major tasks. They are provided by a variety of health care professionals, including physicians, nurses, physician's assistants, dieticians, pharmacists, and safety officers, to name only a few of the groups of the Bureau and Public Health Service employees who provide this vital service.

Food Service professionals provide nutritionally balanced, quality meals, while work in this area equips inmates with skills that they can use after release. Diets are also available to meet religious requirements and the medical needs of diabetics and those who require low-salt, low-calorie or other special diets.

The medical, dental, and psychiatric services available at each institution are provided by staff and contract consultants. The level of care provided is consistent with standards of care in the community. In addition, six Bureau facilities have been designated as major medical facilities, where at least part of the institution provides specialized health services.

### *AIDS*

The Bureau of Prisons tests inmates for the presence of HIV antibodies when they

ask to be tested, when they display clinical signs of HIV infection, and for other administratively necessary reasons. All inmates are tested prior to release. In addition, a 10-percent sample of all newly committed inmates is tested. This sample group receives additional tests at regular intervals, as well as at release, in an effort to monitor the rate of viral transmission within the prison system. The test-retest group shows that only a small number of those who initially tested negative have subsequently converted to HIV-positive. The low rate of change in HIV status during confinement is consistent with little or no known transmission during confinement. Staff are taught that all body fluids must be presumed to contain the HIV virus, and to act accordingly when exposed. However, inmates who test positive for the presence of HIV antibodies are handled with as few restrictions as possible, consistent with their medical needs, the orderly management of the institution, and the safety of staff and other inmates. Each inmate is provided with any medically indicated treatment, such as AZT. Only predatory or promiscuous HIV-positive inmates are segregated, in order to protect those who might otherwise become infected.

Counseling and education continue to be the areas of the greatest emphasis in the Bureau's HIV program. Numerous methods are used, including lectures, written materials, and videotapes, to educate staff and inmates about AIDS, thus assuring more responsible behavior and a continued low viral transmission rate within the prison system.

### *Drugs and Alcohol Treatment*

A majority of offenders being received at Bureau institutions have a history of some drug abuse and 40 percent have moderate to severe substance abuse problems. These numbers are expected to increase as current law enforcement initiatives continue. Therefore, each Bureau of Prisons' facility has a chemical abuse program that screens all inmates upon admission to identify the level



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of drug problem they have, if any. The treatment of drug abusers varies with the nature, severity and length of their abuse history, as well as the drug or drugs they have used. In addition to traditional group and individual programs, an intensive pre-release drug strategy is being developed. It will extend from 1 to 2 years prior to release, and will continue in the community, so that progress can be sustained. An on-going evaluation is being conducted to determine the effectiveness of the program and the relative effectiveness of its components so that the research findings can facilitate program improvement.

The Bureau also has a well-developed program to detect and deter illicit drug traffic and use in its institutions, because of the potential impact such use might have on inmate and staff safety, institutional security and the community. Urine screening is a major element of that program and is used to test inmates involved in community activities, to test for the use of illegal drugs. In addition, any inmate suspected of using drugs is tested, and a random sampling of the total inmate population of each institution is tested each month. The urinalysis includes tests for morphine, methadone, codeine, other opiates, barbiturates, amphetamines, cocaine and cocaine metabolite, phencyclidine, and THC (Marijuana). The number of positive test results continues to be very low, remaining in the 2-3 percent range.

### *Dealing with Personal Problems*

In addition to problems related to substance abuse, incarcerated inmates may have other kinds of personal problems. There are many program alternatives for those inmates who desire to work toward correcting them. They include voluntary groups, such as Alcoholics Anonymous, and Narcotics Anonymous. In addition, institutions have professional staff who are trained in the various social science and medical health disciplines. Inmate participation is voluntary. The staff of each unit is available for informal coun-

seling and also conducts formal group counseling activities.

### *Aged or Handicapped Inmates*

When an institution designation is made, the health of the offender is considered. When health concerns are an issue, the case is referred to the medical designator in Washington, D.C., who assigns the offender to an institution with the facilities to provide the needed evaluation, facilities, services and/or treatment.

Specialized health care resources are expensive, and in constant demand. Therefore, whenever possible, offenders remain in regular institutions, a number of which are equipped with special facilities and services. At each security level, there is at least one institution which is wheelchair-accessible. Additionally, the climate is considered in designations, so that those who require crutches or canes usually are not placed where snow and ice may be a problem.

There are also specialized facilities to provide nursing home services for offenders in need of skilled nursing care. These facilities are available at the Federal Correctional Institutions at Fort Worth, Texas, for males, and at Lexington, Kentucky, for females.

### *Family Emergencies*

When a family emergency occurs and when public safety can be assured, an inmate may be granted the privilege of a visit outside the institution, either to make a deathbed visit or to attend a funeral. This may be permitted in the case of an emergency involving a member of the immediate family—a parent, sibling, spouse and child, step-parent or foster parent. Visits are not permitted to members of the extended family except in very special circumstances, such as might be presented by an offender who was raised by another family member (an aunt or grandparent, for example).

When an inmate is notified of an emergency and requests an emergency visit, the Chief United States Probation Officer in the dis-

trict that the offender desires to visit is notified and asked to verify the claim. When a deathbed visit is requested, a doctor's certification is required indicating that the patient is in grave condition and not expected to recover.

The offender's custody classification determines if the trip is approved and the way in which the trip is made and therefore the costs incurred. An offender, who has "community" custody, may be furloughed and allowed to travel unaccompanied. <sup>2</sup>/<sub>3</sub>An inmate who has a higher level of custody may be eligible for a trip, escorted by one or more correctional officers, depending on the security classification involved.

The costs of an emergency trip must be paid by the prisoner or the family. If the visit is made by furlough, the primary cost is the cost of transportation. If the visit is escorted, the government assumes the salary expense for the first eight hours of each day for the escorts. All other costs, including any additional time required of the escorts and the transportation of the inmate and the escorts, must be borne by the offender or the family.

#### *Separation Cases*

There are many reasons that an offender may need to be separated from others, related to events proceeding and during the incarceration. If the need is known when the offender comes into custody, the United States Attorney may initiate a request for separation that may, if necessary, continue throughout the period of incarceration. The Bureau of Prisons may also initiate the separation, based on post-conviction events, or new information received after the inmate is in custody.

No matter how or when protective status is initiated, the Bureau has two ways in which it assures that those who must be separated are kept safe. The most closely structured protection is provided to those in the Witness Security Program. Offenders in that program typically are housed in special units

of designated institutions, where they are provided their meals in the unit, and never mixed with general population inmates. Other inmates in this program may be mainstreamed into the general population if to do so would not compromise their safety.

The more typical separation case is far less structured. In these instances, an offender must be separated from a few individuals, such as a co-defendant against whom testimony was given, or an inmate with whom there has been a serious fight. This can be accomplished by transferring one or more of the antagonists to another facility. In rare cases, placement as a contract boarder in a state institution is required.

Once an individual's separation needs are identified, their ongoing safety is assured through use of the Bureau's automated data system, SENTRY, which serves as a repository of all separatee data. Before any inmate is transferred, staff reference the system to assure that if the person is a separation case, no separatees are at the intended destination.

#### *Inmate Misconduct*

It is the policy of the Bureau of Prisons to provide a safe and orderly environment for all inmates and staff. As part of this program, copies of the Bureau's statement of prohibited acts (describing both the act and the available sanctions) are provided to each inmate upon arrival at an institution, as are copies of the rules and regulations, and a statement of inmate rights and responsibilities. Violations of rules and regulations of the institution are handled promptly, fairly, and equitably through a multi-tiered disciplinary process that is structured in a way that conforms to all legal requirements for prison disciplinary proceedings.

There are four categories of prohibited acts—greatest, high, moderate and low. Charges that an inmate has committed a less serious offense may be resolved informally or be heard by the unit disciplinary committee. More serious offenses are heard by the Disciplinary Hearing Officer and the most se-

rious may be prosecuted in Federal Courts.

Inmates found guilty of disciplinary violations are sanctioned according to the seriousness of the offense. A variety of sanctions are available to staff to impose when an offender is found guilty of an offense of greatest severity; these include forfeiture of good time (if sentenced under the "old law"), placement in disciplinary segregation, or disciplinary transfer. Conviction of less serious offenses results in lesser penalties, that may mean loss of privileges such as commissary, movies or recreation, change to less desirable housing, extra duty, reprimand or warning.

### Conclusion

With the unprecedented levels of overcrowding, statutory requirements to provide safe, humane environments for criminal offenders become difficult to administer for corrections managers. The public has become more aware of corrections and they demand accountability from correctional officials and the offender. Judges have been frequently hesitant to impose sentences incorporating the use of intermediate sanctions for those offenders not requiring the stringent measures of incarceration, preferring to err on the conservative side. In many jurisdictions, community sanctions do not exist or are poorly administered.

The recent decreased use of probation on the federal level and prison overcrowding in general have resulted in a renewed interest in the use of intermediate sanctions. Intermediate sanctions must serve as options for offenders who do not pose a danger to the community with their presence. When used properly, they can satisfy the demand for accountability in a humane manner, and they reinforce the idea that non-custodial measures can be used effectively. However, because of the limited availability of long-term research concerning intermediate sanctions, we are not able to provide 100-percent assurance of effectiveness at this time.

Those offenders who do pose a threat to society must be removed from the community and placed in secure settings which are operated in a safe, secure, and humane manner. Facilities that provide secure confinement must offer professional services to effectively meet the demands of a rapidly changing society.

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## The Use of Community Sanctions and Programs: Critical Issues, Lessons Learned and an Agenda for Change

by Curt Taylor Griffiths\*

Recent years have witnessed exponential growth in the use of community sanctions and programs for criminal offenders in jurisdictions throughout the world. Despite their proliferation, these initiatives have suffered from a number of difficulties which may have significantly hindered their effectiveness.

We will begin our consideration of the critical issues surrounding community sanctions by examining the controversies that have surrounded their use in many jurisdictions and the debates over the effectiveness of community sanctions in protecting society and assisting offenders.

### The Controversy over Community Sanctions and Programs

A review of the modern history of community sanctions reveals some degree of controversy surrounding their development and implementation. In Canada, correctional observers disagree as to the specific reasons why correctional systems at the federal and provincial levels shifted their focus of attention to community sanctions and programs during the late 1960s and early 1970s. Several explanations have focused on the perceived failure of efforts to rehabilitate criminal offenders in institutional settings and the increased humanitarian concerns with the negative consequences of confinement. Others have argued that the shift was economically motivated—an attempt on the part of corrections systems to reduce the costs associated with incarcerating ever-increasing

numbers of offenders.

There are at least four major justifications that have been offered for the development and expansion of community sanctions and programs. These were that such sanctions and programs 1) would reduce the numbers of offenders involved in the criminal justice system; 2) are more humane than incarceration; 3) are less costly to operate than institutional programs; and 4) are more effective in assisting offenders readjust to society (Ouimet, 1969; Eskridge, Seiter and Carlson, 1981; Doeren and Hageman, 1982). Thomas (1986:378) reflects a more cautious, but nevertheless optimistic view, stating "Those of us who have special interests in penology are at least guardedly optimistic that community-based strategies have far more potential than do institutionally-based alternatives."

Despite the "common sensical" nature of these objectives, e.g. there would seem to be little doubt that prisons have negative consequences for offenders, many observers have raised serious questions about the extent to which community sanctions and programs have "delivered" on them. This is reflected in the comments of Eitzen and Timmer (1985:23) who concluded that "... community corrections has failed significantly in its attempt to fulfill its promise" (See Austin and Krisberg, 1981; Chan and Ericson, 1981; Decker, 1985; Scull, 1982; Smith, 1932-84).

Rather than functioning to reduce the numbers of offenders incarcerated in correctional facilities or involved in the criminal justice system, it is argued, there is evidence that, in many jurisdictions, "net-widening" has occurred, resulting in more people being placed under some form of supervision or control (Lowman and Menzies, 1986).

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Chan and Ericson (1981:55), citing the increased numbers of offenders incarcerated in Canadian institutions and the growth of probation caseloads in recent years, argue that "people are not diverted from, but into and within the system." In a study conducted in the province of Saskatchewan, Hylton (1983) found that the rapid growth of community-based corrections programs between 1962 and 1979 was accompanied by an increase in institutional populations.

In many jurisdictions, as the development and utilization of community sanctions and programs has increased, so has the number of offenders being sent to institutions. Many offenders receiving community sanctions and being referred to community programs are generally low-risk individuals who would not generally be given a sentence of confinement. Thus, the programs are not often operating as true alternatives to incarceration. Conversely, in some jurisdictions, increasing concern is being expressed that the number of serious offenders involved in community programs has increased due to limited institutional resources.

The cost-effectiveness and humanitarian dimensions of community sanctions have also been challenged. Hylton (1982:349) contends that such humanity is more often assumed than demonstrated and that the numerous behavioural restrictions placed on offenders under supervision in the community may be as coercive as the conditions of confinement in an institution. In addressing the relative costs of community corrections versus confinement, Hylton (1982:372) notes: "While many clients are channeled into services that are inexpensive to operate, the social control apparatus as a whole has expanded and the costs associated with the maintenance of social order have continued to increase. Savings have not accrued to the state by means of the creation and use of community programs."

Hylton (1982:367) has also argued that cost savings in community corrections programs are often achieved at the expense of provid-

ing adequate services. A similar outcome has been noted with respect to the 'deinstitutionalization' and 'decarceration' of large numbers of mental patients in North America, many of whom now wander urban streets, victims of the failure of governments to provide sufficient community-based facilities and programs.

The following discussion identifies several key factors which have contributed to the uncertain state of affairs surrounding the use of community sanctions and which, it is argued, have functioned to hinder the potential effectiveness of such initiatives. This involves the difficulties experienced by the criminal justice system in measuring the effectiveness of its activities, as well as considering the larger societal backdrop against which the response to crime and criminal offenders takes place.

### **Are Community Sanctions and Programs Effective? The Difficulties in Measuring Program Success**

While there is an extensive international literature which documents the negative consequences of confining criminal offenders in correctional institutions, there is no consistent, empirical research evidence that community sanctions and programs, *as they have been designed and implemented in most international jurisdictions*, are less costly, more humane, or more effective in rehabilitating criminal offenders than custodial measures. This is unfortunate, for there is widespread agreement that the principles upon which community sanctions and programs are premised are laudable.

The Canadian criminal justice system, similar to its counterparts worldwide, experiences great difficulties in measuring the success of its activities. As with the police, corrections systems worldwide rely on crime control criteria to assess the effectiveness of policies and programs. The most commonly used measures are recidivism rates. Assess-

ing the effectiveness of community sanctions and programs is further complicated by the often-conflicting goals of the sentencing process.

There is disagreement among correctional observers concerning the usefulness of recidivism rates as an accurate indicator of disposition and program effectiveness. Critics argue that recidivism rates are poor indicators of the effectiveness because:

1. By focusing on the violation of the law as a measure of success, they obscure improvements in the individual, such as an increased level of education or the acquisition of a vocational skill;
2. The individual may have returned to criminal activity, but not have been detected by the criminal justice system;
3. There are many factors, other than having received a particular court disposition or having participated in a community programs that contribute to an individual offender's success in the community, including a supportive family, stable employment, and the process of maturation, and
4. The fact that offenders who received a specific community sanction or participated in a community program are returned to prison is not conclusive evidence that the sanction or program is ineffective (Griffiths and Verdun-Jones, 1989:416).

In short, recidivism rates are too crude an indicator to assess the effectiveness of community sanctions and programs. They provide no information on the cost and humanness of such programs, nor on the role played by other potentially significant factors such as the community and the offender's family. In fact, the use of recidivism rates reflects a bias toward imprisonment. The Canadian Sentencing Commission (1987:360) has pointed out that "One serious limitation in comparing the relative ability of custodial and community sanctions to reduce recidivism is that they tend to involve very differ-

ent clientele. Offenders diverted to community corrections appear to be low risk as compared with those sent or detained in prison."

There are a number of possible alternative measures of the success of community sanctions and programs, including a) the nature and extent of community involvement; b) some measure of the offender's family life; c) the nature and extent of one-on-one contact between offenders and community residents in various programs; and d) the 'relative' improvement of the offender, e.g. was an unemployed offender successful in finding employment; if a vocational or educational program was attended, did the offender complete it; if the offender has an alcohol or drug problem, was a program attended and was an attempt made by the offender to address their particular problem?

### **20th Century Retrospect: The Decline of the Community and the Rise of Formal Justice and Corrections Systems**

As the 20th century comes to a close, jurisdictions worldwide have come to rely increasingly upon formal agencies of social control to respond to criminal behaviour and to manage individuals in conflict with the law. The outcomes of this system of social control are well documented: 1) increasing costs; 2) questionable effectiveness in terms of protecting society and/or assisting offenders to alter their criminal behaviour and live productive lives in the community; 3) the involvement of increasing numbers of individuals in the criminal justice system; and 4) a decreasing rate of community participation in the criminal justice and corrections systems.

Criminal justice agencies generally play only a reactive, rather than a proactive and preventive role. The symptoms, rather than the root causes of criminal behaviour, which for many offenders include backgrounds characterized by life in violent, dysfunctional

families, alcohol and substance abuse, and conflict with the law at an early age, are responded to.

The path of the development of systems of criminal justice and corrections worldwide has been one of increasing centralization in both the policy-making and program delivery areas (Singh, 1986). It is also one of rising costs, decreasing effectiveness in crime control, and increasing alienation of communities and their citizens (European Committee on Crime Problems, 1980).

These trends have resulted in a situation in many countries where there are increasing numbers of police officers, youth courts, adult criminal courts and youth and adult correctional facilities; more youths and adults involved in custodial and non-custodial facilities; higher budgets for corrections systems; and extensive fear of crime on the part of the public, even though the actual crime rate may not be increasing.

Concurrent with the growth of formal criminal justice and corrections systems, there has been a decrease in public knowledge of and participation in responding to criminal offenders. Communities and their residents have turned over the responsibility for responding to criminal offenders to the police, the criminal courts, and corrections systems.

The price for this decreased community involvement is widespread community ignorance of the criminal justice and corrections systems. The role of the public is largely limited to a reactive one, with communities demanding more severe sentences by the courts, longer periods of time in correctional institutions, and tighter release policies by parole boards.

One of the more disturbing trends is the tendency for non-North American jurisdictions to expand formal systems of corrections and control based on North American models. While North American and European justice systems are frantically searching for more effective alternatives to probation, institutions, and parole, other jurisdictions are

caught in a headlong rush to create these very same structures and programs. The irony is that, in many of these countries, there are strong community network and informal mechanisms of control that could provide the basis for the development of "localized" programs (Austin, 1987; Griffiths, 1986; Griffiths and Patenaude, 1988; Johnson, 1985; Machado, 1980).

A basic premise of Westernized, adversarial criminal justice systems is the removal of troublesome individuals from society. This is in contrast to more traditional responses where the techniques of negotiation, mediation and dispute resolution are utilized to restore order and to address the needs of the victims, the offender, and the community (Griffiths, 1986; Griffiths and Patenaude, 1988).

Certainly, the experience of indigenous peoples in Canada's remote and northern areas would indicate that there is a vast (and, as yet untapped) potential for increased community participation in the development and operation of community-based programs and services that would function as alternatives to incarceration. Too often, traditional methods of dispute resolution, the role of elders and community leaders and the non-adversarial mechanisms utilized for maintaining and restoring order have been swept aside in the increasing Westernization of justice systems worldwide.

### Wither 'the Community' in Community Corrections?

As noted earlier, the increasing centralization of criminal justice and corrections agencies has resulted in the near exclusion of the community. In many countries, the average citizen has little knowledge of, and only limited participation in, the justice and corrections processes (Conrad, 1984; Duffee, 1984; Kellough, 1985).

The view held by many criminal justice professionals is that the general public has little or no role to play in responding to crim-



inal offenders. There are two notable exceptions to this. In many jurisdictions, the police have mobilized communities and citizens to participate in a wide range of crime prevention programs. Also, in many countries, citizens are selected to serve as jurors in civil and criminal court cases.

Generally, however, community citizens are relegated to the position of outsiders and public input into the criminal justice and corrections systems tends to be of a 'reactive' nature. Citizens groups lobby for more and longer prison terms and for tighter restrictions on the use of probation, temporary release and parole.

The failure to educate the community and to solicit their involvement in a significant way has afflicted not only corrections, but also the efforts of other components of the criminal justice system to involve the citizenry (See Delgoda, 1981; Fattah, 1982; Rosenbaum, 1987). This has resulted in citizens receiving a great deal of 'disinformation' from the media about the decisions and activities of the justice system. Disinformation is a term used to depict information that is provided to the public, generally via the mass media. While not untruthful, the information tends to be sensational and to focus on heinous crimes and sensationalistic failures, e.g. parolees who murder. Disinformation places the general public in the role of resisting the development of innovative community sanctions and programs.

#### *Public Perceptions of Crime*

Research in Canada suggests that, similar to other jurisdictions, Canadians have misconceptions of the true nature and extent of criminal behaviour. Doob and Roberts (1982:2) reported that Canadians overestimate both the extent and seriousness of crime, viewing crime as more serious than it actually is and perceiving that the levels of violence in Canada were similar to those in the United States, when in fact they are much lower. For example, while nearly 75% of the respondents felt that at least 30% of

all crimes committed in Canada involved violence, police statistics indicate that violent offences represent only about 5.8% of the total crimes reported to the police. As Brillon, Louis-Guerin and Lamarche (1984:145-46) note: "People's perceptions of crime in Canada have little connection with the surrounding criminal reality. . . ."

Brillon, Louis-Guerin and Lamarche (1984:257) found that Canadians tended to think of crime in terms of stereotypes: ". . . the images that emerged were cut and dried, without distinction, and . . . were like the stereotypes portrayed in mystery novels, on police programmes on television, or in criminal cases that make the headlines in the newspapers."

The persistence of such images among the general public is due, in large measure, to the public's reliance on the media for information on crime and criminals (Ericson, Baranek and Chan, 1987; Gebotys, Roberts, and DasGupta, 1988; Waller and Okihiro, 1976). The studies conducted by the Canadian Sentencing Commission (1987:95-98) found that more than half of the newspaper stories on sentencing dealt with offences involving violence. This and other research confirms that crimes involving violence are overrepresented in the news media and this significantly affects public perceptions of crime and the response of the criminal justice and corrections systems to it.

#### *Public Perceptions of Sentencing and the Correctional Process*

As part of its study of the sentencing process, the Canadian Sentencing Commission (1987) conducted several nation-wide polls to assess public knowledge of sentencing laws and practices. These studies found "substantial discrepancies between public knowledge and reality." Among the results of the polls were the following:

1. Canadians consistently underestimated the severity of maximum penalties for *Criminal Code* offences; for example,

- while the Criminal Code provides for a maximum penalty of life for robbery, the average public estimate was 7 years;
2. Sixty-four percent of those polled felt that the sentencing practices of the courts were too lenient (down from a high of 80 percent reported in 1983);
  3. Most Canadians under-estimate the severity of sentencing practices of the courts; for example, while more than half of those offenders convicted of assault causing bodily harm are actually sent to prison, most members of the public think the proportion imprisoned is lower;
  4. Most members of the general public have little knowledge of early release, often confusing probation with parole; as the Commission (1987:92) notes: "The public knows offenders do not serve all of their sentences in prison, but it does not know much about the release programs which enable prisoners to serve part of their sentences in the community."
  5. The general public overestimates the number of offenders released on parole; the current release rate is around 33 percent, but the citizens polled estimated that between 60-100 percent of offenders are released on parole.

Figure 1 provides an overview of the nature and extent of public misconceptions of sentencing in Canada.

In another study of Canadian attitudes toward the legal system, Moore (1985) found that the public, while evidencing high levels of support for the police, were less trustful of the criminal courts. There is a widely held view among Canadians that the courts hinder the effectiveness of the police and that the courts are too lenient with criminal offenders.

These findings have significant implications for the potential effectiveness of community sanctions and programs and for the ability of corrections systems to both secure public support for, and involvement in, these initiatives. At the present time, the public

does not have the information base upon which to understand and, ultimately, participate in community-based corrections. This relegates most citizens to merely reacting (often negatively) to judicial dispositions and those of correctional authorities.

#### *Soliciting and Maintaining Community Input and Participation in Community Sanctions and Programs*

There is need to develop mechanisms for increasing community-wide involvement in community sanctions and programs. A major factor in the failure of many non-custodial measures is the lack of substantive community involvement, including private industry, service organizations and individual citizens. Merely labelling a program or service as "community-based" provides no assurance of community involvement and participation. A failure to address the findings of research on community sanctions and programs will result in the same outcomes in other jurisdictions as have been obtained in Canada and the United States.

A key ingredient in all of these measures is the "community," regardless of whether the notion of "community" is conceptualized as the general community including all residents, or specific interest groups in the community that may either be mobilized in support of such measures or which may function as a potential obstacle to their use and effectiveness.

Among the questions relating to the community that must be addressed by corrections systems are: who and what is the community in the jurisdiction? How can the interests of community residents in community sanctions and programs be secured and maintained? What role do interest and lobby groups play in the use of community sanctions and in the operation of community corrections program? What methods can be used by corrections system to counter the "disinformation" that community residents have about crime, criminal offenders, and the operations of the criminal justice and correc-

tions systems?

Also, to date, there has been little attention focused on the potential role of the offender's family in enhancing the efficacy of various community sanctions and programs. Similarly, the potential negative impacts of a specific sanction on the family have not been considered.

### **The Design and Delivery of Community Sanctions and Programs**

#### *A Number of Very Old Concepts*

Many of the community sanctions and programs that are utilized by corrections systems have changed very little over the past century. Probation, parole, and the use of fines and restitution have their historical roots in the 19th century and have remained largely unchanged since that time. On the eve of the 21st century, these strategies should be closely re-examined, and where required, replaced.

All too often, the difficulties associated with sanctions and programs such as probation and parole are ascribed to inadequate personal and financial resources. Large caseloads, for example, are often cited as the reason why probation and parole are not successful in many jurisdictions as techniques to reintegrate offenders and mitigate law-violating behavior. Research findings suggest, however, that caseload size has very little relationship to the success of either probationers or parolees.

Such reasoning is similar to that which often occurs in the field of policing—that “only if we had more police officers, then we would be successful in lowering the crime rate.” Enlightened police administrators know that, in most instances, the police do not actually prevent crime—they respond to crime—and that police effectiveness will be improved by adopting new strategies such as encouraging increased community participation in crime prevention initiatives.

A similar “rethinking” of community sanctions and programs is required. Among the

questions to be addressed would be: “What are the specific objectives of the measure?” “How does the measure interface with existing non-custodial and custodial measures?” “To what extent is the community or community groups involved in the measure?” “How is the success of the measure going to be determined?” “What provisions are there for modifying the measure based on an analysis of its effectiveness?”

Perhaps one of the most important questions to be asked is how the specific community sanction or program addresses the “marginality” of the criminal offender. Many individuals who become involved with the criminal justice system share a number of attributes, including: low socioeconomic status; low self-esteem; low levels of education and little or no vocational skills; exposure as a youth to a dysfunctional home environment, e.g. alcohol and drug abuse, family violence, sexual assault. Community sanctions, to be effective, must address not only the current offence for which the individual has been convicted, but also the life context of the offender. Otherwise, such initiatives have little chance for success.

#### *Matching Community Sanctions and Programs to the Community*

The tendency historically has been for correctional agencies to develop “model” programs which are then dispersed throughout the jurisdiction, without regard for the social and cultural variations among communities (Walker and Kratcoski, 1985). Jurisdictions in the international community have tended to structure community sanctions and programs on North American models, without considering the unique attributes of their own societies and communities that may either hinder or enhance the effectiveness of such measures.

For example, many of the sanctions and programs utilized in the United States have been developed in urban areas with little consideration to the appropriateness or relevance to rural, indigenous populations or to

communities with specific cultural or religious attributes. There may be, among such groups and communities, the persistence of traditional lifeways and dispute resolution mechanisms that could be used in conjunction with, or in lieu of, techniques such as probation and parole (Griffiths and Patenaude, 1990).

In the vastness of multi-cultural Canada, there are a variety of settings in which community sanctions and programs are implemented. The culture, geographic location, socio-economic and political attributes of the larger society and the specific community in which the non-custodial measures are implemented, will have a significant impact on their potential effectiveness in assisting the offender while providing protection to the community.

Certainly, the experience of indigenous peoples in Canada's remote and northern areas would indicate that there is a vast (and, as yet untapped) potential for increased community involvement in the development and implementation of community-based sanctions and programs. These may be premised on traditional, non-adversarial mechanisms of dispute resolution and restitution. Too often, the traditional ways of indigenous cultural and religious groups, including the important roles played by elders and spiritual leaders have been swept aside in the increasing Westernization of criminal justice and corrections systems.

There is considerable evidence from a diversity of jurisdictions that the most successful community sanctions and programs are those in which there is significant community input and participation in the design and delivery of the program and which are firmly grounded in local customs and culture (See Greenwood and Zimring, 1985; Sharma, 1986). Griffiths (1988) has argued for the development of "localized" corrections, where in communities, rather than government agencies and ministries, assume primary responsibility for identifying and addressing the needs of youth and adult offenders.

In fact, in many jurisdictions, the development of innovative community-based sanctions and programs has coincided with the regeneration of communities, a rediscovery of tradition, and an increased role for elders and community leaders (Griffiths, 1987).

Not only is there wide variability in the social, geographic, economic and political arrangements in which non-custodial measures have been implemented; there are also vast differences in the patterns of criminal activity, the types of offenders, and the resources available to create and support non-custodial measures. Such variation may exist not only between countries, but between different regions of the same country.

#### *Offender Input and Involvement in the Design and Implementation of Community Sanctions and Programs*

A primary attribute of the community sanctions (and institutional sanctions) that have been developed by corrections systems worldwide is the lack of input from the clients (criminal offenders). Rather, correctional officials, from senior policymakers to program managers to line level staff have assumed 1) that correctional professionals are in the best position to ascertain the needs of offenders, to design community sanctions and programs, and to select which offenders will be exposed to which measure; and 2) that criminal offenders would have very little to contribute to this process.

Given the difficulties that both community and institutional measures have encountered in achieving their stated objectives, perhaps it is time to include the views and perceptions of the offender. Recently, several correctional researchers have begun conducting interviews with prison inmates to solicit their views of correctional treatment, what programs and services would be most beneficial to them, and how such programs could most effectively be implemented in the institutional environment.

#### *Matching Community Sanctions and Pro-*

*grams to the Individual Offender*

Ekstedt and Griffiths (1988: 246-47) have argued that one of the difficulties that has hindered the potential effectiveness of institutional treatment programs was the failure of treatment personnel to recognize the variability among inmates in terms of their treatment needs and requirements. Warren (1977) was one of the first correctional observers to suggest that there may be considerable variability among offenders as to the most appropriate treatment setting, and, further, that some offenders were more amenable to certain treatment modalities than others. While some offenders are best treated in a community setting, others may be more responsive to treatment in an institutional setting.

Correctional policymakers and administrators must give careful consideration to the design of community sanctions and programs which address the specific and often unique needs of female offenders, offenders from ethnic and religious minorities, indigenous offenders and those offenders with alcohol or drug addictions, and those with mental or physical disabilities.

**A Close Look at Judicial and Correctional Decision Making**

A critical, yet often overlooked, dimension of community sanctions and programs is the decision making of judicial and correctional officials.

There are several characteristics of the decision making activities of judges and correctional officials involved in making decisions on community sanctions and programs. Two of the more important decision making points are sentencing in the criminal court and parole board decision making.

*The Sentencing Process*

In Canada, over 1,000 independent decision makers are handing down sentences for over three hundred different offences in the *Criminal Code*, *Narcotic Control Act*, and

*Food and Drugs Act*. In the absence of any formal guidelines for the use of community sanctions, there is often considerable variation among judges in their use of these sanctions.

Presently in Canada, as in many jurisdictions throughout the world, there are no mechanisms to evaluate which sanctions are appropriate in which cases and which individual or groups of offenders will benefit most from receiving a particular community sanction. As the report of the Canadian Sentencing Commission (1987:67) stated: "Where there are no formal 'standards' against which to judge a sentence, the lack of systematic sentencing information accessible to judges in their determination of sentences almost ensures that there will be unwarranted variation in sentences."

The problem of sentencing disparity has been identified as one of the major issues that should be addressed in any reform of the Canadian criminal justice system. This concern has been given new impetus by the advent of the Canadian *Charter of Rights and Freedoms* which may render excessive sentencing disparity unconstitutional (Jobson and Ferguson, 1987:18). Across Canada, there are significant variations in the manner in which different offence categories are assigned sentences in the various provinces (Hann, et al., 1983; Hann and Kopelman, 1986). Furthermore, there is clear evidence that there are significant sentencing variations within the various provinces themselves.

In his classic study of magistrates' courts in the province of Ontario, Hogarth (1971:12) concluded that there was great variation in their sentencing practices:

In the course of one year, one court used probation in nearly half of the cases coming before it, while another never used this form of disposition. Similarly, the use of suspended sentence without probation ranged from 0 to 34 percent, fines from 2 to 39 percent, short-term goal sentences

from 4 to 60 percent, reformatory sentences from 1 to 37 percent and long-term penitentiary sentences from 0 to 23 percent. These differences appear to be too large to be explained solely in terms of differences in the types of cases appearing before courts in different areas.

Hogarth (1971) found that judicial attitudes and judicial perceptions of the facts of the cases accounted for a considerable proportion of the disparity in sentencing. Indeed, Hogarth (1971:382) suggested that while only about 9 percent of the variation in sentencing practice could be accounted for by "objectively defined facts," more than 50 percent of this variation could be explained by "knowing certain pieces of information about the judge himself."

In a more recent study of judicial decision making, Palys and Divorski (1986) concluded that judicial attitudes and perceptions were related to disparity in sentencing. From their study, which involved asking judges to make decisions in hypothetical cases, these researchers concluded that a major source of sentencing disparity was found in the judges' differential subscription to legal objectives of sentencing (e.g. rehabilitation, incapacitation, general deterrence) and the emphasis they placed on different case facts.

This and other research has indicated that the outcomes of sentencing decisions are strongly influenced by the particular sentencing philosophies of individual judges. As the report of the Canadian Sentencing Commission (1987:77) concluded: "The primary difficulty with sentencing as it exists at the moment is that there is no consensus on how sentencing should be approached." Needless to say, these findings have significant implications for the use of community sanctions and programs in any jurisdiction.

In reaching the "in/out" decision—the judgement as to whether to impose a community sanction or a period of confinement—judges generally do not have access to information on the success of various communi-

ty sanctions or the outcomes of previous cases in which offenders were given a specific sanction. The research in Canada suggests that, in the absence of clearly articulated principles to guide the judge in "in/out" decision making, there exists a presumption in favor of incarceration. The decisions of Canadian appeal courts have tended to reaffirm the "in" presumption.

*The Parole Board: Assessing Risk—Gut Feelings and Guesstimates or Scientific Enterprise?*

Perhaps no one point of decision making in the correctional process has been the subject of more controversy than the decision to grant or deny parole. In fact, concerns with the decision making activities of the parole board, as well as with parole as a reintegrative technique, have led to its abolition in several states in the United States. In Canada, the report of the Canadian Sentencing Commission (1987) recommended the elimination of full parole release for all offenders, with the exception of those serving sentences of life imprisonment.

The ongoing debate surrounding parole board decision making has centered on the failure of the National Parole Board to establish clear and consistent guidelines for release decisions and on the broad discretionary powers exercised by parole board members. The *Parole Act* (1959) provides little guidance in the decision making process, stating that the parole decision should be guided by the following criteria: 1) the inmate has derived maximum benefit from imprisonment; 2) the reform and rehabilitation of the offender would be aided by a grant of parole; and 3) the release of the inmate on parole would not constitute an undue risk to the community.

The *Policy and Procedures Manual* of the National Parole Board (cited in Mandel, 1984-85: 167) includes as factors that may be considered by the board in its decision making the nature and gravity of the offence, prior history of criminal involvement, the inmate's total personality, efforts at self-

improvement made by the offender during imprisonment, release plans, and community reaction to the release. In 1988, the National Parole Board adopted a pre-release policy that divides criminal offences into three categories for purposes of review for parole and standardizes a procedure for risk assessment.

The lack of clear guidelines for parole board decision making creates a situation in which "there are as many criteria as Board members" and decisions that are "highly unpredictable and inconsistent. . ." (Solicitor General of Canada, 1981: C-9). In addition, there is wide variation in the parole granting rates by National Parole Board members across the country.

### Summary

The preceding discussion has examined a number of key areas related to the use of community sanctions and programs. The results of our discussion suggest that there is a need for senior correctional policymakers and administrators to rethink the delivery of community-based corrections. The basic tenets and assumptions that have guided the development and implementation of institutional and community sanctions and programs for the past century must be re-examined and, where required, new and innovative corrections strategies developed.

The guiding principle of these efforts should be: How can we develop more effective community-based sanctions and programs, which function to protect the community, while at the same time addressing the needs of criminal offenders?

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**Fig. 1: Summary of Public Misperceptions Related to Sentencing**

Topic	Reality	Public View
1. Maximum Penalties: Public under-estimates severity Example: Break and enter	Life imprisonment	4 years
2. Sentencing Trends: Public under-estimates punitiveness of courts Example: Break and enter	Over 50% get a sentence of imprisonment	Fewer than 40% get a sentence of imprisonment
3. Early Release Rates: Public over-estimates percentage obtaining early release Example: Parole release rates	30% of all inmates	Most people estimate over 60%
4. Early Release Rates: Public over-estimates amount of crime by people obtaining early release	Release rates have not changed much	More offenders being released now
5. Parole Recidivism: Public over-estimates amount of crime by people obtaining early release	About 5% of parolees reoffend while on parole	About 50% of parolees reoffend
6. Crime Rates: Public over-estimates amount of violent crime Example: Violent crime	6% of total reported crime involves violence	3/4 of public estimate 30%-100% involves violence

# Towards Compensation for Victims of Organised Crime in Developing African Countries

by Femi Odekunle\*

## I. Restitution, Compensation and Victims' Remedies: Background and Justifications

For any contribution on "*compensating victims of organised crime*" to be meaningful and comprehensible, it should be appropriately introduced in the context of the background to (and justifications for) the idea of *restituting/compensating victims of crime* as a class of people who have un-deservedly<sup>1</sup> suffered some certain injury and/or loss occasioned by the criminal behavior of others. *After all*, "organised crime" is simply a species of a more inclusive class (i.e. criminal and/or socially-injurious conduct or behavior) and its victims are, therefore, correspondingly a species of the inclusive class of victims of crime. Hence, this introductory section.

Crimes and their perpetrators would not constitute a "problem" but for the injury/loss/distress suffered by their victims. *And* if they do not constitute a "problem," it may be argued that there is perhaps no need for the agencies of prevention, control and corrections (e.g. police, courts and prisons) and the huge capital and recurrent expenditures on these agencies. That is, without the untoward economic, social, psychological and other consequences of crime on "victims of crime," there may be no "problem of crime" to justify the existence (let alone the material/monetary consumption) of the criminal justice system.

*However*, even though the problem of

crime is largely one of victimization (at least to the society as a socially-organised polity), the criminal justice systems in modern times, as conceived and operated, appear to exist solely for the criminal offender. From statutory provisions, through procedural laws, to penal sanctions, modern criminal justice systems appear to emphasize the *safeguarding of the rights (and "interests") of offenders but are utterly neglectful of the rights and interests of their victims*.

From arrest to sentencing and after, the offender has the right to be cautioned before making a statement, right to remain silent, right to bail, right to innocence until proven guilty, right to fair hearing, right to counsel, right to appeal and be heard, right to human and decent treatment in prison, etc.

As a parenthesis in this introductory discourse, it needs to be pointed out that no politically and socially "conscious" person (and definitely *not* this author) can fault the principles which inform these statutory and other rights of accused persons/offenders, argue for any detraction therefrom, let alone their abrogation. They are rights that had to be won in the dialectical transformation of society from the feudal/monarchical to the industrial-capitalist/democratic stage of development.<sup>2</sup> And they are rights that must be maintained and protected (excepting "exceptional" cases<sup>3</sup>) in the face of an increasingly omnipresent and ever-powerful modern state.

Therefore, whatever "grudge" has not been against the rights of criminal offenders as it has been against the neglect of the rights and interests of their victims. For in the same conveyor-belt process which en-

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deavours to safeguard the rights of an offender, the only certain right assigned the sufferer-victim of the offender's criminal act appears to be the "right" to assist the criminal justice agencies in their processing of the offender (i.e. as a "witness"). Of course, it may be argued by "philosophers" that if and when an offender is convicted, the victim has the "right" (additionally) to partake in the orgasm society allegedly reaches out of the visitation of collective vengeance on the criminal as well as the "right" to benefit from society's alleged achievement of the stated objectives of individual/general deterrence and/or reformation/rehabilitation!!! *And* a similar neglect exists in the area of public expenditure: "while modern societies spend great sums of money annually on the apprehension, conviction and rehabilitation of offenders, very few governments spend anything for compensation to the victims of crime" (Separovic, 1982: 105).

The foregoing constitutes an "extremist" *shift away* from time-honoured "Victim-Justice," the tradition of the rights of the victims of crime to protection and reparation (Katz, 1980: 8-9). This unknowing shift and its adverse consequences for victims of crime in terms of apparent inattention to their plight and apparent negation of their traditional right to reparation "initiated," as it were, problem-directed scholarly concerns about victims of crime and other dimensions of criminal victimization within the discipline of Criminology<sup>4</sup> at the turn of the 1950s. Today, the result of those initial concerns and subsequent devoted work is the existence of a viable "discipline" of Victimology,<sup>5</sup> a successful branch-out (or off-shoot?) of Criminology.

Among other achievements,<sup>6</sup> the victimological enterprise had adequately documented the distressful plight of victims, its counter productive neglect by criminal justice systems the world over and the need for re-orienting the justice system towards victim rights and needs (Marek, 1983: 7-17; Schneider, 1985: 29-37; Huang, 1986: 38-59;

Fattah, 1986; and Fattah, 1987). It should suffice to "hear" one or two of these authors with particular reference to the "secondary plight" of victims with the criminal justice system:

"In a majority of contemporary jurisdictions, the crime victim has been left to play a distinctly secondary role. He reports crime to public officials and leaves it to them to decide whether the offender should be prosecuted or not. In some jurisdictions the victim is told that criminal prosecution is not his case, that he is not a 'party,' and has no 'standing' in criminal case. Thus the victim injury becomes only the occasion for a public cause of action and all decisions are made according to the law enforcement officials conception of the public interest. In this way the victim loses twofold: once in favor of and in the presence of crime offender, the second time for the benefit of state which took almost completely over the monopoly for justice administration (Marek, 1983: 8).

"As in criminal law, the victim receives little attention in the criminal procedure. Even though the state, due to its monopoly of punishment, sets itself up as the avenger in lieu of the victim, it seems to have forgotten only too often the victim's tragical fate as well as his interest in satisfaction, and, even more important, material compensation.

"In the overwhelming majority of cases, the victim of a criminal offense reports the crime to the police. Thus, the victim can get criminal procedure started, but has hardly any influence on the further course of the proceedings. The agencies of formal social control, such as police and the public prosecutor, do not inform the victim, although he/she has been immediately injured by the crime, about the further course of the proceedings either. In the actual trial, the victim usually appears as witness and is thus used as an object in finding the facts. In this function, the victim

has no influence, neither on the course of investigation and trial nor on the choice or the amount of punishment.

"Since the average victim does not have a thorough knowledge of the rules of the criminal procedure, he/she has to cope with the intimidation caused by the criminal procedure in addition to the damage caused by the criminal act itself. This intimidation is partly due to the victim's not having a legal status of his own in the criminal procedure; to give an example, nobody is appointed officially as a victim advocate, as a counsel for the victim to tend the victim's special needs. Apart from this mental stress, the victim frequently has to submit to inconveniences. Although the public prosecutors are largely dependent on the presence of the victim as witness and on the cooperation with him or her, victim is often expected to spend hours waiting in uncomfortable corridors of court-houses and public prosecutor's offices to deliver his or her statement. Only too often, the victim will be summoned for interrogation without the interrogation actually taking place, so that the victim suffers an avoidable loss of time. Inconveniences of this kind give additional nourishment to the victim's feelings of being merely an object of public prosecution and court procedures" (Schneider, 1985: 32).

As stated earlier, victimological works have not only detailed the neglect of both the primary and secondary plight of the victims, *they have also shown beyond any doubt* the adverse effects of the neglect on the effectiveness and efficiency of the criminal justice agencies *and* the preference of victims for restitution and compensation through the system over and above the system's penchant for procedural technicalities, fine and imprisonment. For instance, findings of studies on the matter in Canada and Europe (i.e. The Netherlands, Britain, France and Germany) show that victims' image of police and courts improved with provision and actuali-

zation of compensation (Vennard, 1978; Shapland, 1982; and Dijk, 1985: 17-20).

Finally, in sealing the case for a justice system that is also responsive to the rights, needs and interests of the victim as it has been to those of the offender, hardly controllable principles and justifications for restituting and compensating victims of crime have been marshalled. In providing what he refers to as the "philosophical background of victim compensation," Kirchhoff (1983: 19-22) critically examined seven "theories" of compensation: the functionalist theory; the constitutional theory; the ex-gratia theory; the shared-risk theory; the crime-causing-society theory; the balance theory; and the promotion of cooperation theory. Others had put the justifying principles in more "ordinary" language: that on the basis of the "social contract" between the state and its citizens, the latter is obliged to protect the former and in every case of failure of protection there occurs the obligation to indemnify those who suffer injury or loss from such failure (Cancilla, 1975).

As is usually the case with social problems or problematic social issues, the plight of the victims of crime and the need to rectify the situation "moved" from the papers of scholars (aided by the "activism" of those involved in the victimological enterprise) to social awareness and, inevitably, to governmental policy-responses *as well as to* the United Nations which, in 1985, made a declaration of basic principles of justice for victims of crime and abuse of power (U.N.O., 1985 and 1988).

It can be said that these policy-responses at the national and international levels manifest a conviction, objective and/or subjective, *that all parties stand to benefit from restitution, compensation and other victim remedies*: the victim, the offender, the criminal justice system and, therefore, the whole of society itself. *However, while many* of the industrialized countries of North America, Australia/New Zealand, and Western and Eastern Europe have actualized this convic-

tion in varying degrees and modalities (Marek, 1983: 9-10; Waller, 1986: 69-70; Dijk, 1985: 3-8; Kirchhoff, 1983: 17-18; Atiyah, 1975: 294-315 and 470-472; Bienkowska, 1986: 22-33; and Selih, 1985: 7-12), *hardly any* of the African countries has passed the stage of nominal participation in the relevant United Nations meetings on the matter.

As "follow-suit" nations, being essentially neo-colonial, African and most other Third World countries do not (generally-speaking) manifest initiative or inventiveness, particularly on socio-legal issues—even where their indigenous cultures provide supportive or "receptive" anchors.<sup>7</sup> Hear Diaz on the situation in India:

"Though India, from time immemorial, had systems of informal and formal victim-redress programs, the Criminal Justice System which we took over from Britain did not provide for any of these. Only recently some concerned efforts are being made through the efforts of some criminologists and jurists to focus attention on the vital needs in this area" (Diaz, 1985: 28).

Governmental policy-response at national levels started in North America/Western Europe/Australia and New Zealand in the 1960s, followed by Eastern (Socialist) Europe in the 1970s. *Hopefully*, Africa should "follow-suit" in the 1990s, 2000 being the "magic" deadline year for the "solution" of many national and international problems. And herein lies the appropriateness of this present discussion.

Having provided the *needed* background and developmental contexts on this matter of victims' remedies, *Section II* of the paper is a "brief" on restituting/compensating victims of "common/street" crimes in Nigeria; *Section III* highlights the nature and identifying characteristics of "organised crime" to justify the need for a victim-restitution/compensation mode (offered in *Section IV*) different from that offered for victims of com-

mon crimes; and *Section IV* concludes the contribution by raising matters pertinent to the introduction and success of victims' remedies in a developing country like Nigeria.

## II. Restituting and Compensating Victims of "Common/Street" Crimes

In spite of the specified bounds of the topic of this paper (i.e. organised crime), I consider it necessary to state my position on restituting/compensating victims of "common" or "street" crimes.<sup>8</sup> It is also an instructive prefix to highlighting and justifying both substantive and procedural differences that must attend to restitution/compensation for victims of crime "in general" compared to victims of organised crime in particular.

Needless to say, the justifying principles for restituting/compensating victims of crime the world over also apply to our scene. *In addition*, in terms of any cost-and-benefit analysis, I have shown that for a majority of crimes/criminals that have *over-overcrowd* our prisons, de-institutionalized sentences (e.g. restitution, compensation, community service/labor, reconciliation/restoration, token fines) would do (Odekunle, 1983<sup>a</sup>: 36-41). *Furthermore*, my small-scale research on victims of crimes as well as similar efforts by students under my supervision show that most victims of crime, in Nigeria for example, prefer restitution and compensation to the sentencing of their victimizers to imprisonment or fine (Odekunle, 1979).

It is largely on the basis of the above and other relevant knowledge that I am proposing the modes of "handling" and sentencing of "common/street" crimes contained in Table I over page. As should be obvious, *the modes make room* for restituting/compensating victims by both formal courts and "informal courts;" *they make room* for community involvement in justice-administration; *and they have the potential* of significantly lessening the existing load, burden, and pressure on the criminal justice system.

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Table I: Types of "Common/Street" Crimes and Suggested Modes of "Handling" and Sentencing

Type	Status of "Known" Offenders	Enabling Means	Usual Motive	Usual Victims (Individualized/Direct)	Suggested Mode of Handling	Suggested Mode of Sentencing
Assaultive (Minor)	Usually Low Socio-Economic	Personal/ Working Relationship/ Contact	Usually un-premeditated	Individual(s)	Community/ Neighbourhood "elders" or "jury"*	-Reconciliation/ Restoration <i>and</i> Token Fine
Assaultive (Serious)	ditto	ditto	ditto	ditto	Existing formal Courts of Law	-Restitution by Offender <i>and/or</i> Compensation by the state <i>with</i> Fine <i>or</i> Imprisonment
Property (Without Violence)	ditto	Availability/ Calculation of Opportunity/ Advantage	To obtain money material where-withal	Individual(s) (And corporate bodies)	Community/ Neighbourhood "elders" or "jury"*	-Restitution by Offender <i>with</i> Token Fine <i>or</i> Community Service/Labour
Property (With Violence)	ditto	Availability/ Calculation of Opportunity/ Advantage	To obtain money material where-withal	Individual(s) (And corporate bodies)	Existing formal Courts of Law	-Restitution by <i>and/or</i> Compensation by the state <i>with</i> Fine <i>or</i> Imprisonment
Public Order	ditto	Operative Subculture/ Environment; Ignorance	To gain some "advantage"/ register protest	Individual(s) (And public peace)	Police "Night Courts" or Lay Magistrates	-Reprimand/ Warning/Binding Over/Suspended Sentence <i>with</i> Community Service/Labour
Morals	ditto	Operative Subculture/ Environment; Ignorance	To obtain money/material where-withal; To "participate"	Offenders themselves	Community/ Neighbourhood "elders" or "jury"*	-Elders Counseling <i>or</i> Referral to Social Welfare

\* Lay Magistrates can also "handle" these of crimes.

### III. Nature and Characteristics of Organised Crime

In Nigeria, long before independence in 1960, individuals belonging to apparently rival play-groups occasionally arranged wrecking disruptions at Hubert Ogunde's stagings; and "organised criminals" sometimes printed counterfeit tickets for his plays, thus causing him and his troupe to suffer loss and deprivation from "un-

scrupulous profiteering by ticket touts" (Clark, 1979: 31).<sup>9</sup>

Today, bank workers conspire with one another and/or with computers to defraud unsuspecting individuals, governmental and private corporate bodies of millions of naira.

In between these two time-differentiated kinds of organised crime, the list can be endless: political, economical/commercial, administration/professional corruption, bribery, kickbacks and gratification for public proj-

ects; fraudulent false accounting; under-invoicing, over-invoicing and transfer-pricing; smuggling; drug trafficking and peddling, prostitution, racketeering; etc.; etc. As put by a United Nations document, with respect to its global dimensions, "although illicit drug trafficking probably accounts for the largest share of organised crime's criminal transactions, these illegal operations also include weapons, industrial secrets, unlawfully acquired assets and human economic and sexual slavery, to mention some of them" (U.N.O., 1988<sup>b</sup>: 15).

Unlike the case with common/street crimes, the cost and adverse consequences of the victimization accruing from organised crime are incalculable and inestimable, respectfully. According to an assessment in the document just cited, the magnitude and seriousness of the impact of organised crime on the economic, political and social life of numerous countries cannot be overestimated. And with particular regard to Nigeria, we<sup>10</sup> had put the "toll" this category of crimes exacts on the country thus:

"Economically, politically and socio-morally, the cost entails enormous damage to the country's corporate life and existence: the incalculable loss of government revenue; the undermining of the economy, national development and political stability; the debilitating effect on efficiency, effectiveness, worker-morale and productivity; the perversion and frustration of the formal equality provided for by the constitution and the codes; even the tainting of the national image of the country abroad" (F.R.N., 1985: 81).

Relative to the enormity and multi-dimensions of the victimization of individuals, groups of individuals, large segments of the population and the whole society by organised crimes, it must seem *paradoxical* that their criminal acts are the most difficult to detect or investigate; *their* perpetrators most difficult to "catch" or "pinned-down" by the

criminal justice system; *and their* victims most difficult to locate or identify in person, time and place. Very much unlike common crimes, their perpetrators, and their victims.

For example, most of what we "know" (definitely a mere tip of the iceberg) about these things in Nigeria come from "revelations" of the usual post-coup Commissions and Tribunals of Inquire into the activities of the ousted regimes and those of their henchpersons who, according to the "character" of intra-elite struggles (squabbles?) in Nigeria, must be discredited. Our only other sources of "information" on these things are rumours and the print-media's undisclosed/anonymous/unnamed "official sources."

It may be argued that the paradox lies in the recency of concern with organised crime *but I am more than persuaded that the paradox inheres in the character of organised crime itself and in the nature of its victimization. By character*, "organised crime are often managed in accordance with regular business (and public) administration practices utilized in the management of legitimate commercial (and public) enterprises in the modern world" (U.N.O., 1988<sup>b</sup>: 15).

*By nature*, the model victim of organised crime is one who is "a victim even though he may not be conscious of the injury (or loss) that he has sustained. such unconscious victimization is common in cases of exploitation, fraud, corruption and pollution. . . (involving) a multiplicity of victims" (Diaz, 1985: 20). *Furthermore*, the victimization is as remote as it is diffused: ". . . special difficulties arise from the fact that often, the harm is spread over many people and may be cumulative, in both place and time" (U.N.O., 1988: 12).

#### IV. Restituting/Compensating Victims of Organised Crime

All that has been said in Section III suggests *that* organised crime, as a species of crime in general, "deserves" specialized and focussed enforcement/control attention: *that*

if the victims of organised crimes are to be restituted and/or compensated, most of the criminals concerned must somehow be "caught" and "pinned-down;" and that their victims must somehow be determined and identified. And, *preliminarily*, one way of satisfying those indications is to highlight the main identifying features or characteristics of organised criminals in an "outline" fashion, something I have done in some earlier work (Odekunle, 1983<sup>b</sup>: 10-11) and of which an "updated" version is itemized below:

- 1) they are carried out primarily for economic gain and involve some form of commerce, industry, trade, governmental or corporate services;
- 2) they involve some form of organisation in the sense of a set or system of more or less "formal" relationship between the parties committing the criminal acts;
- 3) they involve either the use or misuse of legitimate forms and techniques of commerce, business, trade, industry or public administration;
- 4) usually, the circumstances of perpetration are subtle or of low-visibility, thus making discovery/reportability difficult;
- 5) usually, the victims (mostly indirect) are common/ordinary citizens and consumers of goods and services who have no (or, at best, only blurred/vague) awareness of their victimization;
- 6) typically, but not necessarily, the persons behind the commission of these crimes have "social status," political, economic and/or bureaucratic power. (Alternatively, they have close or powerful relationships (or are identical) with those persons who control, or at least influence, the social and legal definition and sanctioning of crime.);
- 7) usually, they are able to influence, either directly or indirectly, official and/or public perception of and reaction to their own criminal behavior i.e. elite-instigated societal response as to stigmatization, support or tolerance as well as the use of

"techniques of neutralization;"

- 8) they are "aware" of whatever loopholes in both substantive and procedural laws and "generously" retain lawyers to see them "through" if ever caught, or receive "mitigated" sanctions if ever convicted;
- 9) have "social standing" (legitimate and/or fake) in their particular communities and/or the larger society, they do anything or everything to avoid actual imprisonment (though their economically-insured and loyal "field operatives" may be incorrigible jail-birds on their behalf); and
- 10) even though they are "profit-oriented" and are averse to economic sanctions, they are usually in good financial standing—enough to retribute/compensate victims, if only to avoid imprisonment.

These identifying features or characteristics of organised criminals obviously shows that they are different from common/street crimes in nature and character and in magnitude/seriousness of victimization. And as hinted earlier in this contribution, the difference dictates a mode of "handling" and sentencing that must be different from that suggested for common/street criminals. Hence, the modes contained in Figure 2 over page.

#### V. Conclusion: Matters Arising

Even though hardly contendable principles and justifications for victims' remedies (e.g. restitution, compensation, etc.) have been offered and modes for actualizing such remedies have been suggested (Tables I and II), their consideration for probable acceptance "in principle" (not to talk of implementation as policy) are, of necessity the prerogatives of the political, professional and bureaucratic "powers that be" or "may be." In their consideration, at various low- and high-level "Committees," with assorted professional and administrative "in-puts," and under



VICTIM COMPENSATION IN AFRICAN COUNTRIES

Table II: Types of "Organized Crime" and Suggested Modes of "Handling" and Sentencing

Type	Status of Main Perpetrators	Enabling Means	Usual Motive	Usual Victims (Diffused/ Remote)	Suggested Mode of Handling	Suggested Mode of Sentencing*
I Political	<ul style="list-style-type: none"> <li>- Chief Executives</li> <li>- Other Political Office-Holders</li> </ul>	<ul style="list-style-type: none"> <li>- Political Power</li> <li>- Economic Power</li> <li>- Social Power</li> </ul>	<ul style="list-style-type: none"> <li>- To gain or retain political power. To victimize opponents</li> </ul>	<ul style="list-style-type: none"> <li>- Ideals and values of the polity</li> <li>- Political opponents</li> </ul>	Central code of conduct bureau with extensive jurisdiction and powers. 2. Ad hoc citizen committees constituted by the bureau at federal, state, local government and ward levels. 3. Work-place or community-of-origin of offender as venue of "trial".	<ul style="list-style-type: none"> <li>- Restitution/ Compensation with Public Exposure and Imprisonment</li> </ul>
II Economic/Commercial	<ul style="list-style-type: none"> <li>- Businessmen</li> <li>- Contractors</li> <li>- Consultants</li> </ul>	<ul style="list-style-type: none"> <li>- Economic Power</li> <li>- Political and Social Connections</li> </ul>	<ul style="list-style-type: none"> <li>- To make more profits and money</li> </ul>	<ul style="list-style-type: none"> <li>- The generality of tax-payers and other citizens</li> </ul>		<ul style="list-style-type: none"> <li>- ditto</li> </ul>
III Administrative/Professional	<ul style="list-style-type: none"> <li>- Highly placed Civil Servants and Executives of parastatals</li> <li>- Professionals such as lawyers, doctors, engineers, university teachers, etc.</li> </ul>	<ul style="list-style-type: none"> <li>- Administrative authority</li> <li>- Technicality, exclusivity and autonomy of the professions</li> </ul>	<ul style="list-style-type: none"> <li>- Material wealth</li> <li>- Cultivation of political and social connections</li> </ul>	<ul style="list-style-type: none"> <li>- The generality of tax-payers and other citizens</li> <li>- Consumers of the services of the professions</li> </ul>		<ul style="list-style-type: none"> <li>- ditto (And professional interdiction)</li> </ul>
IV "Conventional" Organised	<ul style="list-style-type: none"> <li>- Political, Economic Social and Bureaucratic elites</li> <li>- High echelons of control/law enforcement agencies</li> </ul>	<ul style="list-style-type: none"> <li>- Influential connections to information sources</li> <li>- Control and Enforcement authority</li> </ul>	<ul style="list-style-type: none"> <li>- Money and material wealth</li> </ul>	<ul style="list-style-type: none"> <li>- Government Treasury</li> <li>- Private Individuals</li> </ul>		<ul style="list-style-type: none"> <li>- Restitution/ Compensation with Public Exposure and Imprisonment</li> </ul>
V Working Class	<ul style="list-style-type: none"> <li>- Artisans</li> <li>- Junior and Intermediate Staff</li> <li>- Market women and men</li> </ul>	<ul style="list-style-type: none"> <li>- Technicalities of the occupational skill</li> <li>- Ignorance and carelessness and acquiescence of the public</li> </ul>	<ul style="list-style-type: none"> <li>- Money and material wealth</li> </ul>	<ul style="list-style-type: none"> <li>- Consumers of goods and services</li> </ul>		<ul style="list-style-type: none"> <li>- Restitution/ Compensation and Community Service/ Labour</li> </ul>

\* Restitution/compensation here necessarily includes the seizure/confiscation/forfeiture of offender's (individual or corporate) money and/or property to enforce restitution/compensation sentences.

varying degrees of "confidentiality," they will "raise issues" and "consider implications"—including those that have been raised, considered and "settled" (by acclamation and/or comments) on the floor of a conference. I would like to conclude this paper with some "participation," a priori, in "their" deliberations—without particular doting on the specific case of organised crime (excepting as demanded by this or that particular "issue" or "implication") with partic-

ular reference to Nigeria.

Assuming that the idea of victims' remedies is found justified and acceptable and it is accepted "in principle," can it actually be implemented in a developing country like Nigeria? Considering the stage of development, is the country ready for it? It should suffice to say that taking into consideration the level of material and social development and the accompanying problem of criminal victimization, the justice system is overdue for the

introduction and operation of victim restitution/compensation. And in reality, it will not amount to an "innovation" but a return to one hall-mark of the peoples' pre-colonial justice system for which Nigerians, particularly those teeming victims of crime among them, have been yearning. This, of course, is not to say that *all* categories of Nigerians would consider it "welcome:" for example, it is conceivable that many members of the legal profession or perpetrators of organised crimes may not "appreciate" the implications.

What about the "problems" of determining the largely-technical but principle-related issues that must arise with actualizing a restitution/compensation scheme? The what, the who, and the how? What kinds of criminal victimization would entitle which kind of victim to what type/amount of restitution/compensation and through what process of determination? What will be the "minimum-loss requirement" and the "maximum-compensation threshold?" In addition to having the experiences of many countries in the world to learn from, Nigeria (like various other developing countries) currently has enough people with the adequate training, knowledge and appropriate experience to make these determinations, determinations that must in any case be reviewed and reassessed as changing social conditions warrant. For instance, it stands to reason that victims of crime proven to have participated, precipitated, or provoked their won victimization should not qualify for restitution/compensation e.g. a defrauded buyer of smuggled goods, or a victim of robbery who had been flaunting wads of currency notes in a drinking bar.

Would these kinds of restitution/compensation schemes and, particularly the suggested modes of handling which involve a certain degree of community-participation in the justice-administration system not require some overhauling of our penal and procedural laws? Restitution/compensation schemes cannot be successfully grafted unto an un-

redeemed colonially-inherited legal system. That is, both our penal and procedural laws have to be subjected to a meaningful re-working for the purposes of achieving a responsive criminal justice system. (Please see APPENDIX A.) Other countries (including Britain in the 1970s) have gone through such an exercise, and fruitfully too. I had been concerned enough with the need for such an exercise to suggest some guiding principles/objectives and a schema for a "functional penal system" (Odekunle, 1977: 357) with translation into feasible criminal justice policies (Odekunle, 1987: 11). And appropriately, the spate of Conferences and Seminars by the Federal Ministry of Justice in recent times seems to suggest that the country is gearing for the kind of exercise required.

Still, on the implication for the existing criminal justice system, if only for the purposes of a meaningful concern with the costs, effects and victims of organised crime, it would have to undergo drastic changes in certain areas. The "failure and futility" of the system relative to any effective control of organised and related crimes have been documented (Odekunle, 1983<sup>c</sup>: 5-14). In this respect, the observations of Misner (1989: 19) is instructive: that for the U.S.A., her problem with organised crime prior to the mid-sixties was partly due to using "only criminal remedies to deal with the problem of organised crime;" and that the country's capability to deal with organised crime improved only after the 1968 Omnibus Crime Control Act, particularly R.I.C.O. (Racketeer Influenced and Corrupt Organisations) which allowed investigators and prosecutors to get at organised criminals and crime as they could not have done prior to the 1968 Act.

In any case, what are the cost implications? And who will bear the cost i.e. funding the restituting/compensating of "thousands and thousands" of victims in these economically hard times? It may even lead to attendant or emergent costs—for bureaucratic set-ups,

periodic research to monitor the "efficiency/effectiveness" of the "programme?" Regardless of which justifying principles are dominant, costs consideration should be regarded as secondary without being ignored. And very important in responding to the question of cost is that restitution/compensation programs can be successfully implemented without the creation of entirely-new bureaucracies. Furthermore, governments should be expected to retribute/compensate victims only when and where the offenders are utterly unable or indigent. Again, if the programs are meaningfully and honestly implemented against organised crimes and criminals, the government may find the "venture" occasionally profitable.

Many members of the legal profession might "worry" about the intrusion of "unlearned" community/neighbourhood "jurors" into an area of social life that is allegedly exclusively theirs. Would this kind of "handling" of cases not lower the "standard" of justice? Would they be willing to "understand" such a scheme and the underpinning principles enough to help play their part in making it a success for the benefit of victims of crime and the society? (For renowned Okonkwo had asserted that if compensation to victims of crime "were ever to be adopted, then the proceedings in question would lose their criminal nature and be essentially civil. . . ." (1980: 20).

No, the standard of justice will not be lowered, it will only be enhanced and appreciated. And if the scheme works well, more hard-working and socially-conscious members of the legal profession (Bench and Bar) may discover that they are able to devote more time and energy to real cases that deserve real trial in the true traditions of the adversarial system of justice. That is, they may grow to understand, and even appreciate, the program. Some of them may even come across Fromm's succinct point about what he refers to as "humanist radicalism:" 'questioning every idea and every institution from the standpoint of whether it helps or

hinders man's capacity for greater aliveness and joy" (Fromm, 1980). After which each every senior lawyers might be required to take it upon himself or herself to seek out and handle, *gratis*, four cases of collective/group victims of organised crime or abuse/misuse of power every year!!!

So far, my uninvited participation in probable "deliberations" has been limited to responding to the issues that might be raised or to questions about the implications of "this whole thing." It is time for me to end this paper by re-raising one issue myself and requesting the consideration of one implication. With regard to organised crime's victimization, "who controls the controllers?" And what is the *implication* of extracting restitution and compensation from perpetrators of organised crime *for* our political, economic and social elites and leaders?

#### Notes and References

1. It is (of course) recognised that some victims do "deserve" their fate as criminological literature and "ordinary" observation attest to instances of "victim-participation," "victim-precipitation" and "victim-provocation."
2. It should be noted also that, subsequently, the emergence of "humanitarianism" and related movements in the last quarter of the 19th Century contributed to the expansion of these rights.
3. Organised crime, corruption in high places, and fatal/near-fatal armed robberies constitute (in any own estimation) such "exceptional" cases.
4. Hitherto, the discipline of Criminology had been concerned mainly with the criminal, his cultural and social environment, the causes of criminality, and like matters.
5. In practice, however, the state, emphasis or orientation of any particular Criminology or Victimology Academic Department or Research Institute notwithstanding, it covers the subject-matters of both. (Afterall, criminal/criminality *and* victim/victimity are two sides of the same problematic coin, with the whole of the criminal justice system in between.

6. For samplers, the establishment of an active, *World Society of Victimology*, its regular holding of *International Symposia on Victimology*, regular issue of *Victimology Newsletter*, and other policy-and-practice related activities on behalf of victims of crime and victims of abuse of all sorts.
7. This situation equally applies to Nigeria (See, for example, Okonkwo, 1980: 19), the so-called "Draft Legislation on Costs and Reparations" (F.R.N., 1985: 83-86) notwithstanding.
8. Also referred to in criminological literature as "conventional" or "traditional" crimes, examples of these include theft, burglary, simple robbery, assault, traffic violations and the like of these—and the victims are usually individuals, and the victimization direct.
9. Hubert Ogunde is a renowned Nigerian playwright and dramatist who started his career in the late 1940s.
10. I served as the Chairperson of the Subcommittee that drafted Topic III (Victims of Crime) for the *Nigerian National Paper for the 7th United Nations Congress on Crime Prevention and Treatment of Offenders*.
 

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EXPERTS' PAPERS

Appendix A

Possibilities for Non-Institutional Handling of Offenders

	Institution	Alternatives to institutions
Pre-Trial (Police/Prosecutor)	Offence	Decriminalization Depenalization
	Arrest	Diversion programmes/informal adjudicatory bodies and community courts/communal dispositions Police warnings, summons, citation
Gaoi	Charged	Deferred or suspended prosecution
	Detention	Bail
	Awaiting trial	Release on recognizance Release on supervision Provisional liberty
Sentencing (Courts)	Found guilty	Admonition/reprimands/public censure Restitution Status penalties: disqualifications and deprivation of certain rights Economic sanctions and monetary penalties: fines, day-fine, confiscation, expropriation, etc. Social obligations to the victim: compensation Conditional or absolute discharge or bonds suspended sentence/conditional sentence/probation/judicial supervision Limitation of liberty Corrective or supervised labour Community attendance centres Periodic detention/semi-liberty Week-end imprisonment (Special mental health treatment)
Post-Judicial (Corrections and after care services)	Prison	Furlough Licence on recognizance Work/educational and conditional release Partly suspended sentences Community programmes
		Parole Pardon, amnesty
	Final release	

Source: Odekunle (1983:47)

## Use of Non-custodial Measures for Offenders in Thailand

by Niwet Comephong\*

### Alternative to Pre-trial Detention

#### *Provisional Release or Bail*

#### Overview of Thai Criminal Justice System

The Thai criminal justice system is mainly governed by two codes: namely the Penal Code and the Criminal Procedure Code (C.P.C.). The former lists all major offences while the latter governs the criminal procedure. The police arrest an alleged offender and make inquiry before referring the case to the Public Prosecutor who will determine whether or not to prosecute him. If the Public Prosecutor finds that the information contained in the file of inquiry establishes a strong case against the alleged offender he prepares and signs an indictment charging the alleged offender with the commission of specified crimes. The alleged offender is required to be brought before the trial court at the time the indictment is filed. The charges in the indictment are read and explained to the accused then he is asked to plead to each of the criminal charges.

The trial then follows and it is full-fledged adversary proceeding. But our system is a non-jury one. Judges determine the accused's guilt and innocence as well as pass sentences. Presumption of innocence and proof beyond reasonable doubt are hallmarks of trial. Punishment includes death, imprisonment, confinement, fine and forfeiture of property. For some offences the law states only maximum imprisonment while for others both minimum and maximum imprisonment are provided. For the former

group of offences the Court may impose imprisonment for whatever length so long as it does not exceed the maximum set by law. For the latter group of offences, the Court must set an imprisonment term of neither less than the minimum nor beyond the maximum. The Court passes fixed or flat sentence, i.e. the offender is sentenced to a specific number of years, such as 1 year, 2 years or 5 years. Suspended sentence and suspended execution of sentence are also available.

#### Pre-trial Detention

Prior to trial, an alleged offender may be kept in custody by the inquiry official\*\* or by the Public Prosecutor for the period allowed by law; or detained under the Court's warrant of detention. According to Section 87 of the C.P.C., no arrested person shall be kept in custody longer than is necessary to the circumstances of the case.

In the case of petty offences or of offences having the rate of penalty not more than that of petty offences, the arrested person can be kept in custody only for such time as may be necessary to take his statement and to ascertain his identity and place of residence.

The arrested person shall not be kept in custody for more than forty-eight hours from the time of his arrival at the office of the administrative or police official, but the time for bringing the arrested person to the Court shall not be included in the said period of forty-eight hours. In case it is necessary for the purpose of conducting the inquiry, or there arises any other necessity, the period of forty-eight hours may be extended to as

\* Deputy Chief Justice, Court of Appeals Region 1, Thailand

\*\* Police of the rank of Sub-lieutenant or higher.

long as such necessity persists, but in no case shall it be longer than seven days.

If the necessity to keep the arrested person for more than the period specified in the above paragraph for the purpose of completing the inquiry arises, the alleged offender shall be sent to Court. The Public Prosecutor or the inquiry official shall apply by motion to the Court for a warrant of detention of the alleged offender.

In the case where the offence committed is provided with the maximum punishment of not more than six months' imprisonment or five hundred baht fine, or both, the Court has the power to grant only one remand for a period not exceeding seven days.

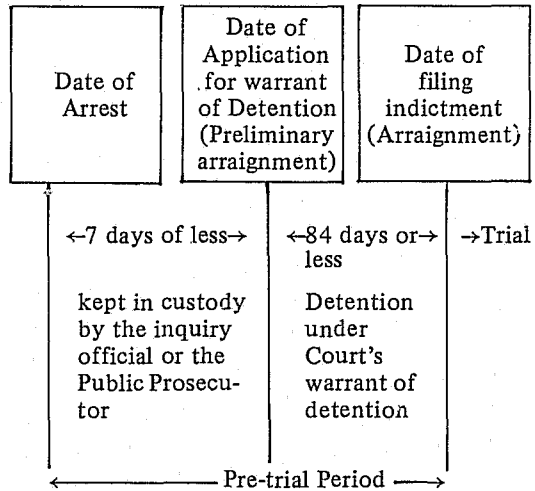
In the case of a criminal punishable with imprisonment, the maximum term of which exceeds six months but does not amount to ten years, or a fine of more than five hundred baht, or both, the Court has the power to grant several successive remands not exceeding twelve days each, but the total period shall not exceed forty-eight days.

In the case of criminal offences punishable with imprisonment, the maximum term of which is ten years upwards, irrespective of any punishment with fine is imposed or not, the Court has the power to grant several successive remands not exceeding twelve days each, but the total period shall not exceed eighty-four days.

To make it more understandable, let us look at the following diagram.

Pre-trial detention is a necessity since there is a need to keep in custody or detention the alleged offender so that the state authorities may follow the necessary steps in the criminal justice process: the police or inquiry official to make an inquiry and to apply for the Court's warrant of detention; the Public Prosecutor to examine the police's inquiry file and consider whether or not to prosecute the alleged offender and to bring him to Court at the time of filing the charge or indictment.

But on the other hand, under the Universal Declaration of Human Right as well as



the law of almost all countries it is generally accepted that in criminal trial, presumption of innocence is to be enhanced; and that before passing a final judgment convicting a person of having committed an offence, such a person shall not be treated as a convict. If an alleged offender is kept in custody or detained pending criminal proceeding at whatever step and finally he is acquitted, it is obvious that he has been deprived of his liberty and his right have been unprotected. Thus, in such case, pre-trial detention is not only a failure to protect an individual's liberty but also a devastation to human rights which are a fundamental and natural law.

In addition, pre-trial detention still carries with it a lot more disadvantages and undesirability. Pre-trial detainees are exposed to every hardship of imprisonment because they are put in prison and treated like ordinary convicted criminals. Sometimes many pre-trial detainees receive worse treatment than convicted persons because they are kept in jail rather than prison. Moreover, there are financial difficulties in maintaining pre-trial detainees. Bail or what we call "provisional release," is an alternative to pre-trial detention. Provisional release during the pre-



## USE OF NONCUSTODIAL MEASURES IN THAILAND

trial period is to ensure the alleged offender's appearance at a further stage of proceedings.

### Types of Provisional Release

There are three types of provisional release:

- (1) Provisional release without bail;
- (2) Provisional release with bail but without security;
- (3) Provisional release with bail and security.

### *Provisional release without bail*

In cases of offences punishable with maximum imprisonment of less than three years or fines, provisional release may be granted without bail. (Section 110, paragraph 2 of the C.P.C.)

When provisional release is to be granted without bail, the alleged offender shall be required to make, before being released, an oath or affirmation undertaking that he shall appear as appointed or according to the summons. (Section 111 of the C.P.C.)

This is similar to release on recognizance in the Manhattan Bail Project.

### *Provisional release with bail but without security*

In cases of offences punishable with maximum imprisonment of three years or upwards, the person to be granted provisional release must furnish bail with or without security. (Section 110, paragraph 1 of the C.P.C.)

When provisional release is to be granted with bail, but without security, the applicant or the surety shall be required, before release has taken place, to sign the bail bond. A bail bond, besides other conditions, shall stipulate:

- (1) that the person granted provisional release or the bailor, as the case may be, shall comply with the appointment or the summons of the official or the Court granting provisional release;
- (2) that a specified sum of money shall be paid in case of a breach of the bail bond.

(Section 112 of the C.P.C.)

### *Provisional release with bail and security*

In case of provisional release with bail and security, the applicant or the surety, like in the case of provisional release with bail but without security, is required to sign a bail bond as provided by Section 112. But, in addition to that, the applicant must furnish the security required before release may take place. (Section 114 of the C.P.C.) There are three kinds of security, namely:

- (1) a deposit of cash;
- (2) a deposit of other valuable securities;
- (3) a person standing as a surety by declaring his valuable securities.

### Where and How to Get Provisional Release

An application for provisional release, without bail or with bail, with or without security, of an alleged offender whether kept in custody detained under a warrant of detention, may be filed by the alleged offender or any interested person as follows:

- (1) where the alleged offender is kept in custody and has not yet been charged in Court, the application shall be filed with the inquiry official or the Public Prosecutor, as the case may be;
- (2) where the alleged offender is detained under a warrant of detention of a Court but has not yet been charged, the application shall be filed with such Court. (Section 106 of the C.P.C.)

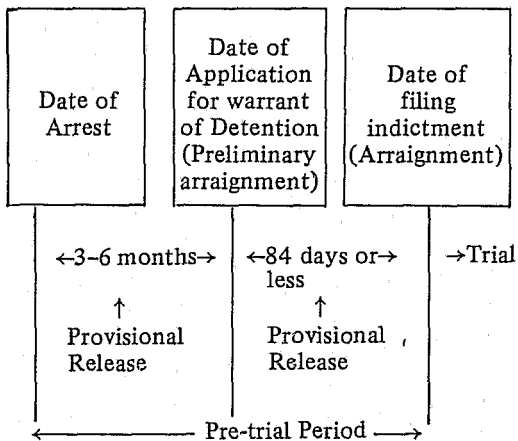
Upon receipt of an application for provisional release, the official or Court shall, without delay, make an order in conformity with the provisions of law. (Section 107 of the C.P.C.)

When provisional release is granted by an inquiry official or Public Prosecutor no matter with or without bail, or with bail with or without surety, the bail bond shall be effective only during the inquiry, or up to the time of the detention during inquiry of the alleged

offender by the Court or until the Court accepts the charge, but not exceeding three months from the first day of provisional release, no matter if provisional release is granted by an inquiry official or by Public Prosecutor. In cases where necessity makes it impossible to complete the inquiry within three months, the period of provisional release may be extended beyond that, but not exceeding six months.

After the end of provisional release according to the foregoing paragraph, if there is still the necessity to continue keeping the alleged offender in custody, the alleged offender shall be brought to Court. And in such case, the provision of section 87, paragraph 4 and 5 shall apply. (Section 113 of the C.P.C.)

To make it easier to understand, please study the diagram below.



Consideration of Application for Provisional Release

In deciding upon an application for provisional release, the following points shall be taken into consideration:

- (1) the gravity of the charge,
- (2) the evidence adduced in the case,
- (3) the circumstances of the case,
- (4) the reliability of the applicant or the securities offered,
- (5) the likelihood of the alleged offender ab-

sconding,

- (6) the danger or injury that might ensue from provisional release,
- (7) in the case where an alleged offender is detained by a warrant of detention of the Court, if there is any objection by the inquiry official, the Public Prosecutor, or the prosecutor, as the case may be, the Court may take such objection into consideration. (Section 108 of the C.P.C.)

This means that in order to decide whether or not to grant provisional release, the officials concerned or the Court must take all those points into consideration. This also applies in determining the types of provisional release and the amount of bail. Let us discuss the meaning of those points.

(1) *The gravity of the charge:* This means that the less severe the punishment for the charge is, the higher the chance to grant provisional release and the less restrictive the type of provisional release and the lower the amount of bail; and vice versa.

(2) *The evidence adduced in the case:* This means that if the evidence establishes a strong case against the alleged offender, provisional release is unlikely. In other words, the weaker the evidence to establish the alleged offender's guilt, the higher the chance to grant provisional release. This sub-section is more relevant to the police's case and the Public Prosecutor's case than to the Court's case because at this stage, trial has not yet been under way.

(3) *The circumstances of the case:* This is to see how much and to what degree the public is interested in the case. In practice, the more interested the public is, the less the chance of granting provisional release.

(4) *The reliability of the applicant or the securities offered:* This means that the more reliable the applicant (the alleged offender himself) or the securities, the higher the chance to get provisional release; and vice versa.

(5) *The likelihood of the alleged offender ab-*

*sconding*: This means that the higher the likelihood of the alleged offender absconding, the lower the chance to grant provisional release and the higher the amount of bail if it is granted; and vice versa.

(6) *The danger or injury that might ensue from the provisional release*: This means that if the alleged offender is an influential person who might do something that may hamper justice in that case or threaten witnesses to the extent that they dare not disclose the truth, provisional release should not be granted.

(7) *Objection of inquiry official, Public Prosecutor or the prosecutor*: This sub-section is relevant to the Court's case only. After the period in which the inquiry official or the Public Prosecutor has power to keep the alleged offender in custody, application for the Court's warrant of detention is needed. And if he is detained by the Court's arrant, and he files an application for provisional release, the inquiry official or the Public Prosecutor or the prosecutor (private individual) may raise an objection. In such case, the Court must take such objection into consideration. Usually objections cover one or more of the points provided by sub-section (1) to (6) of Section 108.

Moreover, in the case where the alleged offender accused of an offence punishable with imprisonment the maximum of which exceeds ten years, if there is the request for provisional release during the examination of inquiry, the Court must ask the inquiry official or the Public Prosecutor whether he shall have any objection thereto. If the Court cannot do so on reasonable grounds, it may refrain from asking him, but must record such reasonable grounds. (Section 109 of the C.P.C.)

#### Termination of Provisional Release

An application for a discharge of the bond or the security may be made by the person who made the bond or furnished the security after delivering the alleged offender to the

official or Court. (Section 116 of the C.P.C.)

When the case becomes final, or liability in the bond is discharged, the securities shall be returned to the person entitled thereto. (Section 118 of the C.P.C.)

#### Breach of Bond

When an alleged offender absconds or is about to abscond, the person who has made a bond or stood as a surety may require the nearest administrative or police official to arrest the alleged offender, or if it is impossible for him to obtain assistance from such officials in due time, he may himself arrest the alleged offender and deliver him to the nearest administrative or police official, who shall forthwith deliver the alleged offender to the official or Court concerned. The travelling expenses shall be borne by such person. (Section 117 of the C.P.C.)

In case of a breach of a bond made with the Court, the Court may order an enforcement of full payment according to the bond or any amount as it thinks fit without entering the claim in Court. Any such order of the Court may be appealed the person who is ordered to pay the money or by the Public Prosecutor. (Section 119 of the C.P.C.)

In case of a breach of a bond made with the inquiry official or the Public Prosecutor, if the party to the bond refuses to pay the money thereof, either of them may enter the claim in Court. And any such order of the Court may also be appealed by both parties.

#### Review of Refusal of Provisional Release

In case the Court of First Instance refuses provisional release the applicant (the alleged offender or the surety) may appeal against such order to the Court of Appeals. The Court of Appeals' order confirming the refusal of provisional release of the Court of First Instance shall be final; but the applicant shall not be barred by such order from submitting his application for provisional release anew. (Section 119 bis. of the C.P.C.)

In case the inquiry official or the Public Prosecutor refuses provisional release, the

C.P.C. is silent. But in practice, the alleged offender may file a complaint against such refusal with the respective superiors of those officials who refused provisional release. And if such act constitutes a crime or a tort the alleged offender may take action accordingly.

#### The Supreme Court President's Recommendations on Provisional Release

The President of the Supreme Court, in exercising the power under Section 1, paragraph 3, of the Court Organization Act, on June 10, 1980, issued certain recommendations to be observed by all judges when considering provisional release applications and giving orders thereof. And in 1988 they were repealed and superseded by the following:

- (1) As a rule, every alleged offender or accused should be granted provisional release, except when there is necessity to keep him in custody or to detain him.
- (2) It is advisable that every convenience be given to all concerned with the process of provisional release. Upon receipt of an application for provisional release, consideration and order should be promptly made.
- (3) In considering and giving order in connection with provisional release application, great care should be taken. Orders should be in uniform. Changes to former orders should be made only when there are special new reasons in order to avoid slander.
- (4) An order refusing provisional release should be accompanied by unequivocal reasons as stated by law.
- (5) (Irrelevant to pretrial provisional release).
- (6) In case the alleged offender is a child or a juvenile or a reliable person who, judging from his post, profession, status or reputation, is unlikely to abscond but will surely appear in Court at the appointed time; such facts should also be taken into account when considering

provisional release application.

- (7) In granting provisional release, security should be reasonably set, taking into consideration the post, profession, status or reputation of the alleged offender or the surety as well as the gravity of the charge, severity of the act and the consequence of the alleged offence.
- (8) In case of an offence punishable with maximum imprisonment of more than three years whereby the Court, under Section 110, paragraph 1 of the C.P.C., has discretion to grant provisional release with bail but without security; the Court should be serious in exercising such discretion.
- (9) In case of the offence punishable with maximum imprisonment of less than three years whereby the Court, with its discretion under Section 110, paragraph 2, may grant provisional release with bail but without security; the Court should frequently exercise such discretionary power; because in such case an accused who has counsel may ask the Court to allow him not to be present at the trial according to Section 172 bis. of the C.P.C.
- (10) In deciding what to accept as security, the Court should not limit security to land alone. Other valuable securities such as buildings, government bonds, lottery of savings bank, bank certified bill of exchange, bank promissory notes, cashier or bank cheques, bank's letter of certification promising to pay penalty charge for breach of bond, etc., should be allowed as securities.
- (11) Section 114, paragraph 2 of the C.P.C. allows a person to stand as a surety by declaring his or her valuable securities. Therefore this kind of security should be accepted when such person is creditable or has a reliable post, profession, status or reputation.
- (12) (irrelevant to pre-trial provisional release).
- (13) In case the surety is a government agen-

cy under the Finance Ministry's Rule Governing Assistance to Government Officials or Employees charged with Crime, if the sum of money stated in the letter of certification is sufficient, such letter should be deemed as reliable sur-ety under Section 108 (4) of the C.P.C.

- (14) (irrelevant to pre-trial provisional release).
- (15) The Court should explain to all concerned with it so that they may understand the process of provisional release. And it should keep an eye on professional bondspersons. Should they do what is improper or take advantage of the public, the Court should give them a warning or take any appropriate action. And when it thinks fit, the Court shall inform the Ministry of Justice of their conduct.

### *Pre-trial Diversion*

#### Introduction

Diversion rests on the idea that not everyone who has violated the criminal law should in fact be prosecuted and punished. In pre-arrest diversion the individual is diverted from formal criminal justice processing before he or she is arrested and formally charged with a crime. For a limited number of offences, pre-arrest diversion is the result of police discretionary action.

In pre-trial diversion, an alleged offender is diverted from the process of criminal prosecution after arrest and is allowed to participate in a supervised programme in the community. In such cases, criminal prosecution is suspended until the required programme is successfully completed; the charge is then dismissed. If the alleged offender gets into further trouble or violates the conditions of the agreement, prosecution is resumed. The programme may include attendance at an alcohol or drug rehabilitation programme; individual, group, or family counseling; registration and contact with mental health outpatient facility; and partic-

ipation in a job-training programme.

#### Situation in Thailand

In early 1977, the Department of Public Prosecution (D.P.P.) made an attempt to introduce the suspension of prosecution programme into our criminal justice system. A draft Regulation Governing Suspension of Prosecution (Regulation) was prepared and submitted to the Cabinet for acknowledgment. The Deputy Prime Minister at the time acting in the name of The Prime Minister, brought the matter to the Cabinet Meeting. The Office of Secretary to the Cabinet forwarded the agenda of the Meeting to the Justice Minister. The Justice Minister was of the opinion that the said Regulation was contradictory to the provisions and the spirit of the C.P.C. So, he who had charge and control of the execution of the C.P.C., opposed it and asked the Cabinet to stop its use. The Cabinet Meeting considered the Regulation as well as the Justice Minister's opposition and resolved that the Regulation be forwarded to the Juridical Council for consideration and to determine if it was legitimate. The Juridical Council, after listening to the views and statement of the representatives of both the D.P.P. and the Ministry of Justice, unanimously ruled that the controversial Regulation was illegal and unenforceable.

So the use of the regulation was scrapped leaving no room for suspension of prosecution in our criminal justice system.

#### Context of the Regulation

The Director-General of the D.P.P., claiming that he was exercising his power under Section 15 of the Public Prosecutor Act (P.P.A.), issued a Regulation on the exercise of the power and performance of duties of the Public Prosecutor in connection with the issuance of order under the C.P.C. and other laws. The contexts of the Regulation are as follows:

Article 1. This regulation is called "Reg-

ulation Covering suspension of Prosecution 1977."

Article 2. This regulation shall apply at the Office of the Public Prosecutor for Court of First Instance nationwide.

Article 3. Suspension of prosecution may be made only in relation to the offences listed in the appendix to this regulation, and when there is conviction that the alleged offender has committed an offence and he has confessed before the inquiry official and filed written application admitting to comply with the behaviour conditions under Article 4.

If the Public Prosecutor finds it proper to suspend prosecution, the following process shall be followed.

Article 4. Upon receipt of the inquiry official's file of the case of which the prosecution is suspendable under Article 3 and the alleged offender is kept in custody or provisionally released pending inquiry and having received an application for suspension of prosecution; if it does not appear that he has received the punishment of imprisonment previously, or it appears that he has received the punishment of imprisonment previously but it is the punishment for an offence committed by negligence or a petty offence, the Public Prosecutor may, when taking into consideration the age past record, behaviour, intelligence, education and training, health, condition of the mind, habit, occupation, environment and personal status of the alleged offender, or motive, nature, cause, object, time, place and all circumstances of the offences, severity of damage or harm to the victim, intensiveness of intention or degree of negligence, repentance, attempt to mitigate the injury of the offence, and, particularly, the anticipated effect of punishment on the offender's living in the future, if he thinks fit, suspend prosecution of such person by directing the inquiry official to make additional inquiries into the offender's former life and his customary behaviour in order to undertake observation of his behaviour.

In directing the inquiry official to make ad-

ditional inquiry in order to undertake observation on the alleged offender in accordance with the first paragraph, Section 143 of the C.P.C. shall apply *mutatis mutandis*.

During the observation on behaviour, the Public Prosecutor shall require the alleged offender to report to his from time to time as he thinks fit, so that he may make inquiries, give advice, assistance or admonition on the behaviour and the pursuit of an occupation as he thinks fit.

Article 5. In implementing Section 4, the Public Prosecutor shall deal with the alleged offender as either of the following:

- (a) to grant provisional release, if he is kept in custody;
- (b) to extend provisional release, if he has been on provisional release;
- (c) to file an application with the Court for release, if he has been detained by the Court pending trial.

Article 6. There shall be no suspension of prosecution in the following cases:

- (a) when the Public Prosecutor is of the opinion that the alleged offender has committed a one-act offence violating several provisions of laws or has committed several distinct and different offences but the alleged offender has confessed to only certain counts, provisions or offences;
- (b) when the Public Prosecutor is of the opinion that the alleged offender has committed a one-act offence violating several provisions of laws or has committed several distinct and different offences while some counts, provisions or offences are not suspendable under this Regulation;
- (c) when the alleged offender is separately charged with other criminal offences of which the cases are not final;
- (d) when the alleged offender is serving imprisonment, confinement or relegation under the Penal Code in other cases, or being kept in custody for training under other laws;

## USE OF NONCUSTODIAL MEASURES IN THAILAND

- (e) when prosecution of the case, to be suspended is going to be precluded by prescription within one year from the date on which the Public Prosecutor receives the inquiry file from the inquiry official;
- (f) when the case falls within jurisdiction of the Juvenile Court;
- (g) when such case may be lawfully settled.

Article 7. In the following events suspension of prosecution shall be terminated:

- (a) when the alleged offender fails to report to the Public Prosecutor as appointed or summoned without reasonable grounds;
- (b) when the alleged offender commits new crimes other than petty offences during the period of behaviour observation and the Public Prosecutor issues prosecution order thereon.

When suspension of prosecution terminates, the Public Prosecutor shall issue prosecution order and take any measures necessary to obtain the body of the alleged offender before filing indictment with the Court.

Article 8. When the observation on the behaviour has proceeded until the determined period is completed in the absence of such events as stipulated by Article 7, the Public Prosecutor shall issue a non-prosecution order before proceeding according to Section 145 of the C.P.C.

The D.P.P.'s Rationale behind the Regulation

The D.P.P. was of the opinion that at the time a number of offenders were not really vicious. They had good records, showed decent behaviour, good education and high social status; and had contributed a lot to society. The offences they committed were caused by negligence or by other parties' excessive self-defence, for example, act under extreme circumstances or under provocation; and were not mala in se but mala prohibita such as going out at night and doing

something without a license. Prosecution of such offenders did them no good but rather caused great harm since standing trial hampered their records and severely affected their minds and occupation as they faced dismissal on termination from work. And if they were sentenced to imprisonment they had to face every hardship and all the adverse effects of imprisonment while rehabilitation was futile because they were not really vicious, the D.P.P. claimed. On the other hand, prosecution was costly, wasted time, increased Court backlogs and prison problems. Therefore, suspension of a prosecution programme should be adopted, the D.P.P. contended.

The D.P.P. also claimed that our prosecution system was based on opportunity principles rather than legality principles. In support of its contention the D.P.P. cited the following provisions of the C.P.C.:

- (a) Section 143 which provides that the Public Prosecutor has the power to direct the inquiry official to make additional inquiry;
- (b) Section 35 which reads "A motion for leave to withdraw a criminal prosecution may be filed at any time before judgment by the Court of First Instance."

The D.P.P. also claimed that the Director-General was empowered by Section 15 of the Public Prosecutor Act to issue a Regulation Governing Suspension of Prosecution. The said Section reads "In exercising power and performing duties under the C.P.C. or other laws, the Director-General of the D.P.P. shall be authorized to issue special orders or regulations for the Public Prosecutor to observe."

Justice Minister's Opposition to the Regulation

The Justice Minister argued that since the Regulation was issued by the Director-General of the D.P.P. in the exercise of his power under the provisions of Section 15 of the Public Prosecutor Act; therefore he

might not exercise his power under such provisions in contradiction of the provisions of the C.P.C. or other laws which determine the power and duties of the Public Prosecutor. He cited the provisions of Section 11 of the Public Prosecutor Act which reads "The Public Prosecutor has power and duties as follows: (1) In criminal cases, he has such power and duties as prescribed by the C.P.C. or other laws." He went on to say that the Public Prosecutor's power and duties in issuing an order, with regard to the inquiry filed under Section 143 of the C.P.C., was simply to issue prosecution order, non-prosecution order and to require additional inquiry by the inquiry official: nothing more. The order issued by the Public Prosecutor must be made on the alleged offender's guilt: whether or not, on the basis of the facts in the inquiry file, the latter has committed the offence with which he is charged. If yes, the Public Prosecutor shall issue prosecution order, but if no, he shall issue a non-prosecution order.

With regard to additional inquiry, the Minister of Justice said that the law empowers the Public Prosecutor to direct the inquiry official to make it only when the evidence appearing in the file was not clear enough for him to determine whether or not the alleged offender had committed the offence. It was to be made only for the purpose of searching for evidence to prove the alleged offender's guilt or innocence rather than for observation of his future behaviour which was irrelevant to the issue as to whether or not he had committed the offence, the Justice Minister elaborated. To support his view, the Justice Minister cited the definition of the term "inquiry" given by Section 2 (11) of the C.P.C. which reads, "Inquiry means the collection of evidence and other proceedings conducted by an inquiry official according to the provisions of this Code in connection with an alleged offence, for the purpose of ascertaining the facts or establishing the guilt and securing the punishment of the offender." He then concluded that when

the Public Prosecutor invokes the Regulation by requiring additional inquiry in order to conduct an observation on the behaviour of the alleged offender whom he believed to have committed the offence and who has confessed to it at the inquiry instead of issuing prosecution order; he was conspicuously violating the provisions of the C.P.C. Admitting that Section 138 of the C.P.C. empowers the inquiry official to inquire into the former life and customary conduct of an alleged offender in order to ascertain his background and customary behaviour, the Justice Minister contended that the law so provided in order that the Public Prosecutor might submit the obtained information to the Court for use in determining how light or severe the punishment should be; or whether or not to grant the offender suspended sentence or suspended execution of sentence: nothing more. The law does not at all require such inquiry in such a manner as to place probation on the alleged offender's future behaviour before issuance of prosecution order or non-prosecution order as set forth by the D.P.P. in the Regulation, the Justice Ministry added.

With regard to Section 35 cited by the D.P.P. to support its opinion that the Thai system of prosecution was based on opportunity principles, the Justice Minister disagreed with the opinion. He argued that the said provisions were meant to provide to the prosecutor of a criminal case with an opportunity to withdraw prosecution whenever it appears after the indictment had been filed that the accused was innocent or there were legal grounds upon which he ought not to be punished.

The Justice Minister also maintained that the offences listed in the appendix to the Regulation of which the prosecution might be suspended, namely an act under extreme circumstances, excessive self-defence and offence under prosecution, were all offences with important points of law. They often came to the Supreme Court for consideration and decision on questions as to whether such



and such an act amounted to an offence by necessity, excessive self-defence or an offence under provocation, he concluded. It was inappropriate to leave such important questions of law entirely to the public prosecutor to decide, he added.

Although he agreed with the D.P.P.'s opinion that at the time, a great number of offenders were not vicious and there were reasons to give them the opportunity to reform, the Justice Minister contended that in practice, in such cases, the court usually granted probation in accordance with Section 56 of the Penal Code. And, as in most civilized countries, probation was dealt with by the Court; probation should not be placed on the alleged offenders whose guilt had not yet been proved in Court as proposed by the Regulation, he said. Suspension of prosecution is based on the same principles as probation; therefore it was seriously inappropriate to give the Public Prosecutor the power which has been expressly and exclusively vested in the Court under the Penal Code, he concluded.

#### The Juridical Council's Opinion

The Juridical Council was of the opinion that Section 15 of the Public Prosecutor Act empowered the Director-General of the D.P.P. only to issue a regulation governing the exercise of power and performance of duties of the Public Prosecutor under the C.P.C. and other laws. The C.P.C. did not empower him to issue regulations on anything other than what was provided by it. The controversial Regulation was giving more power to the Public Prosecutor and increasing the alleged offender's right other

than provided by the C.P.C., so it was in effect an amendment to the C.P.C. which needed the format of amendment to the law, the Juridical Council said. It maintained that the issuance of the Regulation was an act beyond the power allowed by law, thus the Regulation was unenforceable.

Moreover, the Juridical Council was of the opinion that the essence of the said Regulation was also in contradiction with the provisions of the C.P.C. and the Act Instituting the District Court and its Criminal Procedure (A.I.D.C.), for example:

- (a) Under Section 143 of the C.P.C., if it is evident that the alleged offender has committed an offence, the Public Prosecutor must issue a prosecution order. He may issue non-prosecution order only when he finds that the evidence in the inquiry file is insufficient to prove the alleged offender's guilt. In a case when he believes that the alleged offender is guilty, the Public Prosecutor is not allowed to issue non-prosecution order on any other grounds.
- (b) The A.I.D.C. provides that prosecution of the alleged offender shall be made within seventy-two hours from the time of arrest; and that in case the alleged offender confesses to the offence before the inquiry official, the Public Prosecutor must bring him to Court and charge him orally with no inquiry being needed. Such provision is meant to speed up the prosecution. Therefore, the D.P.P.'s introduction of suspension of prosecution by means of the said Regulation is obviously inconsistent with the said Act.

Appendix

Regulation List of Offences

*A. The Penal Code*

1. Offences by mistake on facts with nominal punishment  
(Section 62, paragraph 1.)
2. Offences believed to have been committed under the offender's ignorance of law.  
(Section 64.)
3. Excessive self-defence or act under extreme circumstances  
(Section 69.)
4. Act under provocation  
(Section 72.)
5. Negligent Act causing death or serious injuries to others where the alleged offender has reasonably mitigated the injuries after the incident, such as paying part of medical fees, funeral expenses, lawful maintenance or damages to the victim's

property, except when the alleged offender falls in either case of Section 29 (1) (2) (4) (7) and Section 30 of the Land Traffic Act.

(Section 291 and 300.)

6. Theft committed against the will or on account of unbearable poverty and the property is of little value.  
(Section 334, last paragraph.)

*B. Offences under Other Acts*

Carrying guns in towns, villages or on public roads or tracks without licence.

(Section 8 bis. of the Guns Act, only in the case of licenced guns, except when the alleged offender has committed another offence under Section 7 of the same Act.)

## SECTION 2: PARTICIPANTS' PAPERS

### Current Alternatives to Imprisonment in Hong Kong

by Chan Chun Yan\*

#### (I) Introduction

In common with many countries, a growing tendency of sentencing in Hong Kong has been to explore effective alternatives to imprisonment in order to cope with changes in the political and socio-economic environment. There are a number of alternatives for the courts to choose from. Some are "one-off" sentences while others require offenders to undergo a residential or non-residential programme which is monitored by either the Government or a non-government agency. This paper does not attempt to discuss the philosophy behind each of these alternatives. They are, however, all designed basically to satisfy the main objectives of punishment, namely, retribution, prevention, reformation and deterrence, with a varied degree of emphasis on rehabilitation and reintegration.

#### (II) Sentences in lieu of Imprisonment

These allow the offender, with regard to the circumstances of the offence, to receive one or more punishments which do not require him to undergo a programme of supervision or other treatment.

##### (a) Fines

The courts may order an offender to pay fines in addition to or in lieu of other punishment. Fines are sometimes imposed for a serious offence accompanied by a prison sentence. For the great majority of offences such as contravening traffic laws, gambling or disorderly conduct, fines are common in

lieu of other punishment. The Magistrates' Courts and the District Court may fix a term of imprisonment not exceeding 12 months to be served in default of payment of a fine.

##### (b) Conditional and Absolute Discharge

Upon conviction, the court, with regard to the circumstances under which the offence was committed, may release an offender with or without conditions.

A conditional discharge may require the offender to enter into a bond of good behaviour for a period up to three years. If the offender breaches any condition of the order, he may be brought back to court and sentenced again for the original offence.

##### (c) Suspended Sentence

A court may order a term of imprisonment of not more than two years to be suspended for a period between one to three years from the date of the order. When an offender under a suspended sentence is convicted of another offence punishable by imprisonment, the court may order the suspended sentence to be activated with or without altering the original term.

##### (d) Corporal Punishment

A male offender may be ordered to be caned in addition to, or in lieu of any other punishment for certain offences such as indecent assault or possession of an offensive weapon. This punishment is limited to a maximum of 18 strokes for offenders aged 17 or over. This kind of punishment is, however, seldom ordered nowadays. In 1988, only eight cases were recorded. Recently, action has been taken to abolish corporal punishment in entirety.

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### (III) Sentences Requiring an Offender to Undergo a Programme in lieu of Imprisonment

These alternatives can be classified into two distinct categories, non-residential and residential.

#### (A) *Non-residential Programmes*

As their term implies, the offender is not required to undergo a period of confinement. Instead, he is bound by an order to comply with certain conditions for a specified period of time which does not conflict with normal life.

##### (a) Probation

Under the provisions of the Probation of Offenders Ordinance, the court is empowered for certain offences to place an offender under the supervision of a probation officer for a period from one to three years. In issuing a probation order, the court would consider the nature and the circumstances of the offence, and the character and background of the offender. If the offender is aged 14 or above, he must show a willingness to comply with the conditions of the probation order.

During the supervision period, the probation officer would try to befriend the probationer and utilize all relevant social resources to assist in the rehabilitation including financial assistance, accommodation, education and employment. Through home visits and interviews at the work place, the probation officer maintains regular contact with the probationer and provides him with adequate guidance and support. The provision of probation services is under the auspices of the Social Welfare Department. There is at present a total of 11 probation offices serving the Magistracies, and a team of high court probation officers serving the District Courts and the High Courts. Probation officers may be required by the court to provide information on an offender's character and background prior to sentencing. For the 6 months

commencing from 1st April 1989, a total of 5,012 social enquiries and 1,743 probation orders were made. During the period from 1.4.88 to 31.3.89, 2,187 out of a total of 2,721 probationers had completed probation satisfactorily.

If a probationer breaches any conditions of the probation order, he is liable to be brought before the court to answer for it and if he is no longer considered suitable for probation, he will be sentenced for his original offence.

A Volunteer Scheme for Probationers aimed at promoting greater community involvement in the rehabilitation of offenders was launched in August 1976. Under the scheme, volunteers are selected to provide probationers with personal and moral support, and offer them services such as private tutoring and guidance in the use of their leisure time.

##### (b) Community Service Orders

Under the Community Service Orders Ordinance enacted in November 1984, the courts may order offenders of, or over 14 years of age who are convicted of an offence punishable by imprisonment, to carry out community service in addition to or in lieu of any other sentence. The offender is required to perform unpaid work of benefit to the community for a number of hours not exceeding 240 within a period of 12 months under the supervision of a probation officer, who also provides rehabilitative counselling and guidance.

Offenders placed under a Community Service Order may be required to work in country parks, beaches, hospitals or homes for children, the disabled or elderly. Work sessions of four to eight hours each are held mainly over weekends or public holidays. A breach of any requirement would be reported to the court and may result in the offender being re-sentenced for the offence for which the order was made.

The Community Service Order Office is operated by the Social Welfare Department.

## ALTERNATIVES TO IMPRISONMENT IN HONG KONG

Full scale implementation of the scheme commenced on 1st January 1987 at 3 Magistrates following a two year trial service before it is extended to all magistrate courts expectedly in 1990/91. During the period from April 1989 to December 1989, a total of 71 persons were sentenced to undergo this programme. The active case-load as at 31st December 1989 was 67.

### *(B) Residential Programmes*

Residential alternative is designed to provide institutional training and/or treatment programmes in a closed environment for offenders of particular age groups or those requiring specific care and services.

#### *(a) Probation Homes/Hostels*

Apart from the probation services, a probation order may also include special conditions requiring the probationer to reside in a probation home or accommodation provided by a voluntary agency, while those who are between 16 and 21 years of age may be required to reside in an open probation hostel for a maximum of one year. Probationers aged from 7 to under 16 years can only be committed to a probation home run by the Social Welfare Department for residential training for a maximum of one year. The programmes of such hostels place emphasis on career guidance, proper use of leisure time, and financial and social responsibilities of a law abiding citizen. Residents may work outside the hostel during the day.

The Social Welfare Department operates seven residential institutions which were established under the Juvenile Offenders Ordinance, the Probation of Offenders Ordinance and the Reformatory Schools Ordinance. Amongst them, three are multi-purpose institutions partially used as probation homes while one is exclusively used as such. During the period from April 1989 to September 1989, a total of 225 probationers were admitted to these probation homes/hostels and the number of residents as at 31st December 1989 was 328.

#### *(b) Reformatory Schools*

The Reformatory Schools Ordinance makes provision for a convicted male juvenile offender aged from 7 to under 16 years to be committed to a reformatory school for an indeterminate period from one to five years or until he has reached the age of 18.

Of the seven residential institutions operated by the Social Welfare Department, two are used to cater to the residential training programme which is aimed primarily at character reform. An offender may be released on licence at the discretion of the Director of Social Welfare and subject to such conditions as he thinks fit. The services provided including counselling, family visits and assistance in finding suitable accommodation, job or school placement. If the licensee fails to comply with the conditions specified in the licence, he may be recalled for further training.

During the period from April 1989 to September 1989, a total of 71 boys were admitted to the two reformatory schools and the number of inmates as at 31st December 1989 was 239.

#### *(c) Detention Centre*

The court may order a male offender from 14 to under 25 years of age, convicted of an offence punishable by imprisonment, to undergo a period of training in a detention centre administered by the Correctional Services Department:

- (1) For young offenders aged 14 to 20 years, the period of training varies from a minimum of one month to a maximum of six months; and
- (2) For young adult offenders aged 21 to 24 years, the period of training varies from three months to one year.

The detention centre programme is designed for the correction of young male persons who are first offenders or with a very short criminal history. The programme

places emphasis on obedience, physical exercise, counselling and remedial education with the objective of teaching the inmates to respect the law while at the same time providing positive training. Detention is followed by one year's supervision which is carried out by the After-care Unit of the Correctional Services Department.

(d) Training Centre

Persons aged between 14 and 20 who are first offenders or have a previous criminal history including a previous institutional sentence may be sent to a training centre run by the Correctional Services Department for an indeterminate period from six months to three years. The institutional training is followed by three years compulsory supervision under the Department's After-care Unit. The training centre programme provides education, vocational training, psychological and after-care services.

(e) Drug Addiction Treatment Centre

A person found guilty of an offence punishable by imprisonment, and certified by a medical officer to be drug dependent, may be ordered by the court to undergo a period of treatment and rehabilitation from two to twelve months in a drug addiction treatment centre run by the Correctional Services Department. Residential treatment is followed by twelve months compulsory supervision by the Department's After-care Unit. The conviction will not be registered unless the court so directs. The programme is based on strict discipline and encourages physical and psychological therapy provided to meet individual needs.

(f) Mental Hospital

The court may order a convict to undergo a specified period of specialist treatment in a mental hospital or the Correctional Services Department's psychiatric centre, if such treatment is recommended by a psychiatrist and the court is satisfied that such treatment is in the interests of the offender and the pub-

lic.

(g) Society for the Aid & Rehabilitation of Drug Abusers (SARDA)

Having considered all circumstances of the offence, the court may, in lieu of imposing a sentence of imprisonment, order the discharge of an offender after his entering into a recognizance not exceeding a period of three years. The order may include such conditions as compulsory treatment in a rehabilitation programme run by a non-government organisation. It is not unusual for the court to order a person found guilty of a criminal offence who is addicted to a dangerous drug to be placed in a non-governmental organisation for rehabilitation.

SARDA, the acronym for the Society for the Aid & Rehabilitation of Drug Abusers, was established in 1961 to help and rehabilitate drug abusers. The clientele are confined to drug abusers and services cover a wide range of community-based programmes, to be attended on a voluntary basis. There are at present two treatment and rehabilitation centres, one for either gender, providing the necessary facilities for detoxification, recuperation and rehabilitation. Two years after-care supervision is provided on a voluntary basis from the date of admission to the treatment and rehabilitation centre. As at 31st December 1989, there were 177 men and 27 women inside the centres undergoing treatment and 2,416 men and 100 women following the after-care programme outside the centres.

**(IV) Other Community-Based Programmes for Serving Prisoners or Persons under Detention in a Training Centre, Detention Centre and Drug Addiction Treatment Centre**

*(a) Half-way House Programme*

The Correctional Services Department operates a half-way house programme to help inmates/prisoners re-integrate into the

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community as a transitional phase from institutional training to a community-based correctional programme. The programme is regarded as a continuation of the programmes of the detention, training and drug addiction treatment centres.

The first half-way house was established in August 1968 to help persons formerly in a drug addiction centre. The purpose of the programme is to provide shelter for those treated male drug addicts without a place to live or family ties, or those with unsatisfactory living conditions or an undesirable home environment, as well as persons in need of close supervision and intensive counselling. This half-way house has the capacity for 30 residents and during the period from July 1989 to December 1989, a total of 130 treated drug addicts were admitted to the house. The number of residents as of 31st December 1989 was 21.

The half-way house programme has produced encouraging results and there has all along been a strong demand for the service. The Department therefore took steps to extend the scheme to other type of offenders in early 1983. A second half-way house with a capacity of 120 residents was built for inmates about to be released from the detention and training centres. Residents must work or go to school during the day and return at night. The new programme aims to instill a sense of responsibility and cultivate good working habits within a loosely structured but supportive environment. In April 1984, a new half-way house was opened to extend the service to the female inmates.

Upon the implementation of the Prisoners (Release Under Supervision) Ordinance in July 1988 (to be discussed in the following sub-section) the half-way houses were expanded to functions as work-release centres for prisoners released under the Pre-release Employment Scheme.

During their stay in the half-way houses/work-release centres, regular group and individual counselling sessions are conducted to enhance their insight into their own

problems and to sustain the efforts of reforming themselves to lead a productive and law-abiding life.

On weekends or on general holidays when a resident is not required to attend school or go to work, he may apply for home leave. This arrangement aims to encourage the re-establishment of family relationships and facilitate the re-integration process.

From July 1989 to December 1989, a total of 214 inmates from detention/training centres had been admitted to the half-way house. The number of residents as of 31st December 1989 was 27.

### *(b) Release Under Supervision Scheme and Pre-release Employment Scheme*

The Prisoners (Release Under Supervision) Ordinance was introduced in July 1988. Based on this Ordinance two schemes were devised which allow prisoners to be released earlier than their date of discharge. The first scheme, namely, the Release Under Supervision Scheme, allows prisoners sentenced to a period of three years or more, who have served not less than half or 20 months of their sentence, whichever is the longer, to be released under supervision. Whereas the second scheme which is known as the Pre-release Employment Scheme provides some prisoners with the opportunity to obtain outside employment during the last six months of their sentence. The latter scheme is operated in conjunction with the half-way house programme as discussed earlier.

The Release Under Supervision Scheme allows the release from custody in advance of a date of discharge, providing the prisoner agrees to abide by conditions laid down in a supervision order issued by the Release Under Supervision Board.

The merit of the scheme is that it enables authorities to decide on the best timing for releasing a prisoner based on individual development rather than an arbitrary date of discharge pre-determined by the court many years before. This system further provides

an incentive for prisoners to behave themselves whilst in custody so as to improve their chance of getting released at an earlier date. The schemes can be seen as a contract between the prisoners and society to behave or face the sanction of recall to prison to serve the balance of the entire sentence.

*(c) Compulsory After-care Supervision for Young Prisoners*

The Criminal Procedures (Amendment) Ordinance requires after-care supervision to be provided for all young prisoners who, were sentenced to a term of imprisonment of three months or more before their 21st birthday, and released from prisons before their 25th birthday. The twelve-month supervision period is undertaken by the department's After-care Unit.

**(V) Conclusion**

The administrators of the criminal justice system of Hong Kong are constantly looking for effective alternatives to imprisonment. Community-based programmes are actively preferred to imprisonment which is considered as a last resort as far as rehabilitation and re-integration are concerned. Where imprisonment is appropriate, the needs of offenders are recognized and proper measures are taken to protect psychological well-being against the effects of their being segregated from the society. Certainly, more effective alternatives have yet to be explored firstly to alleviate the problem of overcrowding inside penal institutions and more importantly to keep pace with contemporary developments in the correctional field.



# Community-based Treatment of Offenders in the Philippines: Implementation of the Adult Probation Law

by *Loudes W. Aniceto*\*

## I. Introduction

Enshrined in the 1987 Philippine Constitution are formal declarations on the primacy of every human person and the respect for and protection of human rights. These constitutional guarantees<sup>1</sup> embrace all persons regardless of creed, color and socio-economic-political stature.

The primary responsibility for the attainment of these constitutional commitments rests with the criminal justice system of the country. It is therefore imperative and urgent that reforms be undertaken by the said system to enable it to dispense justice more judiciously, swiftly, efficiently and effectively.

### *A. The Philippine Criminal Justice System: an Overview*

The Philippine criminal justice system has the same components as other criminal justice systems in the world. It is composed of the law enforcement, the prosecution, the courts, the corrections and the community.

1. *Law Enforcement*—Agencies that make up this pillar of the criminal justice system are the Integrated National Police, the Philippine Constabulary, and the National Bureau of Investigation. Included also are the regulatory agencies which enforce laws of special nature such as the Economic Intelligence and Investigation Bureau of the Department of Finance, Bureau of Customs, Bureau of Forestry, Dangerous Drugs Board, Commission on Immigration and Deportation, etc.

tion, etc.

2. *Prosecution*—The National Prosecution Service is the principal agency for this component. It is under the supervision and control of the Secretary of Justice and is composed of the Office of the Chief State Prosecutor, the Regional State Prosecutor's Office and the Provincial and City Fiscal's Office.<sup>2</sup>

3. *Courts*<sup>3</sup>—This is made up of courts at the municipal, city, regional and national levels, as follows:

- a. Municipal Courts are the Municipal Trial Courts (covers only one (1) municipality) and Municipal Circuit Trial Courts (covers two (2) or more municipalities).
- b. City Courts are called Metropolitan Trial Courts (in Metropolitan Manila) and Municipal Trial Courts in Cities (for cities outside Metropolitan Manila).
- c. Regional Trial Courts are found in the National Capital Region and Regions 1-12.
- d. Shari'a Courts are equivalent to Regional Trial Courts but are found in some provinces in Mindanao where the Muslim Code on Personal Laws is enforced.
- e. Sandiganbayan is the so-called graft court with exclusive jurisdiction over violations of the Anti-Graft and Corrupt Practices Act.
- f. Court of Appeals handles appeals from the RTCs, quasi-judicial agencies, boards or commissions.
- g. Supreme Court is the highest court of the land. It is composed of a Chief Justice and 14 Associate Justices.

4. *Corrections*—The agencies that compose

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this pillar are the Bureau of Corrections (then National Bureau of Prisons), the Probation and Parole Administration, and the Board of Pardons and Parole, all of which are under the umbrella of the Department of Justice, the provincial jails under the provincial government and the Office of Jail Management and Penology which is a major staff unit of the Integrated National Police.

5. *Community*—At the base of the Philippine criminal justice system is the politicized community such as the barangays which are the smallest political units in the country. National agencies that play leading roles in harnessing the community into active participation in criminal justice administration and dispensation are the Department of Social Welfare and Development and the Department of Local Government.

*B. The Corrections Sub-System in Focus*

Similarly with other countries in the world, the corrections sub-system in the Philippines has the primary responsibility of reforming and rehabilitating the deviant behavior of offenders through institutional corrections within correctional facilities or non-institutional correction, in the communities. It is pointed out in this sub-system, the offender had passed the law enforcement, prosecution and courts processes.

1. *Institutional Corrections*—There are three levels in the Philippine prison system based on the penalty imposed on the offender.

a. There are the City-Municipal jails (N = 1,500) operated by the Integrated National Police where prisoners who have been sentenced by the courts to imprisonment of six (6) months or less are committed. These City/Municipal jails have a yearly average of 14,100 prisoners. Most of these jails are over-crowded and this congestion is primarily attributed to the large number of detention/prisoners who, because of

poverty, cannot post bail and have temporary liberty. Detention prisoners comprise 90% of the jail population nationwide, and in the metropolitan jails, this percentage goes as high as 95%. (See Table 1)

- b. There are 73 provincial jails administered and supervised by the provincial governments with a total yearly average of 10,000 prisoners who have been committed to an imprisonment term of from 6 months and 1 day to 3 years.
- c. The Bureau of Corrections under the Department of Justice maintains seven (7) correctional facilities for prisoners sentenced to an imprisonment of more than three (3) years. In 1989<sup>4</sup>, the monthly average inmate population was 12,970, distributed in different prisons/penal farms.

Table 1: Jail Population, 1984-1988

Year	Sentenced	Detention	Total	Detained (%)
1984	2,668	11,064	13,732	80 %
1985	2,471	12,340	14,811	83 %
1986	1,631	13,803	15,434	89 %
1987	1,775	13,238	15,013	88 %
1988	1,528	13,619	15,147	90 %
1989	1,671	12,919	14,590	88.5%

Table 2: Monthly Average Inmate Population CY 1989

Prisons/Penal Farms	Monthly Average Inmate Population	Percent Share
New Bilibid Prison	7,071	55%
Iwahig	2,064	16%
Davao	2,049	16%
Sablayan	676	5%
San Ramon	626	5%
Leyte	215	1%
Women's Correctional	269	2%
	12,970	100%

2. Non-Institutional Corrections—Under this category, the reformation and treatment of offenders is undertaken outside correctional facilities and is community-based. These community-based alternatives to imprisonment do not include pre-trial diversions which in the Philippine setting take the form of case disposition under the barangay justice system, release on recognizance, bail, pre-trial conference and imposition of fines. Rather, the non-institutional methods of treatment for offenders being pointed out are the following:

a. *Probation for Youth Offenders*—Presidential Decree No. 603, otherwise known as the Child and Youth Welfare Code provides for the disposition of youth offenders. The Code defines a youth offender as “a child, minor or youth, including one who is emancipated by law, who is over nine (9) but below 18 years of age at the time of the commission of the offense.”

After the apprehension of the youth offender, he is referred for physical and mental examination and committed to the Department of Social Welfare and Development or detention center or the care of his parents or other suitable person who shall be responsible for court appearance. If the court finds him guilty of the offense charged, the court determines the impossible penalty but instead of pronouncing judgement of conviction, the court suspends all further proceedings. The court releases him to the custody of his family, guardian or any responsible person in the community. The Department of Social Welfare and Development (DSWD), through a Social Worker supervises the youth probationer, draws a treatment plan with the offender and the family, refers him for job placement, provides capital assistance to start an income generating project and renders a report/recommendation upon which the court may terminate the case.

b. *Suspended Sentence and Probation of Drug Offenders*—The Dangerous Drugs Act of 1972 (or Republic Act. No. 6425) provides procedures for the placement of certain drug offenders to community-based programs or rehabilitation centers as an alternative to imprisonment in jails.

If an accused less than 21 years old is found guilty of the use or possession of any dangerous drug and is a first time offender, the court may defer sentence and place him on probation under the supervision of the Dangerous Drugs Board or its agents and under such conditions as the court may impose for a period ranging from six months to one year. If the accused violates any of the conditions of his probation, the court shall pronounce judgement and conviction and he shall serve his sentence. If, however, he does not violate any of the conditions of his probation, then upon expiration of the designated period, the court shall discharge him and dismiss his case.<sup>5</sup>

If the court finds that such accused is a drug dependent, it shall commit him to a center for treatment and rehabilitation and upon certification of his rehabilitation the court shall enter an order discharging him. The court then issues an order for the Department of Social Welfare and Development to undertake after-care and follow-up service for a period not exceeding 18 months.<sup>6</sup>

c. *Adult Probation*—A significant milestone in the Philippine Criminal Justice System is the institutionalization of the Adult Probation Law pursuant to the provisions of Presidential Decree No. 968, as amended by Presidential Decree No. 1257 and further amended by Batas Pambansa Bldg. 76. Its full implementation has given a tremendous boost to the deinstitutionalization program of the correctional agencies as shall be properly discussed and shown in the main topic of this paper.

d. *Parole and Conditional Pardon*—Under these forms of release, prisoners who no

longer need institutional measures and are ready to continue serving their sentence in the community under supervision thus, giving them the opportunity to be reintegrated into the Community and live as free men. After release from confinement and before going home to his place of residence, the parolee/pardonee reports to the Board of Pardons and Parole, is briefed on the conditions of his release and his duties and obligations as such. Any violation of the conditions given him may subject the offender to recommitment to prison. The only difference between conditional pardon and parole is the granting authority: the President in the case of pardon and the Board of Pardons and Parole for the latter.

## II. Probation: an Alternative to the Confinement of Adult Offenders

### A. Historical Setting

The system of modern probation as a diversionary measure to incarceration had its beginnings in the middle part of the nineteenth century in the United States.<sup>7</sup>

As early as 1932, the Revised Penal Code of the Philippines, specifically Article 80 thereof, provided that youth offenders could avail themselves of a system of probation. Then in 1935, probation of first time offenders 18 years old and above who were convicted of certain offenses was provided under Act No. 4221 of the Philippine Legislature. Said law, however, was declared unconstitutional.

In 1976, Presidential Decree No. 968 otherwise known as the Adult Probation Law was signed into law although it was expressly provided that the application of the substantive provisions of said law were effected on January 3, 1978. The time lag between the approval of the law and its implementation was intended to complete the organization of the Probation Administration, recruit, select and train its personnel, and conduct a massive public information drive to gain

public support for probation. From August to November 1977, a series of regional seminars was conducted to ensure coordination among the officials responsible for the application of probation—all members of the judiciary, from the Supreme Court justices to the municipal judges, fiscals, state prosecutors, and special counsels of the Department of Justice, chapter Presidents of the Integrated Bar of the Philippines, probation officers, station commanders of the Integrated National Police, private law practitioners, and concerned community leaders.

### B. Special Features of the Probation System

The probation system in the Philippines has special features which are adopted to the country's cultural setting. Among the features are:

1. probation can be enjoyed only once as distinguished from the multiple probation system where an offender may be granted probation several times;
2. probation is intended for offenders who are 18 years of age and above;
3. Offenders disqualified are those:
  - a. sentenced to serve a maximum term of imprisonment of more than six (6) years and one (1) day;
  - b. convicted of any offense against the security of the State;
  - c. who have previously been convicted by final judgement of not less than one month and one day and/or a fine of not more than Two Hundred Pesos", and;
  - d. who have been once a probation under the provision of P.D. 968.
4. The decision to grant or deny probation rests on the court with the Probation Office playing a supportive role to the court;
5. The administration of the probation system is the responsibility of the Probation Administration (now the Probation and Parole Administration)
6. Volunteer Probation Aides may be appointed for a term of two years which may be terminated earlier or renewed, by the

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Probation Administrator from among citizens of good repute and probity. They are not entitled to compensation except for reasonable travel allowance.

### *C. Rules on Probation Methods and Procedures*

Rules and regulations are promulgated to carry out the purposes of Presidential Decree No. 968, as amended, as follows:<sup>8</sup>

1. to promote the correction and rehabilitation of an offender by providing him with personalized, community-based treatment;
2. to provide an opportunity for his reformation and re-integration into the community; and
3. to prevent the commission of offense.

Probation is a privilege granted by the court; it cannot be availed of as a matter of right by a convicted person. Thus, the need for the filing of a petition for probation with the trial court which convicted him after he is convicted and sentenced. The petitioners should not have any of the disqualifications under P.D. 968, as amended by BP Blg. 76. The court notifies the Prosecuting Officer of the filing of a petition who may, within 10 days from receipt of notification, submit his comments on such application. With the petition proposed in due form and the petitioner not possessing any of the disqualifications under the law the court orders the Probation Office within its jurisdiction to conduct a post-sentence investigation and to submit the report and recommendation within sixty (60) days from receipt of order.<sup>9</sup>

The post-sentence investigation is undertaken by a Probation Officer. The investigation process starts with an interview of the probationer and his accomplishment of an information worksheet which shall be the basis for further investigation. A thorough investigation is then undertaken by the Probation Officer to determine the antecedents mental and physical conditions, character and socio-economic status of the petitioner.

This includes interviewing relatives/victim for additional data. All data gathered shall be treated confidentially and the petitioner must be informed about this matter. Results of the interviews and investigation shall guide the Probation Officer in the determination and recommendation of the manner of probation supervision, if granted.<sup>10</sup>

The Post-Sentence Investigation Report is then submitted to the court within the 60-day period. Said report aims to assist the court in determining whether or not the ends of justice and the best interests of the public as well as that of the petitioner will be served by the grant or denial of probation. The Report is signed by the investigating probation officer and approved by the Head of the Probation Office. The Report contains the circumstances of the offense, psychosocial information of the offender, evaluation of the petitioner's potential for re-integration into the community, a recommendation of grant or denial of petition for probation, and information regarding the petitioner's financial capability to meet or satisfy civil obligations."<sup>11</sup>

The petition for probation shall be resolved by the court not later than fifteen (15) days from the date of receipt of the Report from the Probation Office. If the petition is granted, the execution of the sentence is suspended and the petitioner is released subject to terms and conditions imposed by the court, under the supervision of the Probation Office. The Probation Order is effected upon its receipt by the petitioner and the period of probation starts, unless otherwise specified by the court. The Probation Order is read before the petitioner and the Probation Officer in open court. The petitioner is informed about his compliance with conditions of probation otherwise non-compliance or commission of another offense shall mean termination of probation and service of his sentence<sup>12</sup>

As mandatory conditions of probation, the petitioner is required to present himself to the Probation Office concerned for supervi-

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sion within 72 hours from receipt of said Order and to report to the Probation Officer at least once a month during the period of probation. Other conditions which may be required of him are cooperation with the supervision program, meeting his family responsibilities, employment and not to change said employment without prior written approval of the probation officer, comply with a program of paying the civil liabilities to the victim, and rehabilitation/educational trainings, among others.<sup>13</sup>

Supervision of probationers is undertaken by Probation Officers to ensure that the conditions set forth in the probation order are carried out by the Probationer, and to bring about the rehabilitation of the probationer and his re-integration into the community. If the probationer does not report to the Probation Officer, a proper report should be submitted to the court. If a probationer desires to travel outside the jurisdiction of the Probation Officer which has supervision over him, he must file a request for said purpose with his Probation Officer. If the travel is for more than 30 days, the request shall be transmitted by the Probation Officer concerned to the court for approval. Transfer of the residence of a probationer outside the jurisdiction of the original court entails transfer of control over the probationer to the Executive Judge of the Regional Trial Court at the place of the new residence and supervision over him by the Probation Office having jurisdiction over the new residence. A copy of the Probation Order, the Post-Sentence Investigation Report and other pertinent records are transferred to the Executive Judge and the new Probation Officer.<sup>14</sup>

A recommendation for the issuance of a warrant of arrest by the court should be submitted by the Probation Office in cases of absconding probationers. Modification of conditions of probation may be made by the court, *motu proprio*, or on motion of the probation officer or the probationer. Such modifications in the conditions must be carried in the court order and shall take effect

upon receipt thereof by the probationer.<sup>15</sup>

Any act or omission on the part of the petitioner with respect to the terms and conditions under the probation order is a violation of probation which needs a fact finding investigation by the Probation Officer. Once the investigation is completed, a report is submitted by the Probation Office to the court which, after considering the nature and seriousness of the alleged violation may issue a warrant of arrest. Once arrested and detained, the probationer shall be brought immediately to the court for summary hearing of the violation charged. If a hearing cannot be conducted immediately, the probationer may post bail following provisions on the release on bail of persons charged with a crime. He shall have the right to counsel. If the violation is established, the court may revoke the probation granted and the probationer serves the sentence originally imposed. Otherwise, the probationer may continue probation under modified probation conditions and terms.<sup>16</sup>

A probation case may be terminated by the successful completion of program of probation, revocation for cause, or death of the probationer. At least thirty (30) days before the expiration of the period of probation or unless otherwise required by the court, the Probation Office shall submit a final report. The final discharge of a probationer shall restore to him all civil rights lost or suspended as a result of the conviction and shall fully discharge his liability for fine imposed as to the offense for which probation was granted, without prejudice to his civil liability therefor. The Probation Office, upon receipt of court order finally discharging the probationer, shall formally close the records of a probation case and the case is archived.<sup>17</sup>

All probation records are confidential and a penalty of imprisonment of from six (6) months and one (1) day to six (6) years and a fine ranging from P600.00 to P6,000.00 shall be imposed upon any person violating or causing the violation of confidentiality of prison records.

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### *D. The Organizational Structure for the Adult Probation System*

To carry out the objectives of the Adult Probation Law, the Probation Administration (now Probation and Parole Administration) was organized into 13 regional offices, with at least one (1) field office in each province and city all over the country.

The head of the Agency is an Administrator, assisted by an Assistant Administrator, both of whom are appointed by the President of the Philippines. There are seven (7) staff divisions in the central office to provide staff support to the Administrator and the regional offices. These divisions are the 1) Administrative Division, 2) Financial and Management Division, 3) Legal and Inspection Division, 4) Training Division, 5) Case Management and Records Division, 6) Clinical Services Division and 7) Community Services Division. There is a Planning Office under the direct supervision of the Administrator which coordinates the planning efforts of the various staff divisions and regional offices and prepares the agency plans and programs.

The principal officer in the probation system is the Probation Officer in each province and city. He is responsible for the actual investigation of cases referred by the court and for the supervision of all probationers within his area of jurisdiction. He is assisted by as many assistant probation officers and probation inspectors as needed, depending on the workload and geographical conditions of the area. The minimum requirement for appointment as regional provincial and city probation officer, assistant probation officers and probation inspectors are the completion of a bachelor's degree major in social work, sociology, psychology, criminology or related field and at least three (3) years of work in this discipline or is a member of the Philippine Bar.

Volunteer probation aides may also be appointed in far flung areas which are not ordinarily reached by regular transportation. There is a policy that the volunteer proba-

tion aides should be residents of the place where the probationers to be supervised also reside.

The major functions of the Probation Administration are:

1. the investigation of applicants for probation for the guidance of the courts, and
2. the supervision of probationers after they have been granted probation by the courts.<sup>18</sup> A report prepared by the Probation Administration indicates that a total of 91,009 investigations were conducted over a ten-year period (1978-1988) or an annual average of 9,100. Supervision cases numbered 69,143 (for 1978-1988) or an annual average of 6,914.

In 1988, the total court referrals received for investigation were 6,682. With 1,433 cases carried over from 1987, the overall caseload summed up to 8,115. Out of these cases, 5,660 post-sentence investigation reports were completed while 817 manifestations or petitions were prepared and submitted to the courts. The total work output for investigation is 6,477 or 80% with 1,638 or 20% remaining as active investigation cases for the initial caseload for 1989.<sup>19</sup>

At the start of 1988, 19,755 active supervision cases were carried over from 1987 to which 5,234 were added as new supervision referrals received from the courts. Of these 24,989 cases, 6,531 or 26% were concluded—either terminated, revoked or dropped while 18,458 or 74% remained under active supervision status.

### *E. Rehabilitation Programs*

The probation system has a responsibility to ensure that probationers receive whatever services they need for their rehabilitation. Some of these services are provided by the probation system, such as helping them adjust to their status as probationers, or providing them with information and facilitating referrals to enable them to cut through the barriers and receive assistance from so-

cial institutions that may be reluctant to accept them.<sup>20</sup>

Other needs of probationers related to employment, training, housing, health, livelihood activities are the responsibility of other social institutions and should be provided by them. Thus, appropriate linkages are being established with government and community agencies with resources/services needed by the probationers.

1. *Job Placements*—a total of 1,003 clients were referred for job placements in government and private companies such as the Department of Social Welfare and Development (DSWD), National Irrigation Administration (NIA), Department of Labor and Employment (DOLE), Bureau of Forestry, Department of Public Highways (DPH), Coca-Cola Bottling Co., Nangalisan and Balatoc Mines, and FF Cruz Construction, among others.<sup>21</sup>

2. *Vocational and Skills Training*—Some 644 probationers were provided skills training in 1988 by mostly government agencies such as the Department of Education, Culture and Sports (DECS), Department of Agriculture and Food (DAF), National Manpower and Youth Council (NMYC), Department of Trade and Industry (DTI), National Cottage Industries Development Authority (NACIDA), Bureau of Fisheries and Aquatic Resources, DSWD, etc.

Literacy and education programs are being pursued under the DECS tutorial and non-formal education classes. Other clients take formal education classes on their own under the guidance and supervision of probation field offices.

3. *Medical Assistance*—Probationers avail of medical assistance in the form of medical examinations and treatment, admission to clinics and hospitals, blood donations, dental care and treatment, and medical services to families of probationers, especially indigent men. These services are made available through linkages established among pro-

bation offices and hospitals, health centers, the National Red Cross, Philippine Mental Health Association, and private medical practitioners. In 1988, a total of 1,565 clients were beneficiaries of medical assistance.<sup>22</sup>

4. *Livelihood Program*—This program offers the most promising opportunity for the probationers to have an improved social outlook and attitude towards work and life as a whole. Probationers are encouraged to engage in productive and income-generating projects. Access to government programs such as the Self-Employment Assistance Program of DSWD, and *Biyaya ng Dagat* and *Maisang Dagat* of DAF. In 1988, livelihood projects of 6,833 clients centered mostly on livestock dispersal, fish culture, backyard gardening, poultry/hog/goat raising, sponsored by the project proponent agencies and other institutions.

5. *Social and Religious Activities*—Probationers are encouraged to participate in religious or moral regeneration programs to have a well-balanced and well-rounded rehabilitation program. They attend Bible studies, marriage encounters, prayer meetings, moral and spiritual counselling sessions. Social activities include participation in sports, tree planting, clean-up and beautification drives.

#### *F. Cost Effectiveness of the System*

A comparison of the total annual expenditures of administering and operating the probation system by the Probation Administration and the annual maintenance cost of prisoners reveals that the government saved the amount of P29.6 million in 1988 alone. A ten-year period (1978-1988) data show a total savings of P460.2 million.

It is also underscored that the probationer, on account of his non-confinement in a correctional facility and the given opportunity of employment, becomes a taxpayer and becomes a contributor to the coffers of the government. Rather than being a prisoner



who is maintained at a daily subsistence rate of P12.00, he becomes a productive member of the community. Also, the probationers are able to earn and to be able to pay their civil liabilities to their victims.

Far greater than these quantifiable savings are the humane gains in terms of the development and promotion of human worth and dignity, maintenance of family ties and continued performance of responsibilities in the community.

### Concluding Statements

The implementation of the Adult Probation Law for over a decade in the Philippines saw its acceptance and viability as a correctional measure. As an alternative to imprisonment, it has diverted thousands of offenders outside confinement and has contributed financial as well as social gains to the government and the community.

Since probation is community corrections, the move towards the direction of fitting its program into the national socio-development program which calls for the partnership of government agencies, the politicized community and the non-governmental organizations (NGOs) is in order. Already, the Probation Administration has launched a program innovation called Inter-Agency Coordination and Agreement Program (ICAP) to meet the challenge of correctional work. It is observed, however, that most of the responding agencies are those of the public sector. The potentialities of the greater participation and involvement of NGOs need to be explored with more interest. The integration of the management of probationers with the programs/projects of NGOs can spell a great difference and greater success for the system.

With the community corrections program aligned with service delivery programs of both government and non-government or-

ganization and given the Philippine culture of close family ties and clannishness, the future spells its fulfillment.

### Notes

1. Preamble; Article II, Sections 4,9 and 10; Article III, Sections 8 (2), 11, 12 (2), 19 (1&2); Article VII Section 18; Article XIII Sections 1&17. 1987 Constitution of the Republic of the Philippines.
2. Artemio Tuquero, "The Role of Public Prosecutors in the Philippines," *Criminal Justice Journal*. 3:2, September-December 1988.
3. Leo D. Media'ldia, "Court Structure and Trial Proceedings in the Philippines," *Criminal Justice Journal*. 3:2, September-December 1988.
4. 1989 Annual Report of Accomplishments of the Bureau of Corrections.
5. Article VI, Section 32, R.A. No. 6425.
6. Regulation No. 7 of the Dangerous Drugs Board, dated 11 November 1982.
7. Howard Abadinsky, *Probation and Parole: Theory and Practice* (New Jersey: Prentice Hall, 1982), pp. 20-23.
8. Section 2, The Revised Rules on Probation Methods and Procedure.
9. Sections 3-6, *Ibid*.
10. Sections 9-14, *Ibid*.
11. Sections 16-20, *Ibid*.
12. Sections 21-25, *Ibid*.
13. Sections 26-27, *Ibid*.
14. Sections 28-31, *Ibid*.
15. Sections 32-34, *Ibid*.
16. Sections 35-41, *Ibid*.
17. Sections 50-54, *Ibid*.
18. Cleto B. Senoren "Seven Years of Probation in the Philippines", *Criminal Justice Journal*, 3:2, 2nd Quarter 1923.
19. 1988 Accomplishment Report, Probation Administration.
20. Francisco Ruivivar, "The Performance of the Probation System", An Unpublished Masteral Thesis, National Defense College of the Philippines, 1983.
21. 1988 Probation Administration Report of Accomplishments.
22. *Ibid*.

# The Use of Non-custodial Sanctions in the Treatment of Law Breakers in Singapore

by *Lim Kwang Chieng\**

There are ample provisions for the use of alternative sanctions at various stages of the sentencing process in the Singapore Penal Code. These measures range from fines to absolute discharge. The imposition of fines is the most commonly used non-custodial sanction. In the case of juvenile offenders a variety of non-custodial measures are also available in addition to custodial sanctions such as confinement to an approved school or a place of detention.

The following is a short description of the various alternatives to custody in practice here.

## I. Non-custodial Sanctions in Sentencing

### *a. Fines*

The fine is a purely punitive measure, which enables the court to demonstrate society's disapproval of the offence in a case where punishment short of imprisonment is the appropriate response.

Payment of fines by installment may be permitted by the Court in certain cases. For serious offences fines are imposed in combination with imprisonment. Judges and Magistrates have discretionary powers in choosing between fines and custodial sentence where a minimum sentence is not fixed by law.

### *b. Conditional Discharge*

An order for conditional discharge may be made out by the court if considering the cir-

cumstances surrounding the offence, nature of offence and the character of the offender does not warrant punishment nor placement under Probation Order.

A person is granted conditional discharge subject to the condition that he commits no offence during the period of conditional discharge which may last up to 12 months.

### *c. Absolute Discharge*

Provision for absolute discharge of law offenders is available in the Probation of Offenders Act. The Offender is found guilty, but in view of the circumstances of the case, he is discharged without punishment. Absolute discharge is not related to cases that are dismissed for lack of evidence or are for which a person is not found guilty.

### *d. Probation Orders*

Whenever a person is found guilty of an offence other than one for which the penalty is fixed by law, the court may make a Probation Order for placement under the supervision of a probation officer or a voluntary probation officer instead of sentencing him to imprisonment, having regard to the circumstances, nature of offence and character of offender. The Probation of Offenders Act, which governs the terms and conditions pertaining to the placement of offenders on probation orders was enacted in 1951. It could apply to any offence except for serious crimes like murder or treason where the sentence is fixed by law. Probationers will be placed under the supervision and personal care of a probation officer for a specified period ranging from one to three years.

There are no conditions with regard to the offender's age, sex or the number of times

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he may be placed on probation. However, the Courts invariably exercise a certain degree of selectiveness when considering probation for offenders. For this, the Courts rely on the probation officers for pre-sentence reports on the offenders.

A probation order imposes certain conditions which must be observed by the probationer during his period of probation. Failure to comply with any of the conditions specified in the Probation Order constitutes a breach of the order and renders the probationer liable to be brought back to the Court to receive sentence on the offence for which he was placed on probation.

The fundamental aim of probation is to uphold the law and protect society by probation officers working with the offenders to improve his behaviour. Probation allows for the offender to be at liberty in the community but subject to certain requirements regarding his way of life, with help from professional social workers available to him in order to strengthen the offender's resources so as to make him a more responsible person.

## II. Alternatives to Imprisonment at Post-sentencing Stage

In Singapore, statutory remission of sentence is provided for all prisoners except those who are sentenced to death. Apart from this, work-release schemes are available for both short and long sentence prisoners.

### a. Remission

Remission of sentence, under the Prisons Regulations, is available to any convicted person serving a sentence of imprisonment of one month and above. The rules allow for remission of one-third of the sentence imposed by the Court, subject to good behaviour in prison. This means that in practice any prisoner will be released after serving two-thirds of the term imposed unless he has been ordered to forfeit a specified period of remission by the prison authority for

breaches of discipline.

### b. Work Release Scheme

Two work release schemes for short- and long-term prisoners were introduced in November 1985 and July 1986 respectively. Under these schemes, prisoners are released for gainful employment towards the end of their sentences during the day. Allocation to work release is an administrative decision of the Prisons Department and does not constitute a sentence of the Court.

#### (1) Work Release Scheme for Short-sentence Prisoners

This scheme was implemented primarily for first offenders serving a sentence of 12 months and below. These prisoners mainly comprise those imprisoned for traffic offences, illegal hawking, gaming, breach of trust, affray, cheating and such other minor offences. Selection is based on a set of criteria which serves to exclude those with adverse social and criminal records. The prisoners work in private enterprises by day and return to day-release camps in the evening.

The work releasees receive the same remuneration, insurance coverage and privileges as other workers in the same industry. Wages are paid directly to the Prisons Department through the Prisoners' Savings Accounts and disbursements are arranged to cover the following:

- a) travel and incidental expenses;
- b) savings for release;
- c) support of dependents;
- d) payment of fines/debts.

No deductions are made for room and board provided at the day-release camps. The main objective of this scheme is to avoid the "prisonization" of short-term prisoners by enhancement of self-image through responsibility. The work releasees have the option to continue employment following discharge. Thus far (as of 31.12.89) 645 prisoners have been placed on the scheme since

its inception on 8 Nov. '85. The success rate stands at 82%.

(2) Pre-release Employment Scheme for Long-term Prisoners

Prolonged incarceration causes prisoners to become accustomed to institutional life and may therefore find difficulty in adjusting to life outside upon release. The pre-release employment scheme was instituted to aid the re-adjustment of people who have spent long periods of their life in prison through gradual re-introduction to freedom. Under the scheme, any prisoner serving a sentence of 4 years or more will become eligible to be considered for placement on the scheme when he has a balance of one year of his sentence to serve (after one-third remission of sentence). The duration of the scheme is 12 months and comprises four stages, each lasting 3 months. The degree of freedom and privileges is progressively increased through the stages. This is to condition an inmate to total freedom in a systematic manner. The pre-release employment scheme commenced on 7 July '86 and 53 long sentence prisoners have successfully completed the scheme. Seventeen prisoners are presently undergoing the scheme.

**III. Non-custodial Sanctions Pertaining to Juvenile Offenders**

Juvenile offenders are dealt with under the provisions of the Children and Young Persons Act and the Juvenile Court is empowered with the authority to impose any of the following non-custodial sanctions if found guilty of an offence:

*a. Acquittal/Discharge*

The Court may acquit and discharge the offender or discharge him in circumstances not amounting to an acquittal.

*b. Release on Bond*

The offender may be discharged upon his entering into a bond to be of good behaviour

and to comply with such order as may be imposed.

The parent or guardian may be compelled to execute a bond to exercise proper care and guardianship.

*c. Commitment to Care of Relative*

The offender may be committed to the care of a relative or other fit person as determined by the Court.

*d. Probation*

The Court may make a probation order placing the offender under the supervision of a probation officer or some person appointed for the purpose by the Court, for a period of one to three years.

*e. Parole of Offenders from Approved Schools*

A juvenile offender may be sent to an approved school for a period of three to five years. The Director of Social Welfare on the advice of the Parole Board shall have the power to order the release on parole license of any child or young person who has been detained in an approved school or an approved home for one year, at any time before the completion of his full period of detention and on such conditions as may be stated by him in such Order.

**IV. New Directions in Non-custodial Penalties in Singapore**

The correctional policy of a country is a reflection of prevailing societal values and philosophies pertaining to crime and the treatment of criminals. This is evident in the tough stance adopted by the Government against crime and drug abuse. Legislations providing for the enhancement of sentences for a wide range of crimes have been made over the years in response to an increasing crime rate.

Like criminal justice systems elsewhere, sentencing practices vary according to their degree of development and the prevailing socio-political climate. At present, the scope

and application of alternatives to incarceration is limited. However a feasibility study on Community Service Order and Home Detention as a means of diverting a significant proportion of minor offenders from prisons is being carried by the Ministry of Home Affairs. It is at an exploratory stage.

Taking cognizance of the potential implications for the entire criminal justice system and public safety, careful considerations are being given as to which category of prisoners could be placed on this scheme.

*The Potential of Home Detention and Community Service Order as a Viable Non-custodial Sanction*

Home detention is a sanction designed to permit the release of selected prisoners to serve the last part of their sentences in an approved place in the community under intensive supervision. It can also be used as an alternative to a jail term for certain first-timer offenders. The following categories of law offenders have been identified as suitable for release under this scheme:

- a) Minor offenders and fine defaulters;
- b) Non-violent property offenders serving the last period of their sentence (after deduction of one-third of sentence as remission);
- c) Ordinary remandees who could not obtain bailors to secure their release;
- d) Prisoners who are given extended home leave under the Work Release Scheme;
- e) Those placed under police supervision.

Electronic tagging will be used to enhance the enforcement of Home Detention, if the

scheme is found feasible.

*Community Service Order*

Community Service Order Scheme could be used as an alternative to imprisonment for non-violent and minor offenders who might otherwise have been sentenced to a short-term of imprisonment. The scheme employs a system of law offenders rendering community service to targeted groups or establishments, ranging from 40 to 240 hours, mostly on weekends, and taking about 2 to 12 months to complete. This scheme could be used as a sanction for offences where incarceration is too harsh a punishment.

**V. Conclusion**

Crime has always been the scourge of human societies and its total eradication is virtually impossible. The excessive use of custodial sanctions would not solve the problem. Prison systems are expensive entities, in terms of building and maintenance costs. If the eradication of crime is not possible, then the best option available is its effective management.

This is where non-custodial sanctions fit in. These sanctions need not be seen as soft options to a hard problem such as crime. Community-based sanctions can fulfil the needs of punishment, deterrence and incapacitation. Therefore certain categories of law offenders can be adequately dealt with without being incarcerated.

In this regard, the feasibility of Community Service Orders and home detention with electronic tagging is being looked into presently, for possible implementation.

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Annex 1

Outcome of Juvenile Offenders Placed on Probation

Year Cases Placed on Probation	No. of Cases Placed on Probation	Year Cases Classified	Satisfactory		Unsatisfactory		Others	
			Nos.	%	Nos.	%	Nos.	%
1982	251	1985	220	87.3	28	11.2	3	1.2
1983	214	1986	147	68.7	60	28.0	7	3.3
1984	215	1987	150	69.8	56	26.0	9	4.2
1985	259	1988	216	83.4	32	12.4	11	4.2
1986	316	1989	250	79.1	58	18.4	8	2.5
			(78.0%)		(19.0%)		(3.0%)	

Outcome of Adult Offenders Placed on Probation

Year Cases Placed on Probation	No. of Cases Placed on Probation	Year Cases Classified	Satisfactory		Unsatisfactory		Others	
			Nos.	%	Nos.	%	Nos.	%
1982	318	1985	265	83.3	43	13.5	10	3.2
1983	217	1986	185	85.3	31	14.3	1	0.4
1984	421	1987	355	84.3	61	14.5	5	1.2
1985	453	1988	369	81.5	69	15.2	15	3.3
1986	401	1989	327	81.5	60	15.0	14	3.5
			(83.0%)		(15.0%)		(2.0%)	

Figures in parenthesis is the average percentage.

Annex 2

Trend of Sentencing Policy between 1982-1988

Offence	Length of Sentence	Year	1982	1983	1984	1985	1986	1987	1988
			Class III <sup>1</sup>	Less than 1 year	48.5	53.6	35.7	9.2	14.1
	1 year to less than 5 years	36.5	36.0	43.5	62.2	54.9	59.5	63.1	
	More than 5 years	15.0	10.4	20.8	28.6	31.0	30.8	25.9	
Class IV <sup>2</sup>	Less than 6 months <sup>3</sup>	71.3	68.7	59.6	47.0	55.3	56.8	55.4	
	6 months to less than 3 years	25.0	28.0	33.0	43.0	38.6	35.9	36.9	
	More than 3 years	3.7	3.3	7.4	9.0	6.1	7.3	7.7	

- 1: Class III offences – Offences of which the primary motive is against property in the course of which threat or force is used or hurt caused.
- 2: Class IV offences – Offences of which the primary motive is against property in the course of which no threat or force is used or hurt caused.
- 3: As Class IV offences are of a less serious nature dictating shorter sentence, the demarcation limits are so stipulated so that a vivid scenario showing the trend in sentencing policies is discernible.

## NONCUSTODIAL SANCTIONS IN SINGAPORE

### Annex 3

#### Comparison of Incarceration Rates in 1988

Country	Incarceration Rate (per 100,000)
1. Singapore	183.3*
2. Malaysia	126.1
3. Fiji	117.8
4. Republic of Korea	107.9
5. Hongkong	105.7
6. England/Wales	101.8
7. New Zealand	95.4
8. Australia	70.1
9. Japan	44.7
10. Philippines	21.6
11. Indonesia	21.6

\* This figure is arrived at by dividing the number of Singaporeans incarcerated, on 31 Dec. '88 by the population. Singaporeans committed to Drug Rehabilitation Centres are excluded.

## SECTION 3: REPORT OF THE COURSE

### Summary Reports of the Rapporteurs

#### Session 1: Alternatives to Pre-trial Detention and Pre-trial Diversions

*Chairperson: Mr. James Ame Onu (Nigeria)*

*Rapporteur: Mr. Prasit Siripakorn (Thailand)*

*Advisors: Dr. Femi Odekunle*

*Mr. Yutaka Nagashima*

*Mr. Tetsuya Ozaki*

#### Introduction

Our group was assigned the discussion of non-custodial measures applied during the pre-trial stage and as well as the pre-trial diversions in the criminal justice system. This report is the product of the individual experience of each member of the group as well as of the discussions during the sessions of the Group Workshop. The group was made up of two public prosecutors (from Thailand and Japan), three police officers (from Brazil, Jordan and Japan), one correctional officer (from Nigeria), one social welfare officer (from the Philippines) and one Judge (from Japan). We are grateful to the Professors of UNAFEI, Mr. Y. Nagashima and Mr. T. Ozaki, and to the visiting expert Dr. F. Odekunle, the Director of the United Nations African Institute for Crime Prevention and Treatment of Offenders, for their fruitful comments during our discussion. This report is the reflection of the participants' experiences in the field of criminal justice and although all members made due efforts of non-custodial measures. We acknowledge that some possibilities may have been overlooked.

#### Scope

From the beginning of our discussion,

some participants pointed out that the "pre-trial" period, as interpreted, does not cover the period after the prosecution has already been instituted to the court: it is limited to the period prior to prosecution. And the "trial" period begins from the moment of the institution of prosecution to the court until the judgment is rendered by the court. However, the group was of the opinion that it would limit the discussion on the topic to the period when a judgement is rendered by the court.

From our discussion, it was found that one of the reasons why prisons are overcrowded is the large number of persons who are arrested and then detained or remanded by the authorities pending investigation and trial. In order to reduce overcrowding in prisons and the unhappy situation on the side of those who are detained, various non-custodial measures have been introduced to avoid any unnecessary and excessive detention. At the pre-trial stage, efforts have been made to speed up investigation, prosecution and trial by amending laws relating to criminal procedure and to release the arrested under certain circumstances. Even pre-trial diversions such as administrative fine, withdrawal, personal reparations and suspension of prosecution, etc., have been introduced in some countries such as Japan, Korea and Brazil.

#### Detention

In most countries, it is accepted that detention of the suspect is a means being used in criminal justice upon the arrest of the suspect. Such a power is usually given to police or prosecutors to take the suspect into their custody at the earliest stages of the investigation. In some countries, a suspect who has been arrested may be detained on remand by



## ALTERNATIVES TO PRETRIAL DETENTION

court order for a certain period of time during the investigation.

However, in most countries there is a law which places a clear and definite limit on the period for which the suspect may be detained and also on what grounds the suspect may be detained by the police before he or she is taken before a judicial officer for an order granting bail or for remand. A long period of detention of massive suspects awaiting investigation and trial indicates inefficient and delayed investigations, prosecutions and trials. In some cases an excessive length of detention creates prison overcrowding which aggravates the dehumanizing situation in prison and also ignores the very fundamental human rights embedded in our Constitution since the guilt of the suspect has not yet been established.

As it is noted above that the fundamental human rights of the suspect should not be ignored in the Constitution or criminal procedure code of all countries, the suspect may, however, be deprived of his liberty and freedom under some circumstances in order to serve the criminal justice system. The necessity for pre-trial detention of the suspect is recognized in every country as may be pointed out as follows:

1. to prevent the arrested from absconding, especially when he is idle or does not have a fixed residence or lives by begging;
2. to prevent him from destroying or implicating the evidence or hindering the investigation;
3. to prevent him from the possibility of threatening the victim or witness; and
4. to collect certain evidence which proves the criminal offences without his interference.

The above-mentioned are stipulated as the principal reasons to justify the deprivation of the right of the suspect, and are found in criminal procedure codes of every country. In some countries there are some additional necessities for the justification of detention.

In Jordan and Brazil, for example, detention of the arrested is justified on the ground that an arrested has a previous criminal record.

### Alternatives to Pre-trial Detention

We recognize the needs and necessities for holding the suspect in custody for some certain duration, especially in certain types of serious offences. The severity of offences, however, should be weighed against the concern for preventing unnecessary or excessive detention. In the best of opinions there must be alternatives to pre-trial detention. Generally speaking, a suspect should be presumed innocent before trial as guaranteed by the Constitution. Although it was suggested that cases of pre-trial detention are rife and rampant and in fact that has been the practice, bail is still recognized as a viable and acceptable alternative to detention. Bail is accepted in many countries throughout the world. However, there are other non-custodial measures being implemented such as warnings and restriction of movement.

### Release

Detention is necessary during investigation from the police's side. The provisional release, nevertheless, shall not be overlooked, especially in petty or minor offences where the penalty is not severe. Or even in serious offences, if there appears no possibility of necessities as mentioned before, the release should be effective immediately.

The group is of the opinion that pre-trial release is justified on the following grounds:

1. to avoid unnecessary and unreasonable detention, especially in petty or minor offences where excessive detention, in Thailand for example, is possible up to 48 days;
2. to avoid the abuses of power by police such as coercion or threat, while the arrested is in custody as it appears in many countries, especially in those countries

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where the investigating power is vested only in the police;

3. to avoid the possible damage that might result from being detained.

There may be the possibility of a case where a false accusation is made by one who claims himself/herself as a victim and police believe so without sufficient investigation. Or ever if there is sufficient grounds to believe so, the possible damage from being detained outweighs the severity and necessity of detention.

Release is the best measure for the prevention of unnecessary detention at the investigation or trial stage. It is one of the best ways to avoid harrassment of the person being tried and also the overcrowding in jails until his/her guilt or innocence is proved.

Almost all countries have a release system. Most countries have pre-trial release systems (pre-trial in this sense means that prosecution is not yet instituted by the court), while Japan has no pre-trial release system on bail. In other words, in Japan, bail is possible for an offender only after the institution of prosecution (when he becomes a defendant) mainly because the pre-prosecution detention is limited to a maximum of 20 days, which is not very long and does not cause great harm to a suspect. And, there is a judge sitting as a neutral person, who considers the grant of detention as a safeguard to a suspect.

In Japan, the release system during trial is practiced as it is called "the post prosecution release on bail system." As the participants pointed out there is, however, no pre-trial release on bail in the criminal justice system. One reason is that the necessity for preventing the offender from destroying evidence before prosecution is, generally speaking, higher than that after prosecution. But this explanation is not persuasive in the case where there are no possible or reasonable grounds to believe that the offender may destroy evidence.

There is general public comment, recommending the introduction of a pre-trial

release system. However, there is also the opinion which differs with such recommendation, citing that there is a neutral person, who is the judge acting as a screening instrument, who shows no bias or prejudice in considering the petition for detention of the public prosecutors.

Another safeguard to the abuse or excessive detention may be found in a Law like that in Japan. In Japan, it is stipulated in the law that when detention has been effected for an unreasonably long period the Court shall rescind the detention itself and that the Court may, if it deems proper, suspend the execution of detention by entrusting the offender to the charge of his relative and the wife, or restricting his dwelling.

In Brazil, the release system is accepted and practiced through the police authorities in case of not more than two years of jail, or through the judiciary body in case of longer terms of prison.

However, safeguards to the release is also emphasized in Brazilian law, where the release is not possible in one of the following cases:

1. cases of vagrancy and medicancy;
2. cases of violence and serious threat to the viability of the prosecution; and
3. the recidivist offender who has already been convicted of another crime.

Thus, the three categories mentioned above seem to be reconciled with the general safeguards as cited earlier. Since vagrancy and medicancy is no guarantee of his appearance to the authority when such the arrested is required, it is not easy to relocate or to bring back one who has no certain residence.

In Japan and Thailand, this system is available to the arrested in every type of offence. Even in murder cases, release request is possible in some certain circumstances, depending upon the discretion of the judge. In some countries, like Brazil and Jordan, this system is not available in serious offences or to

## ALTERNATIVES TO PRETRIAL DETENTION

recidivists. While in the Philippines, this system is available in all offences except for capital offences.

In countries where this system is legally available in every type of offence, not every release request is granted. It is at the sole discretion of authorities to decide whether or not to grant release by taking into account many appropriate factors which may be prescribed by law or in practice. The following points shall be taken into account:

1. the gravity of the charge;
2. the evidence received in the case;
3. the circumstances of the case;
4. the security offered (if required);
5. the likelihood of absconding; and
6. the danger or injury that might occur from the release.

The authorities who may grant release vary from country to country as well as the stage when release is granted. In the Philippines, the Court is the only authority to grant release. In Jordan and Japan, the prosecutor and judge have the authority to grant release. In Thailand, the police, public prosecutor and courts have the authority to grant release. In Brazil and Nigeria, the police and courts have the authority to grant release. In some of those countries, the safeguard system allows the suspect dissatisfied with the disposition of the police and/or prosecutor, to make a request for release on bail to the court or to the judge.

### *Release on Recognizance*

The most common measure used for avoiding pre-trial detention is simple release on recognizance, whereby the suspect commits himself/herself to appear before the court when the case comes to trial. This is "bail" not involving the posting of property or money as security. In Brazil, Jordan and Thailand, this system is called "release on recognizance."

In some countries, the suspect can be released upon his/her own written promise to

appear whenever his/her attendance is required (and render himself/herself to the others and processes of the authority).

The release is restricted to minor cases only. It is revealed that while it was frequently used for minor offences, it was never applied for serious offences.

However, the seriousness of the offences committed is to be taken into consideration. In Thailand, the maximum possible imprisonment is a decisive factor. Written in the Criminal Procedure Code, the release on recognizance is possible for the suspect only if the imprisonment term does not exceed one year.

### *Release on Bail*

In many countries, release of the suspect is accompanied by some specific property or money as security, that the person released from custody will appear at the appointed time. The security could be classified as follows:

- A. a. cash;  
b. negotiable securities;  
c. others;
- B. a. necessary to be deposited;  
b. not necessary to be deposited;
- C. a. the suspect secures;  
b. another person secures.

In Japan, in practice, almost all cases are A.a., B.a. and C.a., while other means have not been applied often.

In some countries such as Thailand, bondsmen, who are making profits by entering into bail system as sureties, are playing an important role in those system, while in other countries, such as Japan, there are no bondsmen.

While the release awaiting trial is an acceptable form of non-custodial measure in almost all countries over the world, there still are some weak points in this system.

1. In many cases, there is a discriminatory effect relating to the application of the bail required before the release. The arrested

person in an impoverished financial situation is usually not in the position to afford the bail. Therefore, people in poor financial situations are hard pressed to pay the bail money. If we believe that these people should not be restricted from earning release just because of their financial condition, we should contrive other ways to release these people. Judges in Japan may permit a person other than the person demanding bail to pay the bail money, and they also may permit negotiable securities, or a written undertaking produced by a person other than the accused. But these provisions have not been applied often.

2. Another issue is bail money. Its amount must be sufficient and adequate to ensure the presence of the accused. But it is also a matter of course that its amount must not be excessive. How should we find out the appropriate amount? In Japan, Judges are able to examine the evidence which investigators had gathered before prosecution. Judges in Japan can also examine materials which the defence counsel presents. But it is impossible at the very early stages of investigation to examine this evidence, especially the evidence gathered by investigators. Accordingly, if we introduce pre-trial release on bail system, the amount would be decided without considering the personal circumstances of the accused, that is, it would be decided by a predetermined set rate according to the types of crime.

We can think of various ways to ensure the presence of the accused. Sometimes restrictions on the dwelling, documents by reliable persons, and some other conditions might be enough. Although the release on bail system must conform with the total criminal justice system of each country, it is very instructive to know the variations of release on bail system of many countries and to consider the advantages of each system.

### Restriction of Movement

Under the most restrictive measures used

to avoid pre-trial detention, the suspect is required to stay within a certain area or within certain premises, most commonly his or her home. Violation of the conditions may lead to pre-trial detention. Observance of the conditions is generally enforced through constant monitoring by the local police. Such monitoring can also be carried out electronically. In Japan, when release on bail is granted restriction is often imposed on the dwelling of the offender. In Brazil, when release on bail or release without necessity of bail is granted, restriction is always imposed on the dwelling of the offender, and he can neither go overseas nor go on a long trip within Brazil without the judge's permission.

The restriction of movement measure is, so far as we understand, not an independent measure. It is contingent upon the release, whether on bail or on recognizance. When the court grants a release, it may impose some restrictions upon the person so released.

### Supervision

A less restrictive measure requires that the suspect awaiting trial submits to supervision primarily in order to ascertain that he or she has not absconded. The suspect may be required to report to the police or another agency at intervals, or a representative of such an agency will make random checks on whether or not the suspect has adhered to the conditions. These conditions may include not only a prohibition against leaving the locality without prior permission, but also conditions more directly related to the offence being investigated. Examples would include disqualification from driving in the case of a suspected traffic offence, or disqualification from engaging in certain business transactions, in the event of a suspected economic offence. Instead of a representative of an official agency, the supervisor may be another member of the collective at which the suspect works, a close relative, or simply a private citizen who agrees to act as a supervi-

sor or as a guarantor that the suspect will come to trial.

### **Pre-trial Diversion**

To avoid custodial measures, various forms of diversion are introduced in many countries. Among these are the suspension of prosecution, as in Japan and Brazil, amicable settlement, as it is called in the Philippines, fine or penal settlement as it is called in Thailand or pecuniary penalty in Japan. From now, the following portion of this report is devoted to the exploration of details in each systems.

### **Warning**

At the stage of the investigation by the police or public prosecutors, warning, admonitions, and cautions are very practical and pragmatic measures for the offenders who committed the petty offences. The public interest does not require further formal proceedings or heavy punishment for such kind of offenders. This option is almost universally available in Brazil, Jordan, Nigeria, the Philippines, Thailand and Japan, and other countries. Warnings are very significant means of pre-trial diversions, although there are some considerable differences in the amount of discretion allowed. In almost every country, this system is not legally established yet.

The criteria for the Warning is very vague and it mainly depends on the discretion of the police and public prosecutors. However, decisions are made upon taking into account the conditions in relation to the offenders or offences, such as juvenile offenders, minor offences committed by the adult, etc.

As far as the safeguards or conditions for the Warning are concerned, they are usually not completely fixed and involve the circumstances of each cases.

As mentioned above, this is not a formal system based on a specific law or regulations, but is based on practice. This is wide-

ly and frequently utilized for the minor offenders in many countries. The abuse of this system by the investigative authorities may invite some controversial issues, such as unequal treatment for the offenders, mistrust from the public, etc. In this regard, we should establish some guidelines on certain procedures, criteria and safeguards for the appropriate implementation of this system as a significant means of pre-trial diversion.

### **Suspension of Prosecution**

The suspension of prosecution is one of the most desirable treatments to remove factors which hinder rehabilitation of offenders, because this system avoids the stigmatisation accompanying conviction. Besides this system screens out offenders from further penal processing.

In some countries like Japan, Korea and Fiji, the public prosecutor is authorized to grant suspension of prosecution at his own discretion, even if there is sufficient evidence to prove the guilt of the suspect. The rate of suspended prosecution in penal code offences in Japan is about 40%. In Korea, it is more than 10%. In Brazil, the public prosecutor can grant suspension of prosecution provided that the judge agrees to the disposition. In Thailand, the Public Prosecution Department attempted to introduce this system but failed to receive the approval of Parliament.

Both in Japan and in Korea, this system is available in every type of offence. Actually, in these countries, suspension of prosecution is granted even in serious offences such as homicide and robbery. On the other hand, in Fiji, this system is available only in injury cases where the victim forgives the offender and is rarely used. In Brazil, this system is available only in peculiar sexual cases where the victim does not want the offender to be prosecuted.

In Japan where this system is available in every type of offence, the following factors are taken into account as criteria for suspen-

sion of prosecution: character, age and situation of the offender, like criminal record, family environment and others; the gravity of offence; the circumstances under which the offence was committed, such as motive, *modus operandi* and others; the conditions subsequent to the commission of the offence, like compensation of damage, the offender's repentance and others. And exercise of the prosecutor's power of prosecution also must reflect public opinion and the necessity of countermeasures against the criminal sanction. When the public prosecutor does not grant suspension of prosecution only because of gravity of the offence or non-compensation for the damaged, such treatment might not be appropriate from the viewpoint of rehabilitation of the offender. Such a treatment is unavoidable for criminal sanctions and is also to be imposed as retribution against criminal conduct.

In the disposition of individual cases, uniformity is also required, because disparity of disposition reduces the people's confidence in criminal justice. On the other hand, however, blind obedience results in losing flexibility mainly because of overestimation of only objective elements such as criminal records.

Both in Japan and in Korea, in order to prevent inappropriate suspension of prosecution the system of analogical institution of prosecution is conducted. The summary of analogical institution of prosecution is explained as follows: if, in some specific offences such as abuse of authority by public officers, a victim is dissatisfied with the disposition made by a public prosecutor, he may apply to the court for committing the case to a court for trial. In Japan, besides this system, the system of inquest of prosecution is used. The summary of this system is as follows: inquest of prosecution consists of lay people chosen by lot from among ordinary citizens. The function of this body is to examine, based on complaints lodged by the parties and *ex officio*, investigate and control, in an advisory way, the propriety of the discretionary dis-

position of non-prosecution rendered by public prosecutors.

### Diversion to the Village Court

At the pre-trial diversion, there are traditional concepts and practices of settling disputes among community members and these have found their way into the formal legal system of some countries. In the Philippines and Papua New Guinea, community members elect their leaders to be Village Court Magistrates who have judicial powers, settle some kinds of criminal cases, and thus avoid lengthy and expensive trials. Since most of the sanctions imposed at Village Courts are community-based, like compensation order, the Village Court system functions to spare some offenders from serving imprisonment.

In the Philippines, the institutionalization of this community justice system was granted when Presidential Decree No. 1508 otherwise known as the "*Katarungang Pambarangay*" was approved on June 11, 1978. The *Barangay* is the smallest political unit of Philippine society.

The *Barangay* or "Village Court" operates through the "*Lupong Tagapayapa*" (conciliation body) which is composed of the *Barangay* Captain as chairman and not less than ten nor more than twenty *Barangay* residents as members. The number of *Lupong* members is determined by the *Barangay* chairman.

The *Lupong Tagapayapa* does not act directly in mediation or arbitration of disputes. This is done through the *Barangay* Chairman and the *Pangkatng Tagapagkasundo*. And the *Pangkatng Tagapagkasundo* is not a judicial body but a conciliation of conflicting interests or claims of the parties to the end that they may reach an amicable settlement of their dispute. If however, no amicable settlement is reached and parties agree to arbitration of their disputes, the *Pangkatng Tagapagkasundo* adjudicates by hearing the case and rendering a binding arbitration order. Only cases that cannot be settled amica-

bly or where conciliation efforts fail, will go to the courts thus, resulting in the reduction of cases filed in the courts of justice, the unclogging of docket congestion, and the enhancement of the quality of justice dispensation.

All disputes between individuals or natural persons residing in *Barangays* of the same city or municipality are within the authority of the *Lupong*. Exceptions to this authority are offences punishable by imprisonment exceeding 30 days, or a fine exceeding P200; and offences where there is no private offended party, etc. Cases within the authority of the *Lupong* cannot be filed in court or in any government office for adjudication.

An important feature of this system is that petty crimes punishable with a fine of not more than P200 or imprisonment of 30 days or less are no longer lodged formally for adjudication by the courts, and that no complaint, petition or legal action which falls within the competence of the *Barangay* groups can be filed in the court unless it can be certified that the dispute was brought before the *Barangay* and that an acceptable settlement could not be reached at that level.

The success of this form of community-based justice can be seen from its performance since its implementation. In 1989, a total of 111,604 cases were filed with the *Lupong*, of which 99,377 or 80% were settled amicably and 7,321 or 6% were forwarded to the courts. Since the implementation of this system, more than 280,000 offenders of petty crimes have been spared from serving prison sentences.

A similar system was introduced five years ago in Thailand on an experimental basis with the establishment of arbitration committees in a small community of every province. The result of this experimentation has had a great effect on the reduction of cases before the courts.

On the other hand, the conciliation boards which were created in Sri Lanka in 1958 to handle criminal disputes among community members are not operative at the moment.

The people lost confidence in these bodies when persons with no apparent impartiality or skills in handling disputes were appointed as members of the board mainly (if not solely) because of political party affiliations.

### The Other Diversions

There are many other kinds of diversions that exist within the context of the criminal justice system of the countries represented. These are available before the trial, at the trial and after the trial stage.

At the pre-trial stage, the police and other agencies responsible for the enforcement of special penal laws, such as those relating to violations of motor vehicle, customs, revenue and railway laws, are authorized to dispose of minor cases without resorting to criminal prosecution.

Compulsory attendance in lectures on traffic laws, administrative fines for minor traffic violations, customs and revenue law infractions are resorted to in Brazil, Japan, Peru, the Philippines, Sri Lanka and Thailand. These measures have prevented the influx of numerous cases and minor cases into the criminal justice system imposing on the offenders, a certain amount of money called an administrative fine.

### General Recommendations

The public now complains seriously about prison congestion the world over because it is mainly the vast cause of the dehumanizing state of prisons concerned. In order to avoid prison congestion and its attendant evils, all hands must be on deck; the community, all the agencies of criminal justice system and indeed international co-operation must be sought and harnessed. The community, whose role in criminal justice system is considered feasible, the police, the counsels and the court must co-operate based on the accepted practice in each country for speedy dispensation of justice.

Governments should gear up their efforts

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for provision of necessary and adequate inputs to give the alternatives to pre-trial detention and pre-trial diversions full time to operate for public evaluation and proper implementation of non-custodial measures for offenders. General recommendation reached by our group are as follows:

1. The responsibilities of both the police and the prosecutors should include the right to suspend prosecution especially in cases where crime is minor or does not effect society or violate victims' rights.
2. Pre-trial detention should only be used in limited cases under appropriate conditions.
3. The pre-trial detention period should be shortenend and limited.
4. Police and prosecutors should rely heavily on the application of alternatives to pre-trial detention.
5. It is important to ensure the offender's rights to legally refuse pre-trial detention.
6. Police and prosecutors should consider the socio-economic background of the accused (offenders) before referring him to the detention center.
7. It should be stipulated by the law that any offender shall not be detained without legal reason.
8. Because strategies for the application of non-custodial measures require sound information, therefore attention should be given to accurate and valid information about criminals, crime and the environment.
9. The best form of the practice of non-custodial measures is to encourage citizen participation in the field of non-custodial measures.
10. There must be a wide coordination between the judiciary and prosecutors and between correction, probation and parole services in the community.
11. Alternatives to pre-trial detention must be considered to be applied especially

to the following offenders:

- a) pregnant women;
- b) mothers who have young children;
- c) sick and handicapped persons;
- d) elderly males and females;
- e) the offender whose crime is not dangerous.

### Session 2: Non-custodial Sanctions in Sentencing

*Chairperson: Mr. Eroni Sawvakacolo (Fiji)*

*Rapporteur: Mr. Saeed Sayyaf Al-Shahrani (Saudi Arabia)*

*Advisors: Mr. Niwet Comephong*

*Mr. Norio Nishimura*

*Ms. Toshiko Takaïke*

#### Introduction

Crime is considered to be a social phenomenon, and it has existed throughout the history of mankind. However, it is possible to reduce the crime rate and the deleterious effects on society not only in monetary terms but also the social and psychological damages experienced by victims', their families', and society as a whole. At the same time, redution of crime can also alleviate the escalationg problems of overcrowded prisons.

It is often pointed out that imprisonment is inadequate in rehabilitating prisoners in many countries. In the face of rapid industrial change and modernization, the bonds that formerly held communities together have loosend and with global dissemination of information, crime has crossed borders and continents manifesting large-scale operations which exert a powerful influence on national and international concerns.

Going back through history, all kinds of societies have been using different ways of dealing with those who violate social norms,



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values and laws. Because of human nature and its complexity, these trends are changing from harsh punishment to non-punishment. Almost all societies are looking, with great hope, for new ways to control crime and to relieve offenders, their families, the victims, and the society as a whole from crime's ill effects. There is an urgent need to develop local, national, regional and international approaches and strategies in the field of non-custodial sanctions and apply them at the different stages (pre-trial, sentencing and post-sentencing) as well as improving the management of non-custodial measures.

In this workshop, the participants of various countries are engaging in discussions and exchange of experiences for the purpose of formulating a report on non-custodial measures. Our group is taking up the subject of non-custodial sanctions in sentencing.

Group 2 members sincerely hope that this report will serve as a positive contribution toward the pursuit of world love, peace and security.

### *A. Existing and Proposed Forms of Non-custodial Sanctions in Sentencing*

In dealing with existing and proposed forms of non-custodial sanctions in sentencing, we should take into consideration in all respects the draft of the United Nations Standard Minimum Rules for Non-custodial Measures "(draft) Tokyo Rules," because these recommended rules provide a set of basic principles to promote the use of non-custodial measures and also minimum safeguards for persons subjected to non-custodial measures. Moreover we are provided with suggestions from minimum rules. They are general principles in order to meet the needs of all nations around the world despite the recognizable differences in terms of politics, economics, social and cultural circumstances, and traditions of each society.

So, in this respect, we are trying to internationalize all kinds of non-custodial measures in our countries through this report, in

a way which will not contradict the United Nations rules and standards which have been endorsed by our countries to make them more practical and useful. To do so, each existing or proposed form of non-custodial sanction in sentencing will be discussed in this report as follows.

### 1. Suspension of Sentence/Suspension of Execution of Sentence

Suspended sentence of imprisonment and suspended execution of sentence are alternatives to imprisonment. That means the court has the authority and power to stop the execution of the sentence which has been imposed by the same court for a period of time decided by the court or to stop the proceedings without imposing a particular sentence. This is different from the suspension of prosecution which is decided by the prosecutor.

This alternative is widely used in most countries around the world (e.g. Korea, Hong Kong, Saudi Arabia, India, Japan) offering the offender a chance to overcome his problems, and to bring about some solutions for the increasing problems found in criminal justice systems. In this regard, each country has its own standards and ways of deciding the suspension, but the most important factors which are always considered by the courts, are similar. For example, the offender's behavior, age, personal conditions, crime conditions, criminal records, security of society, victim's rights, are important factors to be considered by the courts. However, it is not practical for this group to discuss what each nation must or should do or not when imposing alternatives, but it is our hope that all nations will consider these alternatives more and more frequently, as well as other alternatives to imprisonment.

As a group, it is not our goal in this report to write down what is good and what is bad, but we hope that those who do not use non-custodial measures will reconsider this alternative for their benefit and their people. Imprisonment should be the last choice. In this

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respect, co-operation on local, national and international levels is a major factor in avoiding imprisonment. Finally, economic, social, and political problems must not be obstacles for us, nor, obscure our eyes from a better future.

### 2. Probation

Probation was originally not the outcome of deliberate creative legislation or judicial acts in any countries, but it was the result of gradual growth as a result of the increase in social needs for modification of existing legal practices, and it has been adapted by several nations as an alternative to imprisonment in sentencing. So it is a community based correction which is intended to rebuild the social ties between offenders and community, re-integrating them into community life through the restoration of family ties, availability of employment and education, and securings in the large sense, a place for the offender in society.

So, in probation, some restrictions will be imposed by the court on the offender such as ordering him/her to undertake training such as joining an education program or living in a limited place and others. These restrictions may be different from one nation to another, from one crime to another and from one offender to another, but the important thing is that probation is used rather than imprisonment.

Probation as a non-custodial measure has proved successful especially with first offenders, and as a cost-effective mechanism for screening out offenders who do not require imprisonment. It has provided judges with the ability to modify sentences that may satisfy the public demand for offenders, accountability in a humane non-custodial environment. Probation is one of the outstanding non-custodial measures which is designed to work for early reformation and re-socialization of criminals while they remain in the communities as ordinary citizens, by subjecting them to certain conditions which they must comply with, and by pro-

viding them with guidance, supervision and aid. Probation should be used in a wide sense by those who are using it as a measure, and should be applied by those nations who are not applying it yet, because it is as a measure, a protection and instrument pertaining to the rights of persons who are in conflict with the law.

### 3. Imposition of Fine

Imposition of fine is one of the most frequently used alternative measures to imprisonment, and is gaining in importance in many countries. It is generally advocated as it is economical in terms of both money and labour, and practical in terms of management and administration. It is also evaluated to be humane, as it inflicts a minimum of social harm.

However, it is often pointed out that the imposition of a fine can create inequalities, because the impact of a fine as a penalty is relatively small to rich offenders whereas it may be relatively harsh for poorer offenders, who may be, in some cases, imprisoned because of the default of the fine.

In order to overcome this disadvantage, day-fine system was implemented and is practiced in some countries. According to the day-fine system, the severity of the offence determines the number of day-fines, while the income of the offender determines the size of each individual day-fine. Since the day-fine system allows the court to set the amount of the fine in accordance with the ability of the offender to pay, non-payment is not a serious problem. The day-fine system is reported to have been functioning very well in a considerable number of countries.

Limitations on the conversion of unpaid fines into imprisonment are also applied in a number of countries. For example, in some countries, the court is given discretion over whether or not conversion shall take place.

### 4. Community Service Order

Community service order is considered to

be a new non-custodial measure. This alternative involves the performance of a certain number of hours of unpaid work for the good of the community. As in the case of other non-custodial measures, there are specific provisions regarding the conditions under which a community service can be performed, for example, the type of offence and the consent of the offender and others.

For the last decade, community service has spread to a number of countries as a new way to accomplish a variety of goals such as encouraging community involvement in the re-integration of the offender. This non-custodial measure is mostly imposed besides probation or other non-custodial measures.

It is considered to be one of the most useful alternatives because it meets most of the offender's needs on one hand, and some community needs on the other hand. One of the most important needs which will be obtained by the offender as a result of this measure is the element of freedom. The offender will stay in the community rather than in prison. The community can reduce the cost of putting the offender in prison, and at the same time the offender contributes to the society through community service. The examples of those countries who are imposing these alternatives are Hong Kong, Sri Lanka and the U.S.A.

In some countries, it has been proven that prison have a negative influence on prisoners in part, due to the lack of funds for rehabilitation programmes and in part the dehumanizing atmosphere of overcrowded prisons, etc. Non-custodial measures should be used on a large scale and prison must be considered the last resort.

##### 5. Compensation Order/Restitution Order

Compensation order is an independent sanction which is utilized in only a few countries. However, in many countries, it can be imposed as one of several conditions of a conditional sentence. Generally, compensation or restitution is mostly a civil matter, especially where there is a victim. The United

Nations Declaration of Basic Principles of Justice for Victims of Crime and the Abuse of Power calls for greater use of compensatory payments as a non-custodial sanction.

Compensation of the loss to the victim is deemed an appropriate aim of criminal justice, and is in the interests of society as a whole. So, this measure is in accordance with the social interest of victim protection mostly because victim's rights have received less attention than the rights of offenders in most countries.

Victims of crime have experienced a crisis reaction similar to that experienced by victims of war, or natural disasters. Mental or emotional suffering is the most frequent problem expressed by victims, while time and income loss are difficulties involved in the court process. Fear and emotional stress often extend to the victim's families and friends.

Compensation as a non-custodial measure may require the offender to pay money to the victim and/or justice system or perform community services. Compensation as a criminal sanction is not a new measure or a new development. It goes back to pre-Islamic common law. However it is gaining popularity because it proves to fulfil humane sentencing goals such as restitution which requires offenders to pay for the crime, and ensures greater accountability than protection alone by introducing unpleasant consequences. Compensation also encourages rehabilitation, because the offender works within the functioning economic system while remaining socially responsible for his livelihood and the well-being of those hurt, and maintaining ties with community. So this measure is useful, more humane and practical for the offender, the victim and the society as a whole.

It is important that such alternatives should be used more and more by those countries who are using it nowadays, such as Saudi Arabia, Fiji, Sri Lanka, and it is advisable that those who do not have this measure at all, such as Japan, Indonesia, China,

adopt it.

#### 6. Other Alternatives

The ultimate goal of the Standard Minimum Rules for Non-custodial Measures "(draft) Tokyo Rules" is the re-integration of the offender into society, so it came as a general set of basic principles to promote the use of non-custodial measures as well as minimum safeguards for persons who are subjected to alternatives to imprisonment. Besides that, it intends to promote the involvement of community in the management of criminal justice, especially in the treatment of offenders, and to promote among offenders a sense of responsibility towards society. The "(draft) Tokyo Rules" have left the door open for member states to develop non-custodial measures within their legal systems to provide other options to reduce the use of imprisonment, and to rationalize criminal justice policies, taking into account the observance of human rights, the requirements of social justice and the rehabilitation and needs of the offender. A number of old and new alternatives have been introduced in different countries, such as, home probation, "house arrest," reconciliation, confiscation, loss of licence or rights, penal warnings, release on recognizance, electronic monitoring, closing stores, and refusing travel. All of these options could be carried out by the court by using one or more as alternatives to imprisonment.

Imposing those options or alternatives may be different from one country to another because of the political, economic, social and cultural conditions of each country, but the common aims and objectives of these options and others are to avoid imprisonment in sentencing as much as possible.

#### *B. Criteria and Procedures for the Selection of Offenders for Those Sanctions*

The criteria and procedures which the court considers in imposing alternatives to imprisonment are, to some extent, different from one country to another, however, in

some countries like Japan they are not stipulated by law, rather it is left to the discretion of the sentencing court. In some other countries like Saudi Arabia, for example, the discretion of the court is not enough and there are a number of criteria and procedures provided in Islamic law as general guidance for the court. However there are common criteria and procedures which are considered by the courts in one way or the other such as:

#### 1. Type of Offence

Offences are different from each other in most respects. There are serious crimes, unusual crimes, and simple offences. So, in deciding imprisonment or alternatives, the type of crime is a major factor which the court considers mostly before imposing non-custodial measures or imprisonment. Type of offence means a lot to the court to decide the case. So the court will try to find out if the offender has committed his crime intentionally, and if he has committed his crime to meet normal human needs, or for unusual reasons. The court considers the offender's motivation when considering alternatives to imprisonment. Also, the court looks for the causes of crime. Sometimes victims are behind the offences which have been committed against them, and sometimes a person may commit a crime because he has no choice but to do so. The court, also, considers, to a high degree, the damage which has been effected by the offender on the victim. Finally, the court in this respect considers the way or method used by the offender to commit the offence, and the reaction of the general public to the crime in question.

#### 2. Victim's Rights

Victims, as we know, have been neglected and ignored while the rights of offender have been protected through laws and international agreements. The victim is the one who suffers more than anybody else, and ignoring his right is a major failure of criminal justice systems around the world. Most

criminal justice systems do not care enough about victim's rights. Ignoring victim's rights or giving them low-priority is an inappropriate practice especially on the side of courts.

Lately, through the United Nations and through human rights movements everywhere, protection of the rights and interests of the victims of crime have gained a lot of consideration and respect, but not on the cost of offender's rights. So, there must be more attention paid to the plight of victims of crime and expanded protection of their rights of redress, and consideration must be made to the role victims play in the criminal justice system. Efforts should be made to improve the position of the victim. Some countries have been developing special compensation and redress scheme for various categories of crime victims, but this is not enough because compensation and redress should be considered by the court in all kinds of crime where there are victims. In addition to that, compensation and redress should be based on the principle of the country and individual responsibility for the crime, as well as that of social solidarity. Financial compensation and redress should be coupled with medical assistance and other social services rendered to the victims of crime regardless of their financial situation.

The court, also, should consider the failure of the victim to prevent crime or to cause crime when deciding the case because the principle of justice is to protect each person's rights and not at the expense of others' rights. Reconciliation or agreement between the offender and the victim should be encouraged by the court as much as possible while keeping in mind the security or feelings of the victim. These and other developments and experiences should be widely shared among interested countries because there is a strong need for such an exchange of information for justice policy reformation.

### 3. Reaction of the Community to Crime

The criminal justice system, as a whole,

in any society, works to keep peace and order in the society, and the degree of respect and confidence between the community and criminal justice system depends mostly on the efficiency of justice departments in controlling crime and bringing criminals to justice. Crime is a major problem of national and in some cases international dimensions. Certain forms of crime can hamper the political, economic, social and cultural development of people and threaten human rights, fundamental freedom, peace, stability and security. However, in certain cases it demands a concerted response from the community in reducing the opportunities to commit crime and address the relevant causes in the community. The court must take into consideration the reaction of the community to the crime at all times to get the cooperation and the help of community in improving the criminal justice system and to arrest the criminal and to gather essential evidence, so as to enhance their responsiveness to changing conditions and requirements in society and to face the new dimensions of crime. Finally, the efficiency of the criminal justice system mostly depends on the cooperation and the help of the community, and that depends on the degree of respect and confidence between community and criminal justice system. To keep that good relationship, the court should consider highly, when deciding criminal cases, the reaction and attitude of community at all times because the whole criminal justice system works to serve the community.

### 4. Personal Problems

Through experience, it has been found that most offenders commit crimes because they have problems, and that alternatives to imprisonment can be an effective means of treating them within the community to the best advantage of offenders, victims and society. Offenders are citizens, and his or her problems are not coming from a vacuum but rather they are, mostly, derived from problems emanating from the social system. The

social system is not functioning as well as it can to meet some of the citizen's needs. So, society and the criminal justice system contributes a lot to cause the personal problems.

The court, when looking at any criminal case, should consider the reaction of the offender toward his crime, consider whether he is sorry and to what extent. In addition to that, the court should contemplate the criminal record and the probability of recidivism, the person's character, individuality, and ability to benefit from the alternative sanctions or imprisonment. The age of the offender is one of the most salient factors which should be taken into consideration in the court decision because the stage of development in a person's life influences behaviour and so forth. The court should contemplate the position of the offender in society before he got into trouble with the law and should forecast as much as possible the future of the person in question by going over his or her employment history. Statistics compiled from social studies and others have proved that family environment as a whole is a major cause in preventing or causing crime. In this regard, the court should consider the offender's family situation especially the relation among family members, the economical situation, drug or alcoholic abuse, education and other problems which the offender's family may have.

#### 5. Offenders' Rights

Offenders' rights have been the focus of a lot of studies, human right movements, international conferences, and so on. Bearing that in mind, offenders' rights, such as the right to fair trial, for non-custodial measures, responsibility toward the family, education, employment, medical services and other rights, should be respected and considered, all the time by the Court. Considering the offenders' rights is important for purposes of rehabilitation and reintegrating the offender back into society. Finally, not considering the offenders' rights will harm all parts of society, victims and offenders as

well.

#### C. Sentencing Policy

A fair and prompt adjudication satisfying all the guarantees and safeguards which enable the accused to exert his rights to present a defense and establish his innocence is necessary to a sentence or non-custodial measure. The court should adopt the concept that imprisonment is the last resort. In this regard, the court should have wide discretion in imposing non-custodial measures so that a judge can impose an alternative which is adequate for the offender because classical sanctions, such as fines, suspension of sentence and probation are not adequate for all offenders. Therefore, the legislature should provide more non-custodial sanctions to meet the evaluation of the community towards crime rather than leaving the decision to each judge's discretion. Numbers of non-custodial measures should be reasonable to avoid difficulties in maintaining uniform sentencing practice, and to avoid the difficulties which judges may have in becoming familiar with procedures, conditions, and restrictions with each sanction.

Legislation should make clear provisions of the law on both the conditions for imposition of non-custodial sanctions and the method of their implementation. The alternatives will be reluctantly implemented by the court if there is ambiguity. The law should specify the purpose of the alternative and the expectation of the legislation. This will help judges to use the sanction when it is useful. However, through law, the court should give convincing reasons for the use of prison rather than non-custodial measures when the sentencing is imprisonment. If this is in the law, the judge will be compelled to defend imposing imprisonment, and also, the court should give convincing and reasonable explanations for imposing alternative to avoid misusing them. Likewise, restrictions on imposing non-custodial measures should be considered when comparing them with imposing custodial measures. This includes the type

of offence, the length of the sentence, the criminal history of the offender, the offender's problems, the damage and victim's rights, the offender's need of rehabilitation, the possibility of recidivism and the community reaction to the offence and other attributes of the offender.

The imposition of sentences in all cases should be achieved through an impartial and independent judiciary and should not be subject to influence of any kind. Such sentences should be adequate to express society's condemnation of offences and to ensure the protection of society from the most dangerous offenders. Bearing that in mind, the court should consider imposing a combination of non-custodial measures, if possible, to avoid imprisonment, or imposing additional requirements or conditions to the same alternative.

With regard to the respective types of non-custodial measures, the participants noticed and discussed the following points:

### 1. Suspension of Sentence/Suspension of Execution of Sentence

In many countries, suspension of sentence or suspension of execution of sentence is widely used as an effective alternative measure to imprisonment, especially for those offenders who have committed relatively minor offences and who are deemed to be well rehabilitated within the community.

Although criteria and standards for selection of offenders for these measures may vary from country to country, the participants agreed that feasibility of these measures should be fully and carefully explored in the sentencing of respective cases.

One may fear that wider use of suspension of sentence (or suspension of execution of sentence) would bring about a serious peril to the society. However, experience shows us that such fear is not always well grounded, as long as the selection of offenders is carefully done by the court. For example, in Japan, suspension of execution of sentence is widely utilized; 56.5 percent of the

offenders sentenced to imprisonment with or without forced labour during 1988 were given suspension of execution of sentence. Despite such wide use of suspension of execution of sentence, Japan has one of the lowest crime rates in the world.

### 2. Probation

Recently, suspicion about the effectiveness of probationary supervision has increased in some countries. For example, it is reported that some experiments in some Western countries failed to prove the lower recidivism rate of offenders under probationary supervision when compared with those offenders who were given suspension of execution of sentence without probationary supervision.

Worry about the extremely heavy caseload of each probation officer and about the low capacity of probation services is also often expressed.

However, the participants, from their daily experience as criminal justice practitioners, strongly believe in the usefulness and effectiveness of probationary supervision as a means of guiding and helping the offenders to rehabilitate themselves to become law-abiding citizens. The participants are of the opinion that probationary supervision should be extended to more offenders who are in need of supervision and guidance.

With respect to heavy caseloads and limited human resources of probationary services, the participants were particularly interested in the Japanese successful experience where more than 48,000 volunteer probation officers appointed from among senior community members are involved in the probationary services and work in close cooperation and guidance with professional probation officers.

### 3. Imposition of Fines

Imposition of fines is widely applied in a considerable number of countries as a useful and effective alternative measure to imprisonment. For example, in Japan, approximately 94 percent of all convicted defend-

ants, including traffic violators, were sentenced to fines during 1988. In sentencing fines, attention must be paid to the fact that the impact of fines as a penalty is relatively small compared to rich offenders whereas it may be relatively harsh to the poor offenders, who may be, in some cases, incarcerated because of the default of the fine. In this connection, the participants were particularly interested in the day-fine system which was designed to overcome such possible inequalities and is reported to have been successfully functioning in some countries.

#### 4. Community Service Order

Community service order is a newly developed type of criminal sanction, and most participants were not very familiar with the practice of this order. However, participants agreed that this order may well fit those offenders who have committed so called victimless crimes (for example, crime which harmed social interests) or those offenders who cannot afford to compensate the victims.

In imposing this order, special consideration must be given to the character, social status, age, religion, race, etc. of the offenders, because the offenders are inevitably exposed to the community in serving this order and it may cause intolerable embarrassment to certain types of offenders. In this connection, the participants supported the practice of several countries that requires defendant's consent before the court declares this order.

#### 5. Compensation Order/Restitution Order

It has been gradually recognized that criminal justice systems should pay more attention to the victim's interest while ensuring the constitutional rights of the defendant. Since the right to be compensated is one of the most important rights of the victim, implementation of the compensation order would conform to the above-mentioned basic idea. It is reported that even in many coun-

tries where the system of compensation is not formally implemented, the courts usually check whether the victim has been sufficiently compensated or not, and attach much importance to it in deciding a sentence. This attitude of the court should be supported not only because it would comply with the rights of the victim but because it would help the defendant realize the impact and meaning of his offence.

#### *D. Supervision of Offenders*

The implementation of non-custodial sanctions is a crucial stage in the processes of the criminal justice system. The success or failure of the non-custodial sanction in meeting the offender's needs depends mostly on the implementation of the sanction imposed. In this regard, all key groups of criminal justice system should be aware of the general benefits of non-custodial sanctions through a special form of training, special courses and seminars, since the use of non-custodial sanctions depends on the professional legal culture of judges, prosecutors and all practitioners involved in the imposition and implementation of sanctions.

Supervision of offenders can range from intensive through moderate to minimum. Under the intensive supervision, the offender is kept under close control in order to reduce the opportunities for recidivism, and to re-integrate the offender into society and seek to ensure that the conditions of non-custodial sanctions are fulfilled. On the other hand, minimum supervision entails only sporadic contacts between offender and supervisor, with a moderate assistance to the offender in re-integration back into the community. The supervision can be exercised by professionals, volunteers or by members of the community in which the offender works or lives. However not all non-custodial sanctions entail supervision, but if a non-custodial measure entails supervision, it shall be carried out by a competent authority under the specific conditions prescribed by law, and should be determined for each individual



case, and should be reviewed and adjusted as necessary. Offenders under supervision should be provided with psychological, social and material assistance, and with opportunities to strengthen links with the community and facilitate their re-integration into society.

The competent authority shall determine the condition to be observed by the offender, taking into account both the needs of society and the needs and rights of the offender, and conditions to be observed shall be practical, precise and as few as possible, and be aimed at reducing the likelihood of the offender's relapsing into criminal behaviors, and increasing the offender's chance of social integration taking into account the needs of the victim. All offenders who will be subjected to supervision shall receive explanations, orally and in writing, of the conditions of the sanction including the offender's obligations and rights. The duration of supervision shall not exceed the period decided by the court.

Supervision should be conducted by professionals who have suitable training and practical experience, and who understand the offender's background, religion, race, personality, aptitude, intelligence, value and the circumstances of the offender. Also, the failure of a non-custodial measure should not directly lead to the imposition of imprisonment, but rather to the modification of conditions imposed. However, if imprisonment is recommended by the supervising authority, the offender shall have the right to defend himself, for example to appeal to a judicial or other competent independent authority. Finally the implementation of non-custodial sanctions and all conditions imposed shall not contradict the draft of the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules).

### **Session 3: Alternatives to Imprisonment at Post-Sentencing Stage**

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#### **I. Introduction**

The group III workshop examined alternatives to imprisonment at the post-sentencing stage. This was interpreted to mean that the group was only to examine alternatives that are available when the prisoner is finally admitted into prison. This was further interpreted to mean that the group will assume that all alternatives at the pre-trial or sentencing stage will not be appropriate and that the prisoner must be subject to imprisonment and serve a certain portion of his sentence.

In most of the countries of the world today the use of alternatives to imprisonment at all stages has been encouraged. People have recognized the fact that incarceration of convicted offenders does not serve the deterrence of crime unless the prisoner is a danger to the public safety. Alternatives should therefore be sought so that the prisoner may be allowed to stay outside the prison while serving his sentence. Non-custodial treatment of offenders has been seen to be humane and also economical. In some countries, it is expected to help reduce overcrowding in prisons.

Crimes are complex social phenomena involving almost every aspect of human behavior. Crime and punishment have been common social issues from time immemorial. Institutional treatment of offenders exists in most countries in the world today. On the other hand, however, it has been observed that more humane and effective methods

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should be implemented in treating offenders. Alternatives to imprisonment at the post-sentencing stage were developed during this century. Presently such methods as Parole (Release on License), Work Release, Pardon and Remission, etc., are practiced in most parts of the world. These systems have been introduced to secure the rehabilitation of offenders in the community with or without condition and supervision.

But some problems have surfaced in implementing these measures, because of shortages of officers and lack of community perception. The success of rehabilitation depends on active participation of the community.

The group dealt with the topic under the following headings:

- 1) Existing alternatives at the post-sentencing stage and proposed forms of measures.
- 2) Criteria and procedures for selecting offenders to those alternatives.
- 3) Supervision methods for those offenders under those alternatives.
- 4) Co-ordination between agencies in the community and the prison.

To avoid confusion, we limited our discussion to the scope of adult offenders.

### II. Existing and Proposed Forms of Measures

The group examined the existing alternatives at the post-sentencing stage. After intensive discussion, the following measures were selected as topics for discussion among many other alternatives:

1. Remission,
2. Parole—Compulsory supervision order,
3. Work release—Study Leave, Extra-mural penal employment,
4. Pardon—Amnesty.

The above alternatives are practiced in

most of the countries under different titles.

#### 1. Remission

This is a type of alternative granted to a convicted prisoner who has served a certain portion of his/her sentence in prison but is given early release due to good conduct and behavior. The important factor in remission is that the prisoner must be of good behavior and hard working.

Currently there are different types of remission:

##### a) Statutory Remission

This is a kind of remission prescribed in a country's laws whereby each prisoner sentenced to imprisonment will automatically earn remission and will only lose if predetermined regulations are violated. This type of remission is practiced in Singapore whereby all prisoners who have been sentenced to a term of imprisonment exceeding one month will automatically earn one-third remission of their total sentence. Prison authorities automatically compute prisoners' sentences on admission.

This is an important measure for keeping prisoners in the community rather than in prison or in a correctional institution. As a provision of the said measure, convicts who have good conduct are qualified for release under supervision or without supervision, prior to expiration of sentence. This system serves as an incentive for good conduct among prisoners while being confined. It has been used also as a measure to mitigate the destructive impact of imprisonment upon prisoners and reduce the problem of overcrowding in the prisons.

##### b) Good Conduct Allowance

A prisoner who behaves extremely well in the prison may be given a good conduct allowance and might be released earlier. This type of remission is practiced in countries such as the Philippines and Thailand.

In Thailand, released prisoners through remission are placed under supervision for

which the conditions are the same as parolees. But some countries like Japan and the Republic of Korea do not apply this system. The system of remission differs from country to country. As a provision of this method, prisoners who have shown good conduct are eligible to be released under supervision prior to their imposed term of sentence. In the Philippines, good conduct allowance, a similar system is applied to prisoners who have faithfully observed the rules.

There is another type of remission which is similar to good conduct allowance. In Sri Lanka, prisoners who have completed one year at an open prison camp are eligible for a special remission of one month of their sentence in each year. In India, remission is generally of three types; a) ordinary remission, b) special remission and, c) state government remission. Ordinary remission is granted generally at the rate of four days per month for good behavior and discipline and five days per month for satisfactorily performing the allotted work in accordance with the prescribed standards. Besides, the Superintendent and Inspector General of Prisoners may grant special remission to any prisoner not exceeding 30 days a year while the State Government may grant such remission for 120 days a year. Normally, the total period of remission should not exceed one third of the sentence. In Kenya, special remission is granted by a minister to some prisoners on certain special occasions.

The overriding factor in the grant of remission of sentence is that, whatever style or type, it is an alternative that will enable an offender to leave prison earlier than would have been possible without it.

## 2. Parole or Release on Licence

This is a conditional release of an offender from a penal institution after he/she has served a portion of his/her sentence. The word parole is interpreted in many ways in different countries of the world. In Fiji, for example, release under compulsory supervision order is the same as parole in other

countries. In this case the minister in charge of a correctional institution may order at any time that a certain prisoner or prisoners be ordered to perform public work outside prison. The action is initiated by the Institutional Extramural Board. Whereas in Japan, parole is granted to offenders who have served one-third of the sentence or in the case of those serving life imprisonment, 10 years. In this case, the parole Board will receive a report about the offender and will decide whether or not to release the offender depending on the contents of the report given. Basic conditions are normally—good behavior at the prison, favourable home conditions and feelings for the community.

The offender released on parole shall observe conditions laid down by the Parole Board for effective supervision and rehabilitation of the parolee in a manner in which will also safeguard his human rights, i.e., not to subject him to undue publicity, debasement or any harassment. In whatever manner or name, the whole issue of parole should be seen to mean that an offender is encouraged and helped in his/her efforts to rehabilitate himself or herself.

Parole, release on licence, and release under compulsory supervision are practiced in various ways in many countries. The criteria and procedure of parole implemented in eleven countries are described in the annexed table.

## 3. Work Release—Pre-release Employment

This alternative to imprisonment is a system whereby an offender is allowed to leave the prison grounds everyday in order to enter an approved place of work and return to the prison in the evening without the supervision of prison authorities.

In some countries where this type of alternative is practiced, varied conditions are applied. For example, in Sri Lanka, all offenders who have served over two years and those having less than two years are eligible for consideration under the work release scheme. In Hong Kong, prisoners

having a balance of six months of their total sentence or less may be allowed to obtain outside employment.

In all the cases of work release, the most important factor is that the offender must show good conduct and the aim should be to accord him/her the opportunity to get some employment and earn money to help him/her meet personal needs, help support a family and also pay debts, if any. All offenders under this scheme must also observe some designated regulations, violations, of which will be punished by withdrawal from the scheme.

#### 4. Pardon

Pardon as an executive clemency has long been in existence in many countries. The power to grant pardon is vested with the head of the state such as the King, the Prime Minister or the President, etc. When the pardon is granted to a prisoner, the judgement of the case remains unreviewed. The pardon will free the prisoner from all corporal penalties and execution.

Various forms of pardon are available in many countries of Asia. In Sri Lanka, pardon is granted on Independence Day and Verak full moon day (date of birth of Lord Buddha) and some other special occasions. In India, pardon is granted on commemoration of Mahathma Gandhi's birthday and other special occasions. Thailand and Kenya frequently use this system in national events such as the King's birthday and independence day respectively. In Japan, pardon is usually exercised on an individual basis.

#### Absolute or Unconditional Pardon

This is one which frees criminals without any condition whatsoever. It obliterates in legal contemplation the offence itself. It goes further to restore the offender his civil rights and remit the penalty imposed so far as it remains unserved.

#### Conditional Pardon

This is one to which a condition is an-

nexed, performance of which is necessary to the validity of the pardon. A pardon does not become operative until the guarantee has performed some specific act or it become void when some specific event transpires. An offender will be granted the conditional pardon on the grounds that it shall be revoked in case of a wrongful act.

There is amnesty which is similar to pardon. It is originally addressed to crimes against the sovereignty of the state or to political offences, and is usually general. However, both pardon and amnesty have been performed for the same objectives in some countries and the distinction has become less important than before.

In our discussion regarding amnesty and general pardon, there were strong opinions against them, because they have potentials to be politically abused. But it is undeniable that in some countries they ease the overcrowding issue to some extent.

### III. Criteria for Selection of Offenders to the Above Alternatives

#### (a) Remission

The criteria for selecting prisoners for remission is normally rested with the prison authorities. In case of statutory remission, prison authorities automatically compute and inform the inmates on admission on their due dates of release if they do not commit any offences against regulations.

For other remissions like good conduct allowance or special allowance, whichever name it might assume, the prison authorities will have to compile, and submit a report for the appropriate board or authority to grant the remission.

#### (b) Parole or Release on Licence

Those offenders who might benefit from this scheme will depend on the type of offence, sentence, home condition, social acceptance, good behavior at the prison, remorse, previous occupation and, if possible, willingness to compensate the victim.

*(c) Work Release or Study Leave*

Offenders eligible for this scheme must be physically fit and show vocational skill, good behavior, and willingness to work. Prison authorities will also have to make the final decision as to which type of offender is suitable for work release or study leave whichever the case might be.

*(d) Pardon*

The criteria and procedure for selecting offenders for pardon will depend again on individual conditions given by the responsible authority. In all cases, prison authorities will have to compile the report about the offenders for approval. In the case of amnesty, the head of state normally gives the order as to what type of prisoners are eligible for the amnesty and the prison authorities will have to comply.

In most of the cases, good behavior and gravity of the offence are common criteria.

#### **IV. Supervision Method for Offenders under the Above Alternatives**

All offenders released under any of the above alternatives, i.e., parole, work release, study leave, etc., are provided with the conditions which they have to comply with. The role of supervising officials will be only to see that the supervisee complies with the orders and conditions as laid down. In each of the cases, the supervising officer will be a police officer, probation officer, parole officer, voluntary parole or probation officer, or after-care officer.

These supervising officials are expected to assist the supervisee to adjust and fit into the society and try as much as possible to see that the offender is not given undue treatment while working in the community. The supervision at all times should be such that the offender does not violate the supervision orders and that his/her responsibility toward society and family is encouraged.

Supervision period normally varies from country to country. In Japan, Hong Kong

and Thailand, the supervision period is the remainder of the sentenced term, whereas in Fiji, it is within one year only.

Supervision shall be carried out by guiding and supervising the offender under the conditions of the supervision order and giving him assistance to rehabilitate himself.

For the practice of supervision the best method will be to take each case individually depending on the offender's age, occupation, background, medical and physical condition, home environment, etc.

Supervision may be carried out under non-institutional measures such as parole, work release, etc. to make the offender rehabilitate himself with the guidance and assistance given by the supervisor and to make himself a good citizen in the society. Supervision may vary according to the needs of each offender based on the careful assessment of each case.

The programme of supervision must be explained and made known to the offenders, so that they can follow the programme of supervision without any difficulty. The offender must also understand that this is a self-help programme, where all the assistance given to the programme of supervision is intended to help him become a useful person in society.

Duration of the period of supervision varies according to each case. If the offender responds well to the programme, the duration of supervision may be terminated and such action as early discharge may be taken. On the other hand, if the offender does not respond favourably, measures such as extension of supervision, etc. may be adopted.

The conditions of supervision must be imposed by the competent authority on the offender so that the offender can follow the conditions to rehabilitate himself. Conditions must be known to the offender and must be practical, appropriate to follow and as few as possible aiming at reducing the possibility of the offenders return to criminal behavior. Conditions may be reviewed and modified from time to time with the good

progress of the offender.

It must be always noted that conditions must be drawn up with due regard to the offenders basic human rights considering the human needs of the offender. Other matters to be considered when conditions are imposed on the offenders are their responsibility toward society and the family, place of residence, refraining from criminal activities and association with criminals.

When a supervision order is imposed on the offender, he must be clearly informed of the consequences of failure to comply with any condition stipulated on the supervision order.

When deciding on the duration of the supervision the following criteria has to be taken into consideration: the nature of the crime committed by the offender, the character of the offender, the circumstances that led him to commit the crime, his risk for the safety of the public, and prospects of successful rehabilitation into the society.

Duration of the supervision is stipulated by law in almost all countries.

In some countries, early discharge of the supervision order is made possible by a favourable recommendation of the supervising officer to the authority, on the condition that the offender has served the rehabilitation programme satisfactorily.

Each offender must be provided with the most suitable treatment programme as each offender is different from the others. Other factors must be considered such as the nature of the crime committed, age, sex, mental condition of the offender and circumstances.

The treatment programme must be appropriate for the offender to follow and must not be an excessive burden to him. Community support systems such as family, work place, school, religious or social organizations must be utilized in the treatment programmes.

Keeping a good and close relationship between the concerned officials and the offender is of essential value and the understanding of offenders by the community is

very important for the successful implementation of the rehabilitation programme.

### **V. Co-ordination between Agencies in the Community and Prisons**

All correctional programmes such as community service order, parole, work release, etc. depend largely on public participation and support. Public cooperation plays a major role in all such programmes. This concept is very important as once an offender is imprisoned and then released on parole, work release, etc. normally the public treats the offender as an outcast in the society. The public must accept him into the society with sympathy and try to make him a useful citizen. It is generally accepted that the rehabilitation measures for offenders have a more positive effect than punitive measures.

Effective criminal justice administration cannot be achieved through the efforts of government agencies alone. Instead every possible social resource must be mobilized to that end, that is, every effort must be taken to draw the human and material resources from the public to the criminal justice system to achieve this target. The public must be provided with opportunities to become directly involved in the treatment programmes such as parole, work release, community service, probation service, etc. Some good examples of such organizations are volunteer probation officers in Japan, the Philippines and Thailand who undertake most of the supervisory roles of probation officers. The Big Brothers and Sisters Association in Japan is one example in which citizens are rendering informal support for various needs of the offenders.

To fulfill this aim, the society must recognize and support these voluntary organizations which are involved in community-based correction of offenders. These organizations must be recognized and encouraged by the government and the society. It is very necessary for the officers of government and other organizations and the public to have an

## ALTERNATIVES TO IMPRISONMENT

understanding that non-institutional treatment for offenders is effective.

Crime prevention and treatment of offenders is not only the responsibility of the criminal justice system. All the other members in the society are responsible for crime prevention and treatment of offenders. Crimes that are committed within the society and the task for treatment of offenders should also be shared by the society. So it is very important to educate every common citizen of the society on the purposes and the advantages of each extramural treatment. Law enforcement agencies may employ the mass media and personal contacts to influence public opinion favourably. Inter-agency relationships can be promoted through such activities as newspaper articles and news-releases on radio and television. Other programmes such as distributing information pamphlets could be a way of enhancing public participation.

### VI. Conclusion

As discussed earlier, the whole issue of alternatives to imprisonment at the post-sentencing stage can be seen in the following perspectives:

- a) Offenders could be given an opportunity to be treated within the society without necessarily going to prison.
- b) Imprisonment should only be the last resort and should be imposed for those who could not be treated otherwise.
- c) The issue of overcrowding depends mostly on the individual conditions of each country. In Kenya and other countries, overcrowding exists while in Japan it is not a serious problem. It can also be observed that the type of crimes committed in many countries of the world vary. For example, most people in Japan do not commit crimes due to poverty whereas in some countries it is taken as a major factor of crime.

In this connection, it must be borne in mind that alternatives alone do not solve the problem. For example, if a person commits a crime to satisfy his basic needs, it is difficult to prevent him from committing further offences unless his basic needs are first fulfilled.

The other factor that should be taken into consideration about release on probation, parole or work-release is that there must be a favourable home report and the family must be willing to accept him/her. The question therefor arises, as to what happens with offenders whose family does not need him/her? Will the offender remain in prison for the whole period of the sentence? What if the home report is unfavourable? How long will the offender remain in prison?

We believe that the decision to release on offender should depend not only on the home report but on other related sources. For example, if the family of the offender rejects him, efforts should be made by the concerned officials to help the offender make contact with other community agencies like religious organizations, other governmental or non-governmental organizations.

In order for alternatives to imprisonment to be successful, the public must be prepared to accept them. This is so because, in some countries, if the offenders are seen performing public work, etc., the public might disapprove of this as it will deprive other law abiding citizens of this employment. They would rather see the offenders remain in prison and the work performed by community members. Those mostly affected are the countries where unemployment is a crucial issue.

The employment agencies must be requested to offer employment to ex-prisoners. In reality, however, employment agencies and business corporations do not like to help offenders find employment. If the ex-prisoners are not given a chance to reintegrate into normal life in the society by offering them some employment, they might be back again in prison as recidivists.

## REPORT OF THE COURSE

Of course, as each country has its own tradition, social economic and cultural background, it is impossible or inappropriate to imitate the treatment of other countries. However, we believe that it is of much use to study the new alternatives and take them into consideration in commencing a new alternative or in furthering existing ones.

During our discussions, we came across some alternatives which are not applied in most of the countries. The following alternatives are worthy of reference:

### 1) *Penal Settlement*

Penal Settlement is practiced in Thailand as another alternative to imprisonment. This establishment is used as a place for the pre-release of prisoners. This helps the prisoners to readjust their life into the community after their release.

Penal Settlement in Thailand was first established in 1977 and is located in Nakorn-rachasima Province. It is called the "Klongpai Penal Settlement." Male prisoners who have already served more than half of their sentence and whose remaining period of sentence does not exceed two years are eligible to be selected for the Klongpai Penal Settlement. He must be a prisoner of good class or higher. He must have previous experience in the field of agriculture. If the prisoner has no land and his financial status is unstable, the authority may consider such a case as high priority.

All selected prisoners are given eight acres of land for agriculture and a piece of land for their own house. They are allowed to live with their families. All agricultural products belong to them. Moreover the possessory right of land is transferable to a prisoner's or ex-prisoner's descendants in case of his death.

This measure is working in Thailand and so it may be applied in other countries that still have some land for people to settle.

This type of measure should be implemented only for the rehabilitation of the offenders, but not be utilized as a measure

for segregation.

### 2) *Open Prison Camp*

The correctional facility which is called open prison, prison farm or prison camp is widely utilized in many countries in Asia and the Pacific region. It is expected that the open environment which the facility of this kind provides will be effective for the achievement of rehabilitative programmes without unnecessary frustration resulting from confinement in a prison surrounded by high walls. Another factor in support of the open facility may be that the construction of an open prison does not require a great amount of funds as compared with the expenditures for usual prisons. Basically, open prison is regarded as just one of the ordinary prisons and virtually is not recognized a one specific alternative measure to imprisonment.

However, some open prison camps in Sri Lanka seem quite different from the concept of common open prisons frequently observed in countries in Asia and other regions. It is obvious that there are no walls which have to be built in order to prevent possible escape or intrusion. What is unique is the fact that prisoners there are allowed to manage the camp by themselves with no presence of custodial staff. In the daytime, they are engaged in agriculture, growing fruits and animal husbandry in an open environment. At Kandewatta open prison camp, which was established in 1976, and occupies 29 acres, prisoners are provided the opportunity of acquiring skills in agriculture and maintaining coconut plantations as well as learning diary practices. In the course of the self-governing scheme, prisoners are better rehabilitated and can be resocialized and encouraged to have a sense of responsibility, discipline and cooperation.

Prisoners who have marked good results in a common prison are eligible to undergo this treatment. They come into contact with the neighbouring community while serving sentences which will be beneficial for their



Table: Procedure of Parole in Selected Countries

Country	Sentencing determinate or indeterminate	Eligible term	Initiator of application	Recommending body	Decision authority	Condition (parole regulation)	Supervising authority	Revocation	Decision authority of revocation	Term of parole	Remarks
China	determinate	1/2 or after 10yrs	warden	-	court	○	police	new crime (except negligence)	court	the rest of term or 10yrs (life)	
Fiji	determinate	1/2 and with good conduct or behavior	commissioner	commissioner of prison	minister of home affairs	○	nearest police station	new crime or violation	minister of home affairs	within 1yr	= compulsory supervision order
Indonesia	determinate	2/3 or after 9mos	warden	central board for probation system	minister of justice	○	prosecutor with assistance of probation officer	new crime or violation	minister of justice	the rest of term + 1yr	/remission, pre-release treatment leave
Japan	determinate	1/3 or after 10yrs	warden	-	regional parole board	○	professional & volunteer probation officer	new crime or violation etc.	parole board	the rest of term	/pardon
Korea (general & special)	determinate	1/3 or after 10yrs	warden	parole examination committee	minister of justice	○	police officer	new crime or violation	minister of justice	the rest of term or 10yrs (life)	
Papua New Guinea	determinate	1/3 or after 15yrs	prisoner	licence board	minister of justice	○	nearest police station	new crime or violation	minister of justice	the rest of term or 5yrs (life)	= release on licence/remission, pardon
Philippines	indeterminate	after the expiration of minimum	-	director of prisons	board of pardons & parole	○	parole & probation officer	new crime or violation	board of pardons & parole	after 5yrs or till the expiration of maximum	= conditional pardon/good time system
Sri Lanka	determinate	1/2 (above 4yrs) after 6yrs or 5yrs + 1 on open	from warden to director general of correctional bureau	licence board	minister of justice	○	policeman & prison welfare officer	new crime or violation	minister of justice	after 5yrs or the rest of term	= release on licence/remission
Thailand	determinate	2/3 (best grade), 3/4 (better), 4/5 (good) or after 10yrs	warden	board of parole	director of department of correction	○	volunteer & probation (parole) officer	new crime	minister of interior's condition	the rest of term	/remission (Royal Pardon)
Hong Kong	determinate	a. 1/2 (above 3yrs) or 20mos b. 6mos before earliest date of discharge	prisoner	correctional service department	supervision board	○	after care officer	violation	director of correctional service dept.	the rest of term	= release under supervision/remission
Marshall Island	-	-	-	-	-	-	-	-	-	-	-
Pakistan	determinate	2/3 or after 10yrs	prisoner or next of kin	warden-home department	home department board panel	○	probation officer & local police officer	new crime or violation	home department board panel	the rest of term	
England, Wales	determinate	1/3 or after 12mos (above 18mos)	deputy warden-local review committee	panel of parole board	minister of home affairs	○	probation officer	new crime or violation	crown court minister (by recommendation of P.B.)	the rest of term	/remission (good time system)

smooth reintegration and employment after complete release.

3) *Group or Individual Guarantee*

This is a unique method used in Sudan. The offenders may be released on a guarantee supplied by a friend or relatives, or inmates may guarantee each other to go out to work and can be authorized by the prison authorities.

4) *Extramural Employment*

This method allows prisoners to participate in public works while serving imprisonment sentence. It is currently applied in some countries. The public work has been undertaken in Thailand in which prisoners are still under the supervision of correctional officers and reside in the prison facilities after daily assignments of public work. However, in Fiji, the system is a little different. A prisoner is eligible for release to extramural punishment if his sentence does not exceed 12 months in the aggregate. Prisoners serving longer sentences become eligible when their earliest date of release with remission is not more than 12 months away and provided the prisoners may not be subject to the Commissioner's compulsory supervision order. A person released to extramural punishment and undertaking public work shall be employed under the supervision of any person or authority appointed by the controller or a supervisor of prisons for such number of hours, not being fewer than 30 hours per week as the controller or a supervisor of prisons may specify. According to the Prison Amendment Act, 1980, the expression "public work" includes undertaking work under the supervision of provincial council, town or district council, local authority and religious, charitable or other bodies approved by the Minister. Where the controller or the supervisor of prisons considers that any person undergoing extramural punishment is unsuitable or unable to continue with such extramural punishment, the supervisor may order the recall

to prison of such a person.

Although varying in its application to the system of release by compulsory supervision order, extramural punishment is the other form of release under supervision which is equivalent to parole. This system has also proved very successful and plays a major role in the reduction of the prison population and the creation of incentives for prisoners.

In Kenya, extramural penal employment may be ordered by a court in the case of any offender sentenced to imprisonment for six months or less or committed to prison for non-payment of a fine, compensation or sentenced to detention. The scheme gives an opportunity to an offender to stay at home, perform public work from 8 a.m. to 2 p.m. such as preparation for roads, cleaning government compounds under the supervision of an administrative official. The offender may be granted an opportunity to concentrate on his domestic work, lead a normal life after completing the public work. Though the scheme, which is quite similar to community service order, has several advantages, the courts have not made use of it extensively. It has also been argued that prisoners be allowed to participate in this scheme even after they have served some portion of their imprisonment sentences under the discretion of prison authority.

**Session 4: Management of the Implementation of Non-custodial Measures**

*Chairman: Mr. Chun-yan Chan (Hong Kong)*  
*Rapporteur: Ms. Lourdes Wenceslao Aniceto (Philippines)*

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**I. Introduction**

One of the primary goals of the criminal

justice system, i.e., to reintegrate the offender into society, can best be achieved through the use of non-custodial measures which divert offenders from incarceration and thus, may result in the reduction of the prison population.

Various types of non-custodial measures are being implemented in the criminal justice systems of various countries. The challenge rests not, however, on the number of non-custodial sanctions which may be extended to offenders at the pre-trial, sentencing, and post-sentencing stages but on how well these sanctions are implemented and managed. Thus, there is a need to look into areas of concern relative to and bearing salutary effects on "the management of the implementation of non-custodial measures."

#### *A. Workshop Composition*

The group was composed of a Senior Correctional Superintendent of Hong Kong as Presiding Chairman, a Director of the National Police Commission of the Philippines as Rapporteur, and a Border Security Force Deputy Director of India, a District Judge of Thailand, a Police District Officer-in-Charge of Malaysia, a Public Prosecutor and a Probation Officer of Japan, as Members.

A Visiting Expert from the Simon Fraser University of Canada, Dr. Curt Taylor Griffiths, and two UNAFEI Professors, Messrs. Hiroshi Nakajima and Masakazu Nishikawa provided valuable guidance as well as participation during discussion sessions.

#### *B. Workshop Topics*

Areas relating to the implementation of non-custodial measures in the countries represented (Hong Kong, India, Japan, Malaysia, Philippines and Thailand) served as focal points for discussion. They are as follows:

1. Management of Supervision of Offenders;
2. Supervision Methods and Schemes for Specific Offenders such as Drug Addicts and Juvenile Offenders;
3. Legal Aspects of Supervision of Offenders;
4. Public Participation and Volunteers;
5. Recruitment and Training of Staff;
6. Coordination of Criminal Justice Agencies;
7. Research on Non-custodial Measures;
8. International Cooperation.

#### *C. Modality*

With full enthusiasm and commitment, workshop participants exerted all their efforts and pooled their talents and expertise towards achieving a fruitful discussion of all topics.

To facilitate and ensure the systematic conduct of the workshop sessions, a workshop schedule was drawn up during the organizational meeting on 7 May 1990. The different topics were scheduled for discussion at specific dates under the overall UNAFEI Workshop Program. Each participant was assigned as discussant for a specific topic and was requested to prepare a discussion paper for distribution to members of the group at a specified date. After the paper presentation by the assigned discussant, discussion followed.

The proceedings of each workshop session were summarized after every session, reproduced and disseminated to all participants and advisors before the start of the next session for the Body's perusal and approval.

#### *D. Workshop Report*

This report is the output of a participatory and group undertaking, a presentation of existing systems, procedures and processes on the management of the implementation of non-custodial measures in the six countries represented, and the synthesis of participants' ideas and opinions on the topics discussed. Lectures of visiting experts and professors as well as reference materials from the UNAFEI Library also served as valuable input to the preparation of this report.

## II. Management of Supervision of Offenders

There is no doubt that criminal justice administrators and program implementors in all jurisdictions are giving constant attention to the promotion of non-custodial measures. The matter to emphasize is that these non-custodial measures can be implemented effectively with due consideration to each country's psycho-social, cultural, political and economic situations.

A wide range of measures may be availed of and granted to offenders at the pre-trial, sentencing and post-sentencing stages of the criminal justice systems in the various countries represented.

Of these non-custodial measures, probation and parole are the most common and which require supervision of offenders. Probation is a sanction in which the court places offenders under certain conditions, and under the supervision and guidance of Probation Officers. Parole is the conditional release of an offender from a penal institution after he has served a portion of his sentence and is placed under a supervision and treatment program. This topical discussion is therefore limited to the management of supervision of offenders placed under probation and parole. Further, supervision is operationally defined as the process of overseeing the compliance by the probationer or parolee not only of the conditions set in the probation/parole order but also of the treatment program which was drawn up for the probationer/parolee.

### *A. Necessity for a Competent Authority to Carry out Supervision*

An organizational structure vested with the authority and supported with competent staff and adequate resources is deemed necessary to manage the supervision of probationers and parolees. These organizational structures or offices must not only be centrally located at the national level but decentralized to regional/provincial or the lowest geographical levels possible to ensure serv-

ice delivery to the target client groups. In Japan, there are 50 Probation Offices—one in each prefecture and four in the Hokkaido Islands. There is a Regional Parole Board in each of the eight (8) cities where the High Courts are found. These Probation Offices and Regional Parole Boards are administered by the Rehabilitation Bureau of the Ministry of Justice. Probation and parole supervision is the responsibility of the central and 13 regional offices of the Probation and Parole Administration under the Department of Justice in the Philippines. In Honk Kong, probation work is undertaken by 11 Probation Offices which are under the Social Welfare Department. In Thailand, the Probation Office for adults and Probation Office for juveniles are under the Ministry of Justice while the Parole Offices are under the Corrections Department of the Ministry of Interior. In Malaysia, Probation Offices are under the Social Welfare Department while in India, Probation Offices are under the Social Welfare and Prisons Department.

Probation and parole supervision must be undertaken by competent staffs who are appointed to discharge these responsibilities and not involved in other functions which may be in conflict with supervision work. It is noteworthy to state that, in countries represented, supervision is the function of Probation Officers who are full-time personnel of the Probation Offices. Japan and Thailand, however, have a unique scheme where supervision of probationers and parolees is farmed out to Volunteer Probation Officers who are appointed by virtue of the Volunteer Probation Officers Law and the professional Probation Officers serve as coordinators, consultants and supervisors of these volunteers. In the Philippines, the Adult Probation Law of 1976 provides that volunteer probation aides may be appointed to a term of two years but volunteerism has not reached the level of enthusiasm and commitment of Japanese Volunteer Probation Officers. In India, Hong Kong and Malaysia, no volunteer probation officers assist in probation supervi-

sion.

*B. Period of Probation and Parole Supervision*

In all jurisdictions, the period of probation supervision is the period of probation established by the court. The periods of probation vary among countries. Notwithstanding this diversity, it is imperative that supervision is to be carried out within a period not to exceed what was fixed by the court. In Japan, an adult probationer is placed under supervision for a period ranging from one to five years, corresponding to that suspension of the execution of sentence specified by the sentencing court, with provisional suspension of supervision for good behavior. Hong Kong has probation periods mandated by law of from one to three years. The Philippine probation periods as provided by law range from less than six months to six years although on the average, the supervision period is normally between two and three years. Thailand has a probation period for adult probationers of not more than five years but in practice, probation periods are carried out for a period of one to two years in the period of suspended sentence.

*C. Probation and Parole Conditions*

Probation conditions are set by the courts as technical and behavioral requirements to be complied with by the probationer and also to guide the Probation Officer. These conditions, whether mandatory or special, should take into consideration the needs of the offender, the victim and society as a whole. These should be attainable and practical with the end goal of preventing recidivism and facilitating the reintegration of the probationer or parolee into the mainstream of society. The nature of these conditions normally include mandatory reporting to the Probation Officer, good behavior or conduct expected of a law-abiding citizen, and appearance in court whenever required. Some countries impose mandatory conditions only, others both mandatory and special conditions. Three mandatory conditions are im-

posed in Thailand, four in Hong Kong, three in the Philippines, three in Japan and four in India. In case of special conditions, these are varied and the most common are restriction of alcoholic beverages, prescription of a particular place to reside, meeting one's family responsibilities, attendance of a prescribed secular study or vocational training, and restriction from visiting houses of ill-repute, among others.

The diversity of the nature of conditions imposed by each country assumes no significance. However, the Body agreed that these probation and parole conditions are necessary to enable the probationers and parolees to become law-abiding and self-respecting citizens and that flexibility of conditions should be considered in case of meritorious cases. All efforts should then be exerted by the Probation Officer to ensure that his supervisee is informed properly and understands the conditions of his probation or parole.

*D. Violations of Conditions of Probation or Parole*

In all countries represented, a serious breach in the conditions of probation or parole or the commission of a new offense leads to revocation. In case of minor violations, modifications of the conditions may be made by the competent authority.

The nature and circumstances of the breach need careful examination and investigation by the Probation Officer before a report is submitted to the court. If the court is satisfied that the probationer failed to observe any of the conditions of his probation, it may revoke the probation and the probationer serves the sentence originally imposed as practiced in Thailand, Hong Kong, Philippines, India, Malaysia and Japan.

It is the consensus of the Body that during the fact-finding investigation conducted by the Probation Officer, the court hearing of the violation charged, the arrest and detention of the probationer charged of breach, and, for that matter, any process undertaken

for the duration of his probation supervision, the rights of the probationer should be upheld. His right to counsel and to appeal the modification or revocation to a judicial or higher competent authorities is inviolable.

*E. Supervision and Treatment Program: Its Planning and Implementation*

The formulation of a supervision and treatment program hinges on the following: firstly, the conditions of probation which provides the overall framework for supervision; and, secondly, the post-sentence investigation report which contains the circumstances of the offense, the psycho-social information of the offender, an evaluation of the offender's potential for re-integration into the community and information on the offender's financial capability to meet civil obligations, and the classification system for the offender. It was also the consensus of the Body that, as much as practicable, the Probation Officer should involve the probationer himself in the preparation of his supervision and treatment plan since this participatory process may facilitate the attainment of successful supervision considering that the probationer is the key figure or beneficiary of the program.

Needs assessment is necessary to identify the scheme of treatment to be undertaken, i.e., group therapy, casework, residential programs, etc., as well as other needs related to employment, housing, and livelihood activities, among others. The program should ensure that the probationer gets all the possible help to enable him to adjust to his condition as probationer, provide him with information and facilitate referrals to enable him to cut through the barriers, and receive assistance from social institutions.

How the supervision and treatment program is implemented rests heavily on the burden of the Probation Officer who has to put to use his training, experience, skills and, most of all, his commitment towards the job in bringing about the desired changes in attitude, behavior and social circumstances in

the offender. In performing supervision function, the Probation Officers in the countries represented establish linkages with the community for cooperation and support, exert persuasive influence over employment agencies/offices to enable him to find a satisfying job for his client, and maintain coordination with social welfare agencies, both public and private, for material assistance to his probationer. A probation officer is not only an enforcement officer but a social worker and public relations person, not to mention being a friend to his supervisee.

In Japan, the supervision of probationers and parolees is carried out by the professional Probation Officer who functions as a case manager and the Volunteer Probation Officer who actually undertakes supervision. The Probation Officer interviews the probationer, explains the conditions of his probation, assesses his needs and problems requiring special attention, and draws up a treatment plan. The case record and the assessment (treatment plan) prepared by the Probation Officer is sent to a Volunteer Probation Officer who lives near the probationer who then personally appears before the VPO. The VPO maintains close contact with the probationer and his family through home visits and interviews are conducted periodically. A regular progress report is prepared by the VPO for submission to the Probation Office. During unusual situations, the VPO is required to communicate with the professional Probation Officer. At times, the Probation Officer also makes visits and interviews the probationer and, based on the progress reports as well as his personal assessment of the success of the probationer, may initiate action for his provisional discharge or for negative sanctions such as revocation of supervision.

In the countries represented, the Probation Officers actually supervise the probationers. They undertake home visits and periodic interviews, coordinate with appropriate agencies for services needed by their clients, look for available livelihood programs and em-

ployment opportunities for their probationers, among others.

A periodic report on the progress made by the probationer is prepared by the Probation Officer (by the VPO in Japan) and submitted to the Probation Office. This periodic assessment is necessary in the adjustment of the level or intensity of supervision to be undertaken such that a good probationer may have lesser frequency of reporting to his Probation Officer or he may be left to his own or given an early release, as recommended by his Probation Officer. On the other hand, a probationer who is not cooperating with his supervision and treatment program has to be dealt with more strictly.

### **III. Supervision Methods and Schemes for Specific Offenders such as Drug Offenders and Juvenile Offenders**

Almost all countries are faced with drug criminality and juvenile crimes despite the adequacy of laws on the matter and the resolve of all governments to wage campaigns against the onslaught of the problem. This situation leads to an increasing number of drug offenders and juvenile offenders who are either placed under institutional or non-institutional treatment, depending on the nature of the offense, the personal circumstances of the offender, and the interests of the offender, the victim and the community. Criminal justice practitioners, therefore, particularly those responsible for the supervision of these juvenile and drug offenders, should gear their efforts towards more responsive supervision and treatment programs tailored to the needs of their client groups.

#### *A. Drug Offenders*

All efforts are being undertaken by all countries represented in the Group to provide drug offenders with treatment and rehabilitation programs by appropriate agencies as well as private institutions. These

treatment programs help drug dependents to lead normal lives and to become useful citizens in their communities. Generally, these programs aim at restoration of physical health, removal from psychological and emotional dependence on drugs, and finally, facilitating re-adjustment to society.

Drug abusers in India are not charged but are detained in institutions under the Department of Health and in some private institutions where they are provided with the necessary treatment and rehabilitation program. This is also true in Malaysia where drug abusers are not charged by the courts but are sent to rehabilitation centers where they undergo treatment for a mandatory period of two years. Likewise, in Thailand, there is a compulsory system of treatment and rehabilitation of drug abusers under the special treatment detention centers of the Corrections Department of the Ministry of the Interior and the Central Observation and Protection Center under the Ministry of Justice. Most of the drug offenders in Japan are imprisoned but some of them are placed under probationary supervision for violations of the Stimulant Drug Control Law and those of the Poisonous Substances Control Law, including abuses of organic solvents like thinner.

In Hong Kong, a wide range of treatment programs using various techniques and methods are being used, considering that one form of treatment suitable to some addicts may not be suitable to others. There are three major programs, namely: the compulsory placement program, the voluntary placement program, the voluntary outpatient methadone program provided by the Medical and Health Department and the voluntary in-patient program run by self-financed or government subvented organizations like the Society for the Aid and Rehabilitation of Drug Abusers (SARDA). Of these programs, the compulsory placement program is operated by the Correctional Services Department in their Drug Addiction Treatment Center (DATC) and is designed to cater to addicts who are convicted of

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minor offenses or not so serious offenses and who are considered suitable by the courts to undergo such a program. This compulsory program provides residential treatment for convicted drug dependents, and at the same time, offers the court an alternative to sending a drug dependent to prison.

While emphasis is put on compulsory institutional treatment programs, non-institutional type of programs can play an important role in the treatment and rehabilitation of drug addicts. Since aftercare supervision is strongly needed after an addict is released from a treatment or rehabilitation center, the aftercare supervision is compulsorily carried out in Hong Kong, Malaysia and Thailand.

Probation can be utilized to supervise drug addicts in the community. In Thailand, the drug addicts on probation are encouraged to undergo the treatment in the rehabilitation center under the conditions imposed by the courts.

### *B. Juvenile Offenders*

Juvenile delinquency and youth crimes are problems which must be addressed seriously by proper authorities and the community. The juvenile justice system in the countries represented places emphasis on the diversion of youthful offenders from the criminal justice system to prevent labeling and stigmatization as well as the development of a negative attitude towards the criminal justice system.

The placement of youthful offenders into community-based programs is considered favorable to his rehabilitation since he is given the opportunity to relate to his family and his community. He may be released under the supervision of a Social Welfare Officer as in the Philippines and in Malaysia, or to a Probation Officer as in Japan. A juvenile offender on probation is given conditions to comply with just as an adult offender and violation of any of these conditions may result in modification or revocation of probation. The Probation Officer, however, has to make

the most difficult judgement regarding the application to the court for the revocation of the probation and should consider whether revocation would serve the best interests of the young offender and also the community.

Institutional treatment programs are being undertaken for youth offenders in rehabilitation centers such as in the Philippines, in the juvenile training schools and child education training homes in Japan, and in training schools in Thailand. In Hong Kong, a juvenile offender undergoes a period of detention in a detention center or training center where the program includes formal educational and vocational training as well as a sense of discipline or in any of the reformatory schools for juvenile offenders where he can have training for an indeterminate period of one to five years or until he reaches the age of 18. Also, those aged 16 to 21 who are placed under probation may be required to reside in an open probation hostel.

### *C. Towards an Enhanced Supervision over Drug Abusers and Juvenile Offenders*

The classification of an offender cannot be overemphasized as the result of such classification determines the type of treatment (whether institutional or non-institutional) to be given as well as guiding the Probation Officer as to the level or intensity of supervision he must exert over the offender.

Since classification results are crucial as to the type of supervision and treatment program an offender shall have, a classification system should consider not only the nature and gravity of the offense committed but also the personal circumstances and needs of the offender and other control factors such as previous gang involvement, history of criminal tendencies, public perception of the offender, among others. Those responsible for the classification system have the difficult task of determining the appropriate classification of an offender based on these factors. But in Japan, a classification prediction table is used where several problem areas are taken as predictive factors in distinguish-



ing those who are to be given intensive treatment from those to be assigned to less intensive treatment.

In Japan, probationers and parolees are classified into two groups—Group “A” which requires intensive treatment and special attention from the probation officer and volunteer probation officer, and Group “B” which calls for less intensive treatment.

In view of the nature of drug and juvenile criminality as well as the individual personalities, behavior and tendencies of these offenders, there is a perceived need to undertake new methodologies and directions in supervision work. The traditional man-to-man approach may be expanded into group treatment programs such as those being implemented in the various rehabilitation centers, training schools and half-way houses or rehabilitation aid hostels.

Likewise, the traditional man-to-man approach may be supplemented with intervention strategies which reflect a graduated intensity of treatment and control based on the behavior and the responsiveness of the offender to the treatment program. Counseling and family-casework need also to be enhanced. Furthermore, it is recognized that drug offenders should be given medical and psychological treatment.

Corollary to the improvement of supervisory methods and schemes is the enhancement of the capabilities, knowledge and skills of Probation Officers, Social Welfare Officers and Volunteer Probation Officers. It was expressly adopted by the Body that these personnel and volunteer workers must maintain a commitment to knowledge and skills development to enable them to understand the nature of the offense and their clients' behavior and be able not only to supervise and guide but to relate and deal with them.

#### **IV. Public Participation and Volunteers**

There is an unanimous recognition of the

fact that public cooperation and support for programs on the dispensation of criminal justice, particularly in the implementation of non-custodial measures, wields a tremendous impact on program effectiveness. If only a small number of people (i.e., police, prosecutors, judges, intake workers, probation officers, parole officers) have the responsibility of managing crime prevention and criminal justice, there will be little progress. The public needs to be willing and dedicated partners.

To illustrate, the joint efforts of the police and the community is necessary in crime prevention and in the maintenance of peace and order. Police-community relations programs are therefore adopted in police organizations in countries represented. Different mechanisms of implementing these programs include citizens and civic organizations sharing police work, crime prevention associations, traffic safety associations, juvenile guidance counsellors, traffic guidance instructors, consultation corners, and police-school liaison councils, among others.

Volunteerism in police work in Malaysia is seen through the formation and operation of residents' associations, neighborhood and crime watchers and volunteer corps all over the country. There is also the police volunteer reserve which assists the police in ensuring that suspicious characters' movements are monitored, and in the event of an arrest or an encounter with criminal elements, the police are informed speedily so that more stringent action can be taken on the spot. For almost 25 years of existence, these voluntary anti-crime groups have been playing a pivotal role in the suppression and prevention of crime and other illegal and deviant acts.

The involvement of the community in the treatment of offenders who are placed under non-custodial sanctions assumes great significance considering that the offenders are placed under community-based treatment and therefore, become part of the community. The implementation of their rehabilita-

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tion and treatment program calls for the understanding, cooperation and collaboration of community members.

With special focus on Japanese rehabilitation services, volunteer probation officers participate in rehabilitation programs and are involved also in crime prevention activities. They are honorary national officials and do not receive any remuneration other than the reimbursement of total or part of actual expenses incurred while performing their functions. They are organized into the national volunteer probation officers federation with area associations and prefectural volunteer probation officers federations. Other Japanese voluntary associations organized to assist in the rehabilitation of offenders are the Rehabilitation Service Promotion Association, the National Women's Association for Rehabilitation Aid, and the Big Brothers and Sisters Association which has regional and prefectural associations. There are also rehabilitation aid associations operating halfway houses which provide residential/non-residential facilities for juveniles and young offenders; and residential facilities for adult offenders and those with special problems such as drug abuse and alcoholism.

Cognizant, therefore, of the importance of public cooperation in the implementation of non-custodial measures, greater and more sustained participation of the public should be maintained. One strategy is the encouragement and due recognition of the role of non-governmental organizations in the treatment and rehabilitation of offenders with a view towards strengthening their interest and commitment. Likewise, promotion of public awareness on existing correctional and rehabilitation policies, programs and activities, to include the activities of volunteer groups should be actively pursued through the use of the print, broadcast and television/movie media and through other public information programs such as the conduct of community seminars and similar activities.

It is pointed out, however, that public perception and attitude towards the criminal jus-

tice practitioners determine to a great extent the level of public cooperation and volunteerism not only in offender rehabilitation work but for the whole criminal justice administration, thus, the imperative for the enhancement of and commitment for professionalism, credibility, discipline and integrity among the officials and staff of the criminal justice system.

### V. Recruitment and Training of Staff

There is no doubt that the effectiveness and efficiency of the implementation of a program is determined, to a large extent, by the calibre, training and motivation of the personnel manning it. This is particularly so in respect to programs which deal with human beings instead of machines. It follows that very special care and attention have to be given to the selection and training of staff.

Probation and parole involve the study and diagnosis of human behavior and the guidance of young and impressionable individuals in need of help and rehabilitation. The probation/parole officers are entrusted with the prime responsibility of moulding the character and conduct of individuals and making them useful to the society. Their responsibility assumes greater significance when the individual is found already contaminated with misconduct and misbehavior. The probation/parole officers are expected to supervise the conduct and character of probationers/parolees, that is, persons of proved criminal behavior, during a particular period and ensure that they conform to societal norms and function as normal citizens. Based on these considerations, therefore, there is general agreement among the participants that the importance of recruitment policy and a well-directed training program for probation/parole officers needs greater emphasis.

#### A. Recruitment

Recruitment of probation/parole officers should be open to all qualified persons re-

ardless of creed, sex, age, language, social origin, property or birth status. Said recruitment system should consider not only educational qualifications but also their personality, behavioral traits and characteristics such as good health, intellectual and emotional stability, integrity, ability to work with others, tolerance, and capacity to win confidence, among others.

*B. Educational Qualification and Experience Requirement*

The minimum educational qualification requirement for a probation officer should be a bachelor's degree in any discipline, preferably in applied social sciences like psychology, sociology, social work, criminology, and related subjects. Besides, weightage should be given to any field of work performed by the applicant under the auspices of any recognized school of social work.

While the requirement of experience in social case work may not be prescribed as a prerequisite for recruitment, preference or special weightage may be given to applicants having experience in teaching, law enforcement, child welfare and other social welfare activities.

*C. Selection and Training*

Applicants who meet all the qualification standards for the position should undergo an examination and interview. The examination should be designed to test the applicant's skill in understanding human behavior as an individual and as a member of society, his intellectual maturity, emotional stability, etc. The oral interview shall try the applicant's aptitude for social work and determine his leadership qualities, etc.

After selection and appointment, it is essential that a recruit probation officer be put through an intensive and extensive training program which consists of a pre-service, basic, on-the-job or practical and specialized training course. There is also the need for him to gain knowledge on the workings of the other agencies of the criminal justice sys-

tem as this will help him during the discharge of his functions.

Besides this regular training program, there should be a system by which the probation/parole officers may update their professional knowledge and skills. This could be best achieved by having advanced and refresher courses. These courses should be aimed at helping them develop scientific understanding of the impact of changing social-economic and political situations on crime and delinquency; to equip them better with modern methods and latest techniques in correctional treatment; to provide an opportunity for professional interaction and exchange of technical knowledge and experience pertaining to their specific areas of work and role performance; and, to encourage them to develop a better appreciation and realization of the need and efficiency of a unified approach to social defense in dealing with the problems of crime and delinquency.

In Japan, the national training program for probation/parole officers is conducted by the Research and Training Institute of the Ministry of Justice while the training of volunteer probation officers is undertaken by the Probation Offices.

In the other countries represented, the training of probation/parole officers is undertaken by the training divisions/units of the Probation/Parole Offices. It is perceived by the participants that the nature and extent of the training for probation and parole officers requires the establishment of a training institute at the national level so that a uniform pattern of training is given to them.

Training courses, seminars and conferences in foreign countries such as this UN-AFEI course on the "wider use of non-custodial measures" as well as observation tours could facilitate information and technology exchange and promote better understanding of mutual problems and areas of concern.

## VI. Coordination

Criminal justice exists in a continuum and that if justice is to be fully realized, each link in the chain of the system must function in close coordination with one another. In addition, the fact has been observed that criminal justice forms part of the overall agenda of a nation's development. Thus, there is the need for its firmer linkage and coordination with other government offices, not to mention with non-government organizations as well.

### A. Criminal Justice Inter-Agency Coordination

It is recognized that coordination should be a primary consideration in an effective implementation of programs in criminal justice. This becomes most obvious when it comes to the management of the implementation of non-custodial measures which necessarily calls for the understanding, cooperation, and collaboration of the police, the prosecutors, the judges, the probation/parole officers, other criminal justice program implementors, and the community.

Towards fostering coordination among criminal justice agencies, there is the need for a clearer and better understanding of the interdependent nature of the functional areas of these agencies and the necessity for an integrated approach to crime prevention and the rehabilitation of offenders, particularly those under non-custodial sanctions, with due consideration to the independence of the different agencies. Proper delineation of responsibilities should be emphasized whenever joint undertakings are to be planned and conducted.

To facilitate coordination and integration of efforts, a coordinating mechanism should be established at two levels: firstly, at the top level of government where the highest ranking officials hold regular dialogues among themselves, agree over common policies, and commit the resources of their agencies for the implementation of such policies. These policies should be translated into specific is-

suances and guidelines to obviate from just merely shifting of responsibilities among agencies. These clear guidelines should be handed down to the operating levels for observance and implementation. Secondly, program implementors should have a forum such as conferences, seminars and training programs where the problems and constraints encountered during program implementation are discussed. Results of dialogues and discussions at this level should be submitted to their respective agency heads for appropriate action and deliberation during first-level dialogues. Better integration and closer coordination of planning and implementation efforts at the policy and program implementation levels will no doubt result in uniformity and consistency of policies as well as better use of scarce resources.

Such a coordinating mechanism may derive its organizational authority from legislation or executive issuances in the countries represented and, as much as practicable, be decentralized to the regional, provincial or even lower levels. Concerned about the scarcity of resources and the need for additional manpower, the issue has been raised that *ad hoc* bodies and multi-sectoral councils and committees whose memberships are representatives of the criminal justice system like the Technical Panel on Crime Prevention and Criminal Justice and the Peace and Order Councils in the Philippines, may prove responsive to the strengthening of inter-agency coordination and cooperation.

Japan's experience in the field of inter-agency coordination indicates that even without any formal and central coordinating structure, the system of implementing programs is stable. There are many regular meetings among agencies in criminal justice. For example, a system has been institutionalized for a period of 25 years where regular meetings are being conducted among the District or Family Courts and Probation Offices at the regional levels with the Supreme Court and the Ministry of Justice providing the Secretariat. At this juncture,

therefore, a coordinative mechanism is formally established and the call for coordination is addressed.

Collaboration of training efforts for personnel of the other criminal justice system and the probation/parole officers can be a fruitful endeavor considering that their works are interdependent. Joint projects may be planned and undertaken such as national and regional seminars, conferences, symposia, etc., in order to have a well-rounded discussion and exchange of ideas about issues and problems in criminal justice administration with emphasis on the treatment and rehabilitation of offenders under non-custodial sanctions.

### *B. Coordination with Other Government Agencies*

Since the criminal justice system operates within the framework of national development and considering that some of the services needed fall within the delivery system of other government agencies, there is an imperative need for the criminal justice agencies to forge closer linkage and cooperation with these agencies. A sustained coordinative mechanism should be adopted which has a program strategy of involving appropriate government agencies in the implementation of the treatment and rehabilitation program of probationers/parolees. To illustrate, the Philippine Probation and Parole Administration has launched a program being participated in by government agencies where the Department of Agriculture offers nationwide technical assistance to probationers and their families through its extension programs and projects; the Department of Environment and Natural Resources extends employment opportunities to probationers/parolees through its community employment and development program; and the Department of Education, Culture and Sports, encourages probationers in the community to participate in its non-formal education program to enable them to acquire livelihood skills necessary for gainful employment and improve-

ment of their way of life.

Of great importance is the coordination of criminal justice agencies with the law-making bodies considering that criminal justice administration must perforce respond to change and new legislations are needed to provide authority and legal bases for major policy directions such as depenalization, decriminalization, amendments to existing laws and the like.

## VII. Research

Conducting research as a necessary management tool for policy formulation, program development and program evaluation in criminal justice in general and the use of non-custodial sanctions in particular deserves serious consideration. Through research and with the application of appropriate and scientific methodologies, problem areas in the implementation of non-custodial sanctions and the necessary corrective measures may be undertaken to improve existing policies and procedures or new systems and strategies may be developed for adoption and implementation.

It is recognized that there is an inadequacy of research on the phenomenon of crime, criminal justice operations, and the use of non-custodial measures. This could be explained by the low priority given to research by administrators who would look down upon it as too costly, time consuming and a waste of resources. Others regard research as an academic exercise and so theoretical that its findings may not be practical for implementation. Another identified constraint is the inadequacy of resources in terms of manpower and finances as well as the lack of expertise and facilities for research work.

The lack or inadequacy of statistics necessary for research work is also recognized. Statistical information about the phenomenon of crime, offenders and criminal justice operations and processes are of extreme importance not only to research work but also to policy formulation and program evalua-

tion. The need for the establishment of a crime information system is in order, even just adopting a simple and manual approach which shall later expand to a sophisticated system through the introduction of computer technology where an offender data-based information system can track down the movement of an offender from the time of his arrest to his incarceration or placement to non-custodial sanction or final release into the community.

Despite these perceived problems, the importance of research could not and should not be ignored. Better coordination and cooperation between policymakers and researchers should be established to make research more relevant and responsive to policy needs and to facilitate the conduct of research work. Criminal justice agencies may tap university-based research groups for joint research undertakings but due consideration and proper delineation of responsibilities should be made in the following areas: identification of research topics, source of funding support, manpower allocation, extent of access to data sources, control of data in terms of data processing, data analysis and interpretation, preparation of report, dissemination and publication of research findings, mechanism for the submission of findings to decisionmakers and, if necessary, to legislators in aid of legislation, among others.

To meet the demands for research expertise, training courses and seminars on research methods and statistical techniques, to include formal education in academic institutions, should be made available to criminal justice researchers. Basically, however, personnel occupying middle management positions in criminal justice agencies should be knowledgeable about research work.

Research grants from foreign governments and associations/foundations as well as local sources should be looked into for possible availment.

### VIII. International Cooperation

The enhancement of international cooperation in crime prevention and criminal justice administration is an imperative among nations. The campaigns against the continuing incidence of transnational crimes across national borders and the quest for more humane and fair treatment of offenders are certainly among the national agenda of each and every nation, the attainment of which relies heavily on international cooperation.

International cooperation in the investigation of criminal cases among investigative agencies, to the extent permitted by national laws of concerned countries, is encouraged in the same way that the exchange of information on crime and offenders should be promoted among countries. The role of INTERPOL is cited in this regard.

The identified areas of cooperation between and among countries insofar as the implementation of non-custodial measures is concerned includes the conduct of research, exchange of information, exchange of procedural innovations and technology, and training.

The conduct of cross-cultural research and comparative studies on the rehabilitation of offenders placed under non-custodial measures such as probation and parole involves the cooperation of selected countries. The international research-sponsoring agency (whether a government office, non-government research organization or individual researcher), upon clearance from the appropriate national agency should be given all the necessary assistance and cooperation by the selected research clientele. On the other hand, said international research group should provide research findings to host countries. Cooperation among countries is needed also in the collection of comparable crossnational statistics regarding crime, offenders and criminal justice operations, as well as crime prevention strategies.

There is no doubt that training programs for multinational participants foster interna-

tional cooperation. International seminars, congresses or conferences provide participants with the opportunity to interact among one another, exchange views and information about existing policies and procedures on the criminal justice system in their countries, particularly on the implementation of non-custodial measures and innovations undertaken in the field of offender rehabilitation.

Coordination and cooperation on the international level can also be pursued through memberships in and linkage with international bodies involved in criminal justice and crime prevention, foreign criminological facilities and other similar institutes.

Exchange programs for the training of staff at the operating level similar to the program between the KAWAGOE JUVENILE PRISON and one of the prisons of the state of Oregon, USA, should be promoted, to include the visits of experts to other countries.

Also, the transfer of foreign prisoners, as provided under the United Nations Caracas Declaration of the 6th United Nations Congress on Crime Prevention, calls for international cooperation.

Acknowledgment is made for the role of the UNITED NATIONS and its INSTITUTES for promoting international cooperation. Of special mention is the UNITED NATIONS ASIA AND FAR EAST INSTITUTE FOR THE PREVENTION OF CRIME AND TREATMENT OF OFFENDERS (UNAFEI) and the JAPANESE GOVERNMENT for their tremendous and laudable contribution to the promotion of international cooperation through the conduct of international training programs, cross-cultural researches and statistical surveys, and assistance to brother institutes in other regions.

In view of the changing socio-politico-economic situation in the Asia-Pacific Region, there is general agreement on the need to strengthen UNAFEI through:

1. The expansion of its training programs in terms of additional training courses, increased quota of participants from various countries, longer observation tours, immersion programs, etc.;
2. The establishment of its own research and publication facility in pursuance of its training program implementation, separate and distinct from the Research and Training Institute of the Ministry of Justice of Japan. In this manner, the UNAFEI serves as the Criminological Research Center for Asia and the Pacific region and research output and feedback from different countries shall be monitored by it and submitted to the United Nations Crime Prevention and Criminal Justice Research Branch; and
3. The establishment of a Regional Crime Information System at UNAFEI to facilitate date access and exchange among countries in the region and finally link-up with the United Nations Criminal Justice Information Network (UNCJIN). UNAFEI shall then bring into realization the call of the 6th United Nations Congress for the "worldwide need to develop relevant and reliable statistical and other reliable information about the phenomenon of crime and the operation of justice systems."

## IX. Conclusions and Recommendations

The Workshop output presents timely and significant information on the different topics relating to the management of the implementation of non-custodial measures, as obtained by countries represented.

Within the bounds of cultural, social, political and economic situations in these different jurisdictions, significant strides are being undertaken towards facilitating and enhancing the supervision of offenders placed under non-custodial sanctions of probation and parole, to include specific offenders such as drug abusers and juvenile offenders. Such supervision is effected with due recognition to the civil rights of offenders and proper support from competent and trained staff of

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agencies specifically organized to undertake rehabilitation services. This supervision work and other implementing functions could not have met the demands of the clientele, the victim and the community without the enthusiasm and support of other government agencies, non-government organizations and individual volunteer workers as well as the coordinated efforts among criminal justice agencies. The role of research and international cooperation, with special recognition to the laudable efforts of UN-AFEI, capped the discussions.

The truer value of the Workshop Report is its emphasis on the strategies, directions and measures which Workshop Participants believe would bring about a more enhanced implementation of non-custodial measures. Indicated below are the summaries and broad categorizations of detailed recommendations found under each topical discussion, thus:

1. For the implementation of a non-custodial measure which calls for supervision like probation and parole, there is a need for an organizational structure vested with authority to carry out such responsibility, and supported by a competent staff which is carefully recruited and selected under established qualification standards and given adequate training to equip them and enhance their skills and knowledge to meet the demands of their responsibilities;
2. The conditions set for the compliance of an offender during probation/parole supervision should consider his needs as well as those of the victim and the community and these conditions should be properly and adequately informed and explained to the offender, particularly on the revocation or modification by competent authority of such order in case of breach and possibility of an early termination of order and supervision in case of a good response to the rehabilitation and treatment program;
3. Taking into consideration the classification of the offender, the treatment and rehabilitation program, which includes psychological, medical, educational, social, vocational components and the like, should not be longer than the probation/parole period issued by the competent authority and it should be subject to periodic assessment to enable the probation/parole officer to adjust the level or intensity of supervision;
4. A well-directed coordinative mechanism shall be established to coordinate and integrate the efforts of all criminal justice agencies at the policy-making and program-operating levels;
5. The involvement of other governmental agencies, non-government organizations and individual volunteer citizens should be encouraged, supported and recognized. In this connection, individual volunteers should be carefully screened and trained for their responsibilities of supervision of cases;
6. The conduct of research and the establishment of a crime information system should be given priority consideration and the possible involvement of the academic in the conduct of research should be considered;
7. International cooperation should be pursued through the various ways identified. Acknowledging the laudable efforts of UANFEI in this area and considering the changing socio-politico-economic situation in the Asia-Pacific region, the expansion of UNAFEI training programs and the expansion of its organizational structure and facilities are recommended.

On the whole, Workshop IV proposes that existing methodologies and strategies found effective within the psycho-cultural, social, political and economic environments in the



## MANAGEMENT OF NONCUSTODIAL MEASURES

countries represented shall be fully implemented but a continued search for more meaningful, responsive and timely alternative methods necessary to enhance the implementation and supervision of treatment and rehabilitation programs of offenders

placed under non-custodial measures should be a continuing commitment and should form part of the agenda for an improved criminal justice administration under the framework of the overall national development plan.