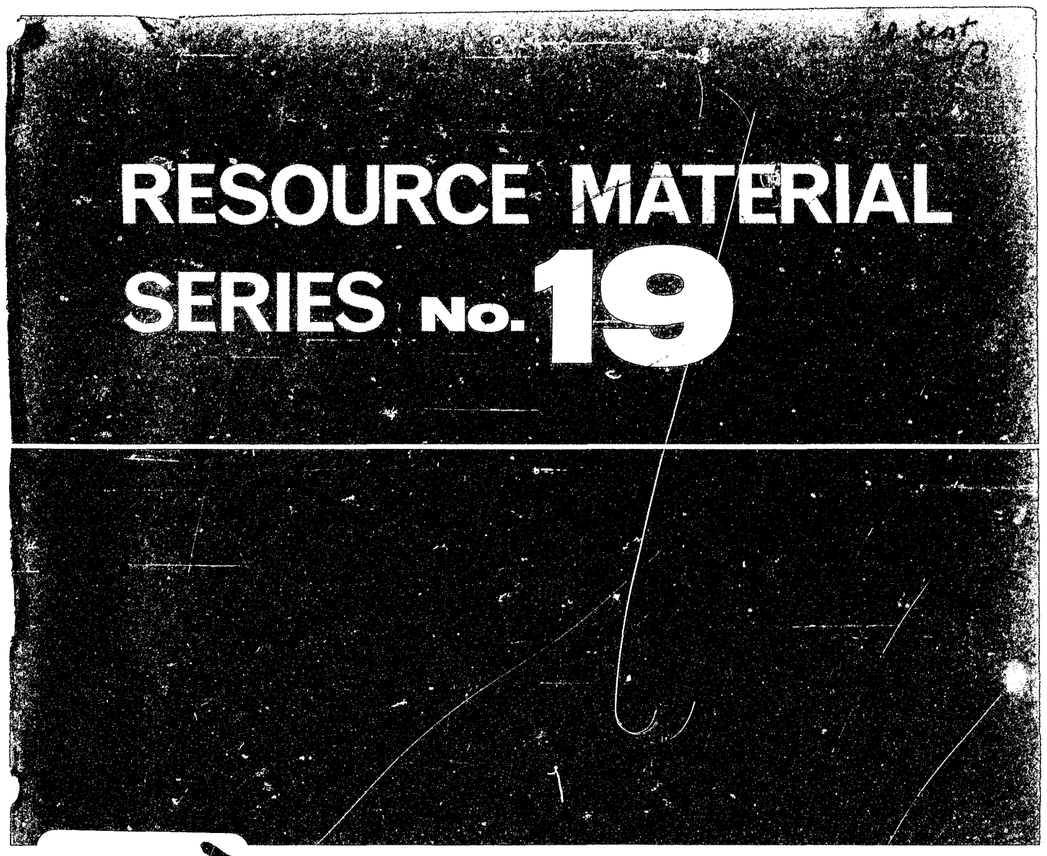

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Introductory Note

The Editor is pleased to present No. 19 of the Resource Material Series carrying papers produced during the 54th International Seminar and the 55th International Training Course.

Part I contains materials from the 54th International Seminar on the Arrest and Pre-trial Detention held from 12 February to 15 March 1980.

Section 1 consists of papers contributed by two visiting experts. In the paper "Protecting Rights and Status of Defendants, Citizens and Investigating Officials," Professor B.J. George, Jr., New York Law School, U.S.A., examines the basic theory, nature, concepts and alternatives of exclusionary rules developed in the United States, and discusses protection of victims and witnesses, special proceedings to aid criminal investigation with emphasis on the judicial orders for the acquisition of evidence, encouraging or enforcing citizen cooperation and grants of immunity to needed prosecution witnesses. Another visiting expert, Hon. Xavier Connor, Judge, Supreme Court of Australian Capital Territory and Federal Court, Australia, in his paper on "Some Aspects of Arrest and Pre-trial Detention," discusses such essential issues as criteria for arrest, action after arrest, custodial investigation, right to silence and confessions in the light of Australian court practice.

Section 2 comprises the papers by the participants of the Seminar, and Section 3 the Report of the Seminar.

Part II contains materials from the 55th International Training Course on the Institutional Treatment of Adult Offenders held from 15 April to 5 July 1980.

Section 1 contains papers written by two visiting experts, i.e. Mr. J.P. Delgoda, Commissioner of Prisons, Sri Lanka and Dr. Knut Sveri, Vice-Dean, Faculty of Law, Institute of Criminal Science, University of Stockholm, Sweden. Mr. Delgoda, in his paper on "Some Practical Problems in Asian Corrections" points out several contemporary problems commonly confronting correctional administrators in the Asian region and warns that changing attitudes of prisoners as well as prison officers may well lead to violent outburst unless some appropriate countermeasures are immediately taken. Dr. Sveri, in his paper on "Recent Changes in Correctional Policies and Practices in Sweden" discusses in detail the Swedish criminal law reforms from 1940 to 1979, with special emphasis on the new trends in correctional philosophy in his country.

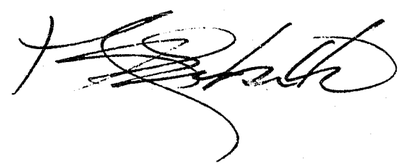
Section 2 contains the papers of the participants of the Course, Section 3 the Report of Group Workshops and Section 4 the Report of the Course.

In both courses, many excellent papers were submitted to the Institute. It is regrettable, however, that all the papers cannot be printed, because of

limited space of this volume. The Editor would like to add that, owing to lack of time, necessary editorial changes had to be made without referring the manuscripts back to their authors. The Editor asks for their indulgence for having to do it in this way since it was inevitable under the circumstances.

In concluding the Introductory Note, the Editor would like to express his gratitude to those who so willingly contributed to the publication of this volume by attending to the typing, printing and proofreading, and by assisting in various other ways.

November 1980



Minoru Shikita
The Editor
Director of UNAFEI

PART I

Material Produced During
The 54th International Seminar Course
On the Arrest and Pre-trial Detention

SECTION 1: EXPERTS' PAPERS

Protecting Rights and Status of Defendants, Citizens and Investigating Officials

*by B.J. George, Jr.**

Sanctions against Unconstitutional or Illegal Investigatory Acts

A. Basic Theory of Exclusionary Rules

In common-law jurisdictions, many if not all unlawful investigatory acts by law enforcement officials gave rise to civil liability in favor of citizens whose rights had been impaired, and perhaps criminal responsibility as well. Activities which violated the law also expressly or implicitly contravened police agency regulations and could be made a basis for departmental disciplinary proceedings. In practical application, however, such remedies were ineffective: civil litigation was expensive to pursue and might well result in unenforceable judgments against police officers without personal resources. Unless death or very serious physical injury resulted under clearly inexcusable circumstances, prosecutors were loath to pursue criminal proceedings against members of police agencies upon which they relied for criminal investigations. Administrative disciplinary proceedings were a closed world to citizens who lacked legal standing to require that they be instituted.

Consequently, American courts, particularly the United States Supreme Court, developed the remedy of banning the use in court or before other governmental agencies of evidence obtained unlawfully by governmental agents or employees, as well as evidence derivative from it ("fruit of the poisonous tree"). The underlying assumption was that officers acted chiefly if not exclusively to gather evidence on the basis of which criminals might be convicted. If evidence which was the objective of their unlawful actions were to be rejected by courts and agencies because of the methods through which it was obtained, the primary motivation for official misconduct would be eliminated. Even if that were not so in particular instances, it nevertheless was important that courts have nothing to do with unlawfully obtained evidence lest they themselves become contaminated, a concept characterized as "the imperative of judicial integrity." An exclusionary rule in some form has been fashioned judicially in every context in which constitutional standards have been set forth to guide criminal investigations; such rules also have been made binding on the states through the due process clause of the fourteenth amendment. Until modifications in the several rules began to appear from 1974 onward, exclusionary rules seemed to rest directly in the federal constitution itself and thus were subject to change only through altered judicial interpretations by the Supreme Court alone or constitutional amendments.

B. Nature of the Rules in Specific Contexts

The first exclusionary rule directly affecting police investigation methods[1] was based on the fourth amendment prohibition against unreasonable searches and seizures.[2] Although in its original form it did not govern the states, that was changed by the 1961 decision of *Mapp v. Ohio.*[3] State courts had discretion to evaluate facts to determine whether a constitutional violation had occurred, but if they concluded it had they were allowed no discretion whether or not to exclude the evidence thus obtained.

Exclusion went only to evidence; defendants subjected to unlawful arrest did not thereby become immune to prosecution once they were physically produced before a court with territorial and subject-matter jurisdiction.[4] In terms of legal

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concept, therefore, the development of a new approach to entrapment based on due process[5] is interesting because it immunizes from prosecution defendants within its protection. The same result seemingly flows from delayed commencement of proceedings, not justified by legitimate investigatory needs, which causes actual prejudice to a suspect.[6] Otherwise, however, whether successful invocation of the fourth amendment exclusionary rule forestalls trial turns on a pragmatic prosecution judgment whether, after a suppression order has been complied with, sufficient uncontaminated evidence remains to carry a case to the trier of fact (*i.e.*, past the stage of prima facie proof).

As indicated, all primary and derivative evidence falls within the exclusionary rule once a fourth amendment violation has been ascertained. Derivative evidence includes testimony from witnesses discovered through unlawful search and seizure, provided such witnesses have not reached a free-will decision to cooperate with the prosecution.[7] In instances of real or documentary evidence, the principal issue appears to be whether a causal relationship can be perceived between discovery of derivative evidence and the original unlawful source, namely, official misconduct and its primary results. Accordingly, the prosecution can defeat application of the derivative evidence rule to subsequently obtained evidence if it can establish an independent source for that evidence.[8] This has been expanded in some decisions to an "inevitable discovery" rule: evidence becomes admissible if police had other untainted leads which in time would have led to discovery of the evidence in question. The Supreme Court through dictum has intimated that such a rule may be valid as far as confession-derived evidence is concerned[9] which, if ultimately substantiated, should extend to search and seizure cases as well.[10] Also, in what may be simply the obverse of the independent source test, if the causal relationship between the original unlawful police action and acquisition of particular evidence has become so attenuated or stretched as legally to produce a break, the evidence can be admitted.[11] On occasion, admission of certain derivative evidence may be viewed as constitutionally harmless error, forestalling the need for an appellate court to vacate a conviction.[12]

The exclusionary rule traditionally has extended to all phases of a criminal proceeding; the only breach in the tradition has appeared recently in the context of bail, sentencing, and probation and parole revocation, and even there some courts continue to invoke the exclusionary rule.[13] It also governs forfeiture proceedings.[14] The logical underpinnings of the doctrine require that it apply to civil actions to which government is a party; there is precedent to that effect.[15] However, there is little if any rational basis to require exclusion of evidence in purely civil actions to which government is not a party, since the deterrent impact on law enforcement officers would be minimal and the harm potentially great to litigants unable to control official investigative activities.

There seems to be one exception to the prohibition against use of unlawfully obtained evidence during criminal proceedings: such evidence may be used to impeach a defendant who testifies by choice at trial.[16]

Action by employees or agents of government is required before the constitutions are violated and the exclusionary rule must be invoked. Therefore, unlawful acts of private citizens which would be unconstitutional if performed by, *e.g.*, law enforcement officers do not justify applications of exclusionary rules even if a government later makes use of evidence thus derived.[17] The same doctrine governs searches in other countries by officials of the latter, whether or not in compliance with local law.[18]

A purely logical analysis of the fourth amendment (or any other) exclusionary rule might support a conclusion that any person should be allowed to assert violations of any other person's constitutional rights as long as the government makes use of evidence derived from such a violation in a proceeding affecting the particular

citizen. Such an "automatic standing" rule would create maximum deterrent effect by increasing the number of proceedings in which the exclusionary rule could be invoked. The United States Supreme Court, however, has rejected such an application of the federal constitutional rule.[19] Consequently, a citizen must show that his or her own constitutional rights have been trespassed upon by government agents and that injury in fact has resulted. Accordingly, no federal litigant can claim relief based on injury to rights of third parties. A state of course can create a broader concept of standing under its own constitution as has, for example, the State of California.

Turning to the field of confessions, all the rules affecting interrogation techniques[20] require exclusion of confessions obtained in violation of their requirements. The only exception appears to be that confessions, otherwise voluntary, obtained after noncompliance with the details of the *Miranda* rules, may be used to impeach a maker who later decides to testify in court in personal defense.[21] If, however, a confession is constitutionally involuntary it cannot be used lawfully for any purpose including impeachment.[22] Although the Supreme Court has not decided the point thus far, it would seem a similar analysis perhaps should underlie the impeaching use of confessions obtained in violation of the right to counsel, although the case for that conclusion is not as strong as when a confession is involuntary.

It might be (and has been) maintained that if a first confession is legally invalid, later confessions also should fall because, if a first confession has been given, the will to resist giving later statements has been weakened. This "cat out of the bag"[23] rationale has been accepted in principle by a majority of the Supreme Court[24] and occasionally is encountered in state and lower federal court decisions.[25] Usually, however, courts have looked to see whether circumstances invalidating an earlier confession continue in force to affect the validity of a later.[26] That in practical effect constitutes an application of the independent source test, the source in such an instance being a free decision of the individual to give a new statement despite earlier improper interrogation by officers.

The Supreme Court decreed a general derivative evidence rule under *Miranda* a short while after that case was decided;[27] if, for example, the contents of a confession should lead officers to a weapon or other evidence which they would not have discovered through alternate sources available to them, all such evidence should be inadmissible. It is probably in this dimension, however, that the Court has most sharply revised its exclusionary rule analysis, a matter discussed below.

Several forms of eyewitness identification procedures are governed by constitutional principles.[28] As in the other contexts discussed in this paper, violation of these special rules can result in inadmissibility of evidence. However, there is no "per se" exclusionary rule prohibiting witnesses from testifying to the identity of a defendant as perpetrator of a crime even if an identification procedure is fundamentally unfair. It is reversible error to allow a witness to testify directly that he or she identified a defendant during an unconstitutional identification procedure or to use a police or other witness to confirm that fact.[29] Such testimony is considered the direct product of unconstitutional investigative activity. However, a witness is not barred from giving in-court identification evidence unless a court concludes that the witness's impressions on which such testimony is founded go back only to the improper identification procedure and not to the criminal transaction itself. In the latter instance, identification testimony is not considered to have been derived from unconstitutional activity.[30]

C. Changing Concepts of the Exclusionary Rules

Almost from their inception exclusionary rules have drawn sharp criticism from various quarters. A chief objection has been that unlawfulness on the part of one person, an officer, may in practice make it impossible to convict another lawbreaker: "because the constable has blundered, the

accused must go free."[31] A corollary to that criticism has been the assertion that only guilty persons benefit from the exclusionary rule; innocent citizens subjected to unlawful police acts must resort to the civil, criminal and administrative remedies which the Supreme Court thought inherently inadequate. To innocent citizens, any benefit from the deterrent impact of exclusion of evidence against criminals in other cases is theoretical and abstract, and unproductive of concrete redress. Moreover, judicial concentration on exclusionary rules has generated legislative and administrative inattention to the matter of developing remedies beneficial to all citizens, in the process warping the concept of separation of powers. Also, granted the stated objective of the exclusionary rules, *i.e.,* deterrence of police misconduct, they have been couched in excessively broad terms, in that they extend to police actions undertaken in good faith and with an intent to act lawfully, later characterized, perhaps by a slim majority of an appellate court, as objectively in nonconformity with constitutional requirements. Classic penal law theory assumes intentional or reckless (*cf.* Roman law *dolus eventualis*) action to be the only activity to which the deterrent theory properly may be applied, since it is in relation to such activity alone that a focused exercise of free will can be observed. To apply a deterrence-based exclusionary rule to both wilful and unintended law enforcement acts, *i.e.,* to impose a strict liability to which the Supreme Court itself has expressed hostility in the setting of penal law interpretation,[32] is to defeat truly effective deterrent impact, since subjectively culpable and nonculpable officers are treated alike. Finally, although to preserve the integrity of judicial processes by purging away contaminated evidence is a theoretically impeccable goal, the judicial system has a primary task of reaching just adjudications, a process which is impaired by excluding from consideration reliable and apparently relevant evidence.

Since 1974, a majority of the Supreme Court has accorded a measure of recognition to most of these criticisms. The first step in preparing for modification was taken when the fourth amendment exclusionary rule was held not to govern admission of evidence before an investigating grand jury.[33] A principal concern on the part of the six-Justice majority was the harm which the exclusionary rule might work on the independence of grand juries, a concept much cherished by the Court in other contexts.[34] However, the *Calandra* opinion also characterized the exclusionary rule as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."[35] Consequently, its application "has been restricted to those areas where its remedial objectives are thought most efficaciously served."[36] By denying direct constitutional status to the exclusionary rule (and at the same time overruling *sub silentio* the theoretical premise on which *Mapp v. Ohio* had rested), the Court thus cleared the way for modifications to it by less than constitutional revision.

A similar fate befell the *Miranda* doctrine which quite clearly had direct constitutional status as it was set forth by its creators. In another 1974 decision, *Michigan v. Tucker,*[37] the Court considered whether the trial testimony of a witness, discovered through the contents of an admission obtained after a failure correctly to state *Miranda* warnings, was derivative evidence and thus inadmissible. A majority of the Court concluded that it was not. In the process, however, it characterized the *Miranda* guidelines, and specifically their warning requirements, as simply "measures to insure that the right against compulsory self-incrimination was protected," but not "themselves rights protected by the Constitution"; they are but "prophylactic standards," a "practical reinforcement for the [constitutional] right."[38]

Having thus opened a theoretical basis for reconsideration of the scope of both rules (fourth amendment and confessions), the Court then modified the framework within which exclusion of evidence under

the fourth amendment is to be determined. Deterrent effect rests upon an assumption "that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right—Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force."[39] The significance of this language was demonstrated in a 1976 decision, *Stone v. Powell,*[40] in which the Court held that federal habeas corpus is not available to determine fourth amendment issues if a state prisoner habeas corpus applicant has had a full and fair opportunity to litigate them in state proceedings, whether or not the opportunity in fact had been availed of. It noted that a consequence of the invocation of the exclusionary rule is that "the focus of the trial, and the attention of the participants therein, are diverted from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding."[41] A companion result is that "the disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice"; this may "well have the opposite effect of generating disrespect for the law and administration of justice."[42] Such an effect is exacerbated "when a criminal conviction is sought to be overturned on collateral review on the ground that a search-and-seizure claim was erroneously rejected by two or more tiers of state courts."[43]

That analysis was carried forward in another 1976 decision, *United States v. Janis,*[44] in which the issue was whether evidence seized by state officers under an unlawfully issued search warrant could be used in federal civil tax penalty assessment proceedings. After reviewing the literature on impact of the exclusionary rule, the Court opened up a balancing test to determine whether evidence need to be excluded in a given proceeding: the need "for concededly relevant and reliable evidence" against the need to deter deliberate police misconduct. If, in light of "the societal costs imposed by the exclusion," rejection of evidence achieves no deterrence in a particular case, then invocation of the exclusionary rule is unwarranted.

The dimension of the need of the judiciary for as much credible, relevant data as possible was explored in *United States v. Ceccolini,*[45] in which, for purposes of the appellate litigation, it was assumed that a witness's existence and identity were discovered through an unlawful search; the witness, a college student in a criminal justice program, voluntarily cooperated by becoming a prosecution witness. The Court rejected a per se exclusionary rule. The extent to which a witness decides to aid the prosecution is important in determining the degree to which "the basic purpose of the exclusionary rule will be advanced by its application."[46] The court recognized that "[r]ules which disqualify knowledgeable witnesses from testifying at trial are . . . 'serious obstructions to the ascertainment of truth.'"[47] Under the standards laid down in *Michigan v. Tucker,* courts ought not readily prevent witnesses from testifying; "a closer, more direct link between the illegality and that kind of testimony is required."[48] As it sustained the lower court ruling that the witness could testify, the Court reaffirmed a rather old statement that "a criminal prosecution is more than a game in which the Government may be checkmated and the game lost merely because its officers have not played according to the rule."[49] Thus, "[t]he penalties visited upon the Government, and in turn upon the public, must bear some relation to the purposes which the law is to serve."[50] Under the circumstances of *Ceccolini*, "[a]pplication of the exclusionary rule . . . could not have the slightest deterrent effect on the behavior of an officer such as [this]"; the burden of silencing a witness permanently "is too great for an evenhanded system of law enforcement to bear in order to secure such a speculative and very likely negligible deterrent effect."[51]

As the Court has opened up this balancing approach to the exclusion of fourth amendment-violative evidence, the "im-

perative of judicial integrity" appears largely to have dropped from the picture; the abstract purity of the judicial system "has limited force as a justification for the exclusion of highly probative evidence."[52] It has makeweight force when exclusion is ordered to deter deliberate official misconduct: "When there is a close causal connection between the illegal seizure and the confession, not only is exclusion of the evidence more likely to deter similar police misconduct in the future, but use of the evidence is more likely to compromise the integrity of the courts."[53]

The long-range impact of this altered jurisprudence has yet to be felt. The more attenuated the causal relationship between primary unlawfulness and acquisition of particular evidence, the less deliberate the police misconduct, and the more relevant and probative the particular evidence, the weaker the constitutional mandate to exclude. In *Miranda* cases, a balancing test under *Tucker* can apply only to derivative evidence; there is no indication that contravention of the prophylactic rules set forth in *Miranda* can ever tolerate admission of a primary confession, for to hold so would in effect overrule the *Miranda* doctrine. There is no precise counterpart to the balancing test to be found in the area of eyewitness identification law, although in net result the same effect has been wrought by the Court's ruling that there is no per se exclusionary rule applicable to identification testimony even though an identification procedure has violated due process.[54] Instead, the question is whether a due process violation is truly the source of a witness's identification testimony, and not impressions received at the time a crime was perpetrated.

As a matter of federal constitutional law, state courts must accept the rationale of the recent Supreme Court cases as prevailing federal constitutional doctrine; they cannot declare the Court's majority to be doctrinally in error.[55] However, they are free to create a higher protective standard under their own state constitutions, *i.e.,* to preserve the positions of the earlier Warren Court (to 1970); several states have been active in that process.[56] At the same time, some other nations have taken steps in the direction of the exclusionary rule which embody a balancing approach not dissimilar to that apparently developed by the present Burger Court.[57]

Will the United States Supreme Court ultimately go further to abolish the exclusionary rules entirely? A safe assumption is that it will not, even if effective alternative remedies begin to be developed, as discussed in the next subdivision. If an era ever arrives in which all citizens can achieve full redress for injuries to their constitutional rights, including adequate financial compensation, the exclusionary rules might well atrophy. Nevertheless, granted the overwhelming number of legislative bodies in the United States which must authorize funds and fix standards governing disbursements before redress becomes a reality, disappearance of the exclusionary rules lies far in the future. At the same time, however, professionals in other nations who disagree with the fundamental desirability of exclusionary rules might well consider that development of civil and administrative avenues of redress against official misconduct is the best preventive against resort to exclusionary rules as a last-ditch judicial defense against rampant unconstitutional activity.

D. Alternatives to the Exclusionary Rules

Development of alternatives to the exclusionary rules consists essentially of identifying and remedying defects in traditional concepts criticized by the courts when exclusionary rules first were laid down. In considering whether criminal prosecutions against some offending officials are possible, a survey of criminal code provisions is a prerequisite. In most American jurisdictions there is little or no need for new criminal statutes governing official misconduct because a sufficient array now exists. Culpability or mens rea is required to violate them, precluding a strict liability approach, but that seems not to be a defect in light of the Supreme Court's emphasis on the deterrent function as a dimension of the exclusionary rules themselves. It might

be noted that one remedy against excessively zealous law enforcement efforts bringing about the commission of crimes which otherwise probably would not have occurred (*i.e.,* entrapment) is to apply accomplice liability concepts to those officers and send them to prison along with the perpetrators,[58] which perhaps is as direct a deterrent as can be envisioned.

Unwillingness of prosecutors to levy criminal charges against erring police officers has been an important dimension of the American scene. It is unlikely that American constitutions and statutes will be amended to eliminate prosecutorial discretion during the charging process. One response, however, is to provide for the appointment of special prosecutors in cases involving misconduct of federal officials. There is federal legislation of that nature, and an analogue is found in the Japanese procedure allowing institution of prosecution through special judicial orders in certain cases involving abuse of public office, and the appointment of a special prosecutor from the private bar.[59]

It is unlikely that criminal prosecution of offending officers ever will play a large role in the control of law enforcement misconduct; only the most serious instances of abuse of power are either likely or appropriate to be reached in that manner. Are civil actions generally a more efficacious response? Granted the fact that traditionally the American legal system does not subsidize private litigation, and that the process of enforcing a civil judgment is tedious and not likely to produce results against a typical police officer, the chances of success are not overwhelming. This has been true, for example, in the utilization of a federal doctrine allowing suits against erring federal officers based directly upon the fourth amendment itself.[60] Legislation can provide for recovery of costs and reasonable attorney fees as a means of subsidizing civil litigation; there are illustrations of the concept to be found in existing federal statutes.[61] Encouragement of private civil actions generally occasions expense to government, however, in the form of legal expenses on behalf of defendant officers, since most governmental units now provide for them when a public employee is sued for activities apparently done in the scope of duty.

Therefore, the chief issue may become one of whether government should allow itself or its political subdivisions to be sued directly for the wrongful acts of its employees including law enforcement officers. In the Anglo-American tradition this requires that sovereign immunity against subject or citizen suits be relinquished either through judicial decisions or legislative enactments. Congress, for example, has done this to a certain extent under the Federal Tort Claims Act and is considering even broader coverage; the Department of Justice position is, however, that individual officers then should be immune to independent civil suit, in part to spare the department the expense of defending both FTCA and private civil actions. Damage actions against local and state governmental units for violations of the Federal Civil Rights Act by their employees are possible,[62] but plaintiffs must establish actual damages or else be content with nominal damages of one dollar.[63] Because of the nature of federal-state relationships under the eleventh amendment, a state (as opposed to its political subdivisions) cannot be sued for damages based on civil rights violations.[64] However, any level of state or federal office or its employees can be sued for injunctive or declaratory relief, provided there is no current state avenue for relief which has not been pursued to completion.[65]

Litigation, while important to the delineation of legal rights and scope of official powers, cannot directly benefit large numbers of citizens even under a system of subsidies for civil actions. More citizens probably will benefit from a system of administrative remedies, particularly those based on discipline of offending officers. Many police departments in fact have developed machinery whereby, for example, citizens who have suffered physical or property injury are reimbursed their costs, and apologies tendered for trespasses against civil rights. Perhaps the principal

motivation for such redress has been a desire to avoid federal or state litigation, the likelihood of which is much greater now than even a decade ago. Nevertheless, an important contemporary issue is whether more specific rules and regulations should be promulgated so that citizens may know clearly the administrative remedies they may pursue for either monetary relief or departmental discipline of erring employees.

It is clear that under an administrative procedures act or on a theory of implied powers, any governmental unit can promulgate appropriate regulations. Indeed, the United States Supreme Court has confirmed the desirability of such rules as a means of safeguarding citizen rights by refusing to construct exclusionary rules of evidence on good faith failure to comply with them, lest administrative safeguards not be provided.[66] If disciplinary proceedings are provided for, an important policy question is the degree to which, if any, citizens should be able to institute and pursue administrative action against individual employees. Police and other administrators understandably are reluctant to allow outsiders to precipitate charges; they feel that should be an agency matter. Nevertheless, at least in urban areas or in instances involving alleged abuses against minority groups or individuals, citizens are most cynical about disciplinary proceedings under the exclusive control of public officials. In considering amendments to the Federal Tort Claims Act, referred to earlier, the Department of Justice, as a compensatory position to its insistence that individual federal law enforcement officers be immune to civil suit, has endorsed an ability on the part of aggrieved citizens to demand departmental disciplinary proceedings and eventually lodge a special civil action in a federal district court alleging abuse of official discretion in the disposition of the complaint. The approach appears to have merit, at least in the contemporary United States.[67]

As a practical matter, many citizens will be satisfied if they feel their complaints against police and other governmental officials have been inquired into by some neutral person. The most apt device to accomplish this is the office of ombudsman. Australia has seen the institution of this device in some of its jurisdictions,[68] and the office is well established, particularly in the Scandinavian nations.

It also is well to stress that in the long run police entry and inservice education is vital to effective protection of both public security and citizens' rights. Funding is necessary, but the key decisions about eligibility for and contents of training lie with each police agency.

Protecting Victims and Witnesses

An inherent defect in a legal system which concentrates on police misconduct and its impact on criminal defendants, as has the United States, is that the protection of victims, witnesses and other citizens necessary to the effective administration of justice is lost sight of.[69] Hearings conducted by the American Bar Association Section of Criminal Justice Committee on Victims on June 4-5, 1979, revealed a discouragingly high frequency of violence, threats of violence or intimidating activity towards victims of crime, especially sex offenses, on the part of defendants, their relatives and friends. Although acts of overt physical violence often can be made a basis for criminal prosecution, the latter may be of little practical benefit in resolving the underlying problem if a victim or witness is dead, has moved from the jurisdiction to avoid harassment, or simply fails to appear in court.

In August 1980 the American Bar Association adopted several recommendations by the committee concerning criminal justice system modifications which might ameliorate the problem.[70] From a pragmatic viewpoint, the principal responsibility to protect against victim and witness harassment rests with law enforcement agencies. Because instances of intimidation and harassment usually are reported first to the police, larger departments should establish special units (perhaps denominated a victim/witness protection unit), the

primary role of which is to provide immediate effective protection against the possibility of assault and to investigate for prosecution acts of intimidation which already may have occurred. If no activity yet has been noted but there is a significant potential for intimidation or retribution, the unit should be alerted to commence protective surveillance and other effective measures. A protective unit, and the agency of which it is a part, should advise victims and witnesses about the forms which reprisals or intimidation might take and about methods of communicating with the unit and agency, and should be prepared to offer an array of services to meet any threats which eventuate.

Such services should be wide-ranging. They include "hotline" numbers, separate from "911" or "110" numbers, direct to the protection unit itself, personnel of which should always be on duty. In some instances, necessary protection can be accomplished through increased foot or motor patrols, or the stationing of police personnel at premises during a period of danger. Transportation in police vehicles may need to be provided to and from work. In extreme cases, it may be necessary to relocate a victim or witness under security conditions preserving anonymity. The federal government has had such a program covering witnesses to organized crime activities, and several thousand people have been accommodated in that way, some of them living on government stipends. A few metropolitan governments, using federal funds, have developed similar programs for particularly vulnerable crime victims and witnesses.

Police officers also ought to be able to warn defendants and their relatives and friends about the existence of a protection unit and its interest in a particular case, and to admonish them about the penalties which may be imposed for intimidating acts.

The role of prosecuting offices in victim and witness protection is also important. If witnesses fail to appear in court, a prosecutor in charge of a case should initiate inquiry into the reasons, calling for police assistance in the investigation if necessary. Because intimidation cases thrust directly at the heart of the justice system, preference should be given to the prosecution of all such cases as they occur, including priority calendaring to the extent a prosecutor's office has influence concerning or control over the docketing process. The concern for witness protection should extend beyond acceptance of a guilty plea or entry of a guilty verdict, in that retaliatory acts are as possible after judgment as pending an adjudication. Prosecutors also should be able to warn potential intimidators before, during and after trial of the consequences of harassing activities.

The judiciary as well has a role in protecting victims and witnesses. One obvious area, in jurisdictions in which the law permits it, is the conditioning or refusal of preconviction release because of a risk of harassment or intimidation.[71] The constitutional issue in the United States bearing on the existence of such a power is serious, however, and remains to be resolved.[72] If a court observes in the course of proceedings intimidating activity or passive but intimidating physical presence of persons in the courtroom,[73] it should be able to enter an order forbidding contact with a named witness or any activity aimed at harassing or intimidating a witness.[74] The inherent power of a court to regulate proceedings before it and to protect the integrity of its precincts and activities should be a sufficient legal basis for such orders, violations of which can be charged as civil or criminal contempt. If an important prosecution witness fails to appear and there is a possibility that intimidation is the cause, a court should grant a reasonable continuance at prosecution request so that the matter can be investigated and suitable protection accorded the missing witness. Courts also have a responsibility to provide secure waiting areas for witnesses, including toilet facilities, to forestall confrontations, accidental or otherwise, between witnesses and bailed defendants or their relatives and friends; in-trial intimidation frequently is facilitated because witnesses

and spectators are forced to commingle in public areas adjacent to courtrooms.

There may well be scope for amendment of criminal statutes as they bear on victim and witness intimidation. For example, extortion or intimidation statutes may not extend to efforts by essentially unlawful means to dissuade victims or witnesses from reporting victimization to authorities, seeking or cooperating in the institution of formal charges, or aiding in the arrest of those responsible for harassment; a special statute, which the ABA recommends at the misdemeanor level, may be required for the purpose. An aggravated special felony statute may be necessary to reach intimidation based on violence, in furtherance of a conspiracy, for gain, or committed by a prior felony offender. If attempt is charged, actual failure to intimidate a witness should not affect criminality.[75] On the analogy of statutory crimes of wilful nonappearance while on preconviction release or of escape, punishment for crimes of witness intimidation should be imposed without regard to the ultimate disposition of the underlying criminal charge; acquittal should have no impact on sentencing for an intimidation conviction, and conviction of both should result in cumulative imposition of punishments. Otherwise, there is little potential deterrence in special legislation to protect victims and witnesses.

Intimidation aside, victims may be deterred from bringing the facts of crimes committed against them to the attention of police and prosecutors because they do not know where to go and with whom to speak. The ABA advocates that community organizations be established, in coordination with courts, the legal profession, prosecutor's offices and law enforcement agencies, perhaps denominated a "friend in court" service, to provide informal assistance for persons baffled by the system. In effect, this would provide a form of "traveler's aid bureau" for citizens in the courts. That organization, or cognate community groups, might well advise victims and witnesses of the progress of cases with which they are concerned, and the "jail" or "bail" status of defendants, since freedom for the latter is often a cause, and frequently a justifiable cause, for apprehension or fear on the part of victims and witnesses. Representatives of such an organization, present at a courthouse or courtroom, also might help witnesses find their way to the proper place at the correct time.

To this point, the principal focus has been protection of victims and witnesses against defendants. There also can be, in the nontechnical sense, harassment of witnesses by counsel. This occurs most frequently in the United States in the form of cross-examination of victims of sex offenses about their previous sexual conduct. Some recent state statutes do not allow inquiry into or proof about a victim's sexual conduct unless it was with the defendant or is offered to establish the source or origin of semen, pregnancy or disease. Even then, a trial court must find the probative value of the evidence not to be outweighed by the inflammatory or prejudicial impact of the evidence. These rape shield laws have been sustained as constitutional over a claim that they unconstitutionally limit the defense in showing possibly exculpatory or mitigating evidence to a trial jury.[76] But it is possible for prosecutors as well to harass defense witnesses in any sort of case by threatening them or their relatives or friends with prosecution. That is unprofessional conduct. When a trial judge did substantially the same thing, the Supreme Court denominated it a denial of due process of law.[77]

One final area of practical concern should be noted, unrelated to active harassment or intimidation of witnesses. The court system often appears dedicated to making the role of witness as unpleasant as possible. Citizens are summoned, often on short notice, and then kept waiting for hours. Proceedings may be postponed without explanation and witnesses then required to appear on later occasions. If excluded from a courtroom so that they cannot hear the testimony of witnesses who precede them to the witness stand, they may be forced to wait in dirty, noisy

corridors of a public building. If witness fees and travel expenses are paid, the rates usually are based on a schedule rendered absurd by time and inflation. Various reforms are being experimented with to ease burdens on citizens as witnesses and jurors, including dockets and calendars which are updated daily through use of computers, telephone notification to witnesses to be available at identified telephone numbers for further notice of the expected time for testimony, prompt notification of adjournments or continuances and explanation about the status of cases in which their testimony may be required. In civil cases, and to some extent in criminal, videotaped depositions (in the presence of defendant and defense counsel in criminal cases to meet confrontation requirements) are being used for professional or expert witnesses in order to control demands on their professional time. Some court buildings have been renovated to create pleasant waiting rooms for potential jurors and witnesses, including sufficient rooms that witnesses in a single case can be segregated from one another. There is general agreement that juror and witness fees should be increased substantially, but legislatures are regrettably quite slow in appropriating the needed public funds.

Special Proceedings to Aid Criminal Investigations

A. Judicial Orders for the Acquisition of Evidence

In legal systems influenced by Roman law, judicial activity is essential to the gathering of witness statements, real, demonstrative and documentary evidence and forensic (expert) data. This tradition continues in Japan. For example, before public prosecution has been instituted, a public prosecutor, etc., can invite a person to formulate an expert opinion; if a physical or mental examination of a suspect is necessary for that purpose, a request can be submitted to a judge for an order authorizing the necessary detention.[78] If a person other than an expert refuses to cooperate and is believed to have information essential to a criminal investigation, an application can be made to a judge for a witness examination conducted by the judge.[79] The same procedure is followed if a witness at first volunteers information and then appears to be under pressure to withdraw or change earlier statements.[80] Applications can be made as well to a judge for warrants or orders for search, seizure, inspection or examination of places or physical examination of persons, including suspects.[81] Like investigative acts can be conducted after institution of public prosecution;[82] before the first day of public trial a suspect, defendant or counsel for either can apply to a judge (not a court) for similar orders to preserve evidence which otherwise may not be available for trial use at a later time.[83]

The traditional American system is not as flexible. Search warrants can be obtained at police request at any time; on occasion, identification evidence like fingerprints or photographs can be obtained in that way. If a search warrant is used, the usual probable cause must be established. In dictum, the United States Supreme Court indicated that judicial orders on less than probable cause might be issued against citizens who may be suspects, requiring them to submit to fingerprinting;[84] a few jurisdictions appear to have taken advantage of that suggestion. Grand jury investigations at times permit the acquisition of real, demonstrative and identification evidence,[85] although the fact that defendants and counsel do not participate in such proceedings usually renders witness statements unusable because of the confrontation clause.[86] In federal practice, a United States Attorney cannot go directly to a court for an order to produce evidence, but instead must work through a grand jury to have a grand jury subpoena issued.[87] After a grand jury has issued an indictment, its process cannot be used to develop additional evidence for the prosecution.[88]

American courts differ over whether there is inherent power to order suspects, not under arrest, detention or preconviction release, to attend a lineup proceeding. Some say there is such inherent power,[89]

while other courts require enabling legislation.[90]

Depositions may not be taken until after formal criminal charges have been filed; the right of confrontation requires that defendant and defense counsel participate if the resulting transcript or videotape is to be admissible at trial. A preliminary examination hearing can be used in many jurisdictions as a means of preserving witness testimony in case of death or nonappearance;[91] confrontation rights are satisfied because defendants must be present with counsel (unless representation by the latter is validly waived) at such proceedings.[92]

After formal charging, discovery practice in most jurisdictions allows for the performance of expert examinations, including physical and mental examinations, on court order. It is doubtful, though, that magistrates before whom preliminary charges are pending have similar powers to aid either prosecution or defense. Statutes are increasingly widespread, however, which allow court-ordered mental examinations to determine whether a defendant is constitutionally competent[93] to participate in any phase of a criminal proceeding.

Before formal criminal charges are filed, documentary evidence usually is acquired through issuance of a search warrant or grand jury subpoena; there is only the most limited coverage of documents by the privilege against self-incrimination so that suspects as custodians and persons acting for them like accountants or attorneys must comply with such process.[94] However, under a 1978 Right to Financial Privacy Act,[95] federal investigating authorities, including grand juries, must give notice to noncorporate suspects that their financial records are sought so that propriety of the examination of such records may be contested within a brief period of time. State investigations are not covered, although Congress has been considering parallel legislation governing them. After formal charges have been filed, subpoenas duces tecum are used to require custodians to produce documents and records in court.[96]

Granted the lacunae in existing American methods of gathering and preserving evidence before and after the filing of preliminary and formal charges, it would be desirable if something resembling the Japanese pattern were developed by statute or rule. A model rule which, if adopted, would achieve substantially that end has been promulgated.[97]

B. Encouraging or Enforcing Citizen Cooperation

Citizens against whom summons or subpoenas are issued have no legal ability to resist them; it is expected that they will comply.[98] Criminal defendants aside, receipt of process does not create a basis for a self-incrimination claim; that must be asserted with reference to specific questions or (to the extent privilege can be violated through production of documents) identified documents or portions of documents.

Should, however, police or prosecutors be given compulsory powers to require citizen cooperation? American prosecutors have advocated a prosecutor's summons which, in case of refusal by a recipient to comply, could be made the basis for a prosecution request for a judicial order requiring appearance in court for provisional examination. It seems likely that legislative authority to prosecutors to issue binding orders on their own authority would violate the federal constitutional requirement that warrants be issued by neutral and detached magistrates;[99] in *Coolidge,* a justice of the peace who issued a search warrant was also an assistant attorney general and thus could not have the requisite independence. But there would seem to be no constitutional objection to instituting the equivalent to the Japanese practice described earlier[100]; it might even be that *Davis v. Mississippi*[101] would allow such orders on less than probable cause if the inconvenience of appearing for examination can be viewed as relatively inconsequential.

The matter of refusal by citizens to cooperate in brief on-the-scene inquiry, and penalties which may or may not be

attached to it, poses a sensitive constitutional issue.[102] The basic policy question is whether a stated citizen duty to cooperate with police investigative inquiries is a moral duty only, or is a legal obligation supported by penalties for noncompliance. Granted the fluidity of street encounters and the probability of a swearing contest in court between police officers and citizens about what actually occurred, it may be that the most appropriate resolution is in favor of a moral duty or obligation only, with criminal penalties reserved for those who actively obstruct legitimate police inquiries. But the issue certainly is open to legitimate debate.

Legislatures also may wish to consider whether rewards should be given to those who supply law enforcement or prosecution officials with useful information. Allowing those who facilitate prosecutions or civil actions for unpaid taxes or customs duties to share the proceeds with the government (traditionally denominated as actions *qui tam*) has for centuries been a useful enforcement device; many tax inquiries also are the result of anonymous leads from disgruntled spouses or employees. However, experience with the use of undercover informers, for example, in controlled substances investigations in which cooperating criminals are allowed to keep for use or sale significant amounts of narcotics or barbiturates, may suggest that a reward system relating directly to "making" individual cases is too subject to abuse to be allowed as a routine law enforcement technique. Public cupidity perhaps is legitimately to be encouraged only in notorious homicide, kidnapping or robbery cases in which a large reward announced to the public generally may produce indispensable leads to what usually are dangerous criminals.

C. Grants of Immunity to Needed Prosecution Witnesses

Police officers or prosecutors, in order to encourage cooperation, may promise suspects or even defendants that they will not be charged or that charges will be dismissed if they cooperate in the investigation and trial of other criminal figures. If an individual agrees to cooperate and indeed does perform his or her part of such a bargain, courts in the exercise of a form of equity power will see that the bargain is enforced against the state. If an undertaking to cooperate (turn state's evidence) is in the form of a plea bargain and is lived up to by a defendant, the terms of the plea agreement will be enforced.[103] However, formalities of a plea negotiation and settlement are no prerequisite; informal commitments on the part of police officials or prosecutors also will be enforced, for example, through court orders dismissing or reducing the severity of pending criminal charges.[104]

If actual or potential defendants will not cooperate and waive privilege against self-incrimination by testifying for the prosecution, they cannot be called to the witness stand without infringing privilege. Therefore, the only functional means of forcing their cooperation is to provide them with immunity through appropriate proceedings. Under the federal constitution, an immunity order is sufficient if it provides "use" immunity against prosecution use of either specific answers or evidence derived from or discovered through the contents of those answers; transactional immunity against charges arising out of the episode to which testimony relates need not be accorded.[105] Special immunity legislation is a prerequisite to prosecutorial and judicial action. Once an immunity statute has been enacted, the remaining issues are the practical ones of (1) the categories of officials empowered to apply for immunity; (2) the courts, tribunals, administrative entities, etc. legally authorized to confer immunity; (3) the extent to which defendants can seek immunity for themselves or for witnesses whose testimony they need;[106] (4) the documents to be provided an immunized witness preserving his or her testimony for future reference if a claim of infringed immunity later is made; (5) the nature of the burdens of going forward with evidence and of persuasion resting on the prosecution in a later criminal proceed-

ing against a witness to establish an independent source for its proof; and (6) other governmental uses which also may constitute a forbidden "penalty" barred by an immunity grant. Immunized witnesses of course may be punished if they commit perjury during their testimony.[107] Although immunity legislation can be abused, particularly if corrupt officials wish to accord so-called immunity baths to other public or private persons, on the whole it provides an important prosecution tool, particularly in conducting investigations into political corruption and corporate criminality. Abuses generally can be guarded against by leaving the ultimate decision whether or not to accord immunity to a court, under a standard based on intrinsic justice and fairness.

NOTES

1. Violations of the privilege against self-incrimination by courts or agencies long have been visited with an exclusionary rule, prohibiting direct use of incriminating responses and also banning introduction of evidence discovered as a result of primary testimony. Counselman v. Hitchcock, 142 U.S. 547 (1892).
2. Weeks v. United States, 232 U.S. 383 (1914). A derivative evidence rule was included almost from the start. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).
3. 367 U.S. 643 (1961).
4. United States v. Crews, 100 S.Ct. 1244, 1251 (1980); Gerstein v. Pugh, 420 U.S. 103 (1975); Frisbie v. Collins, 342 U.S. 519 (1952) (interstate return); Ker v. Illinois, 119 U.S. 436 (1886) (improper return from another country).
5. Language in Hampton v. United States, 425 U.S. 484 (1976), supports a rule that due process of law is violated if police use "outrageous" or "shocking techniques in bringing about commission of a crime by a citizen. *See also* State v. Metcalf, 60 Oh. App. 2d 212, 396 N.E.2d 786 (1977) (large undercover agent used physical duress to bring about commission of offense). Police also may incur criminal liability for their agents' acts. People v. Backus, 23 Cal. 3d 360, 590 P.2d 837, 152 Cal. Rptr. 710 (1979). On so-called "take-back sales," in which undercover officers supply narcotics to a future defendant for resale to yet other officers, see People v. Cross, 77 I11. 2d 396, 396 N.E.2d 812 (1979) (can consider predisposition to traffic in drugs); People v. Duke, 87 Mich. App. 618, 274 N.W.2d 856 (1978).
6. United States v. Lovasco, 431 U.S. 783 (1977); United States v. Marion, 404 U.S. 307 (1971).
7. United States v. Ceccolini, 435 U.S. 268 (1978).
8. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920); United States v. Miller, 608 F.2d 1089 (5th Cir. 1979); People v. Burndt, 604 P.2d 1173 (Colo. 1980).
9. Brewer v. Williams, 430 U.S. 387, 406 n.12 (1977).
10. Examples include People v. Foster, 102 Cal. App. 3d 882, 162 Cal. Rptr. 623 (1980) (smell of decaying body would have led to summoning of authorities); State v. Williams, 285 N.W.2d 248 (Iowa 1979) (retrial of *Brewer v. Williams* case; evidence about murder victim's body admitted); Staae v. Byrne, 595 S.W.2d 301 (Mo. App. 1979).
11. Rawlings v. Kentucky, 100 S.Ct. 2556 (1980); Brown v. Illinois, 422 U.S. 590 (1975); United States v. Stevens, 612 F.2d 1226 (10th Cir. 1979).
12. Schneble v. Florida, 405 U.S. 427 (1972).
13. Cases withholding application of the rule include United States v. Lee, 540 F.2d 1205 (4th Cir.), *cert. denied,* 429 U.S. 894 (1976) (inapplicable to data used at sentencing); United States *ex rel.* Sperling v. Fitzpatrick, 426 F.2d 1161 (2d Cir. 1970) (inappropriate at parole revocation hearing); State v. Nettles, 287 Or. 121, 597 P.2d 1243 (1979) (inapplicable to probation revocation); Bridges v. Superior Court, 396 A.2d 97 (R.I. 1978) (not invoked in bail revocation proceedings because of potential damage to pretrial conditional release system). Cases continuing to apply the exclusionary rule include United States v. Workman, 585 F.2d 1205 (4th Cir. 1978) (probation revocation; evidence unlawfully obtained by probation officers); People v. Belleci, 24 Cal. 3d 879, 598 P.2d 473, 157 Cal. Rptr. 503 (1979) (may not consider at sentencing); People v. Dyas, 100 Cal. App. 3d 464, 161 Cal. Rptr. 39 (1979) (prosecutor considering pretrial diversion program eligibility may not consider suppressed evidence); People *ex rel.* Piccarillo v. New York State Board of Parole, 48 N.Y.2d 76, 397 N.E.2d 354, 421 N.Y.S.2d 842 (1979) (cannot consider at parole revocation).
14. One 1978 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1968).
15. Standard Oil Co. v. Iowa, 408 F.2d 1171 (8th Cir. 1969) (state antitrust action); *contra,* LaMartiniere v. Dep't of Employment Security, 372 So. 2d 690 (La. App. 1979) (suppressed evidence admissible in administrative proceeding to deny unemployment compensation after discharge from employment because of theft; court relies on *Janis*, note 44 below).
16. United States v. Havens, 100 S.Ct. 1912 (1980) (may impeach all testimony of defendant, not merely specific statements during direct examination); Walder v. United States, 347 U.S. 62 (1954).
17. Burdeau v. McDowell, 256 U.S. 465 (1921). Airline security checks and baggage examinations frequently fall within this concept, *e.g.,* United States v. Keuylian, 602 F.2d 1033 (2d Cir. 1979), as do private security guards. Gillett v. State, 588 S.W.2d 361 (Tex. Crim. App. 1979), *but cf.* Lucas v. United States, 411 A.2d 360 (D.C. App. 1980) (special police personnel were government agents, but it was reasonable to use electronic sensor to detect removal from store of garments not paid for). Public school officials are state agents, but their search activities generally are viewed as constitutionally acceptable if done to enforce a valid school health or safety regulation and not excessive in scope. *See, e.g.,* Doe v. Renfrew, 475 F. Supp. 1012 (N.D. Ind. 1979); *In re* L.L., 90 Wis. 2d 585, 280 N.W.2d 343 (Wis. App. 1979).

    A few jurisdictions have provided broader coverage in their own state constitutions. *See, e.g.,* State v. Hutchinson, 349 So. 2d 1252 (La. 1977) (but visual inspection of van exterior did not invade protected area of privacy); State v. Helfrich, 600 P.2d 816 (Mont. 1979).
18. United States v. Busic, 492 F.2d 13 (2d Cir. 1978); Stonehill v. United States, 405 F.2d 738 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969) (admissible even though Philippine laws were violated).
19. Rawlings v. Kentucky, 100 S.Ct. 2556 (1980); United States v. Salvucci, 100 S.Ct. 2547 (1980); United States v. Payner, 100 S.Ct. 2439 (1980); Rakas v. Illinois, 439 U.S. 128 (1978).
20. The principal rules currently in force include: (1) Coerced confessions violate due process of law and are inadmissible. Mincey v. Arizona, 437 U.S. 385 (1978); Garrity v. New Jersey, 385 U.S. 493 (1967). (2) Confessions given by persons in custody are admissible only if counsel was present during interrogation or the presence of counsel was validly waived after specified warnings of rights were given. Miranda v. Arizona, 384 U.S. 436 (1966); recent interpretive decisions include Rhode Island v. Innis, 100 S.Ct. 1682 (1980); Fare v. Michael C., 442 U.S. 707 (1979); North Carolina v. Butler, 441 U.S. 369 (1979); Oregon v. Mathiason, 429 U.S. 492 (1977). (3) Confessions given by formally-charged defendants represented by counsel are invalid unless counsel was present, provided that presence was not specifically and validly waived; waiver of *Miranda* rights does not suffice. United States v. Henry, 100 S.Ct. 2183 (1980); Brewer v. Williams, 430 U.S. 387 (1977). (4) A confession by a person under unlawful arrest or detention is inadmissible under the fourth amendment ban on unreasonable searches and seizures, unless the causal relationship between custody and confession has stretched to the point of attenuation. Rawlings v. Kentucky, 100 S.Ct. 2556 (1980); Dunaway v. New York, 442 U.S. 200 (1979); Brown v. Illinois, 422 U.S. 590 (1975).
21. Coerced or involuntary confessions cannot be used in any way, including

impeaching cross-examination. Mincey v. Arizona, 437 U.S. 385 (1978). However, if only failures to follow technical aspects of the *Miranda* rule are involved, impeachment is possible. Oregon v. Hass, 420 U.S. 714 (1975); Harris v. New York, 401 U.S. 222 (1971). It also is no violation of privilege against self-incrimination to ask why an exculpatory version of a transaction was not reported to authorities before arrest, Jenkins v. Anderson, 100 S.Ct. 2124 (1980), or to take into account at sentencing a failure to cooperate with investigating authorities by identifying other criminal participants. Roberts v. United States, 100 S.Ct. 1358 (1980). Only impeachment based on silence following *Miranda* warnings is outlawed, Doyle v. Ohio, 426 U.S. 610 (1976), and that does not cover conflicting statements given at earlier times. Anderson v. Charles, 100 S.Ct. 2180 (1980).

22. Mincey v. Arizona, 437 U.S. 385 (1978).
23. "[A]fter an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantage of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as the fruit of the first." United States v. Bayer, 331 U.S. 532, 540 (1947) (Jackson, J., concurring).
24. Harrison v. United States, 392 U.S. 219, 225–26 (1968), *citing* Justice Jackson's language in *Bayer*.
25. *E.g.*, People v. Johnson, 70 Cal. 2d 541, 450 P.2d 865, 75 Cal. Rptr. 401, *cert. denied*, 395 U.S. 969 (1969); Commonwealth v. Watkins, 379 N.E.2d 1040 (Mass. 1978).
26. *E.g.*, State v. Young, 344 So. 2d 983 (La. 1977); State v. McDonald, 195 Neb. 625, 240 N.W.2d 8 (1976); People v. Chapple, 38 N.Y.2d 112, 341 N.E.2d 243, 378 N.Y.S.2d 682 (1975); State v. Mendacino, 288 Or. 231, 603 P.2d 1376 (1979).
27. Harrison v. United States, 392 U.S. 219, 222 (1968).
28. Formally-charged defendants must have (or validly waive attendance by) counsel during such procedures, United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967), including those conducted in court. Moore v. Illinois, 434 U.S 220 (1977). Precharging identification procedures are governed by ad hoc fundamental fairness standards, Kirby v. Illinois, 406 U.S. 682 (1972), as are photographic identifications. United States v. Ash, 413 U.S. 300 (1973), *and see* Manson v. Brathwaite, 432 U.S. 98, 114 (1977).
29. Moore v. Illinois, 434 U.S. 220 (1977).
30. Neil v. Biggers, 409 U.S. 188 (1972); Gilbert v. California, 388 U.S. 263 (1967). Unlawful arrest or detention does not render a person's facial characteristics suppressible derivative evidence, because a contrary holding would eviscerate the Court's holding that personal jurisdiction is not affected by unlawful arrest or custody. United States v. Crews, 100 S.Ct. 1244 (1980); see note 4 above.
31. Judge (later Justice) Cardozo in People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926).
32. Recent decisions include Colautti v. Franklin, 439 U.S. 379 (1979); United States v. United States Gypsum Co., 438 U.S. 422 (1978). A similar approach characterizes civil liability under federal securities law. Aaron v. Securities & Exchange Comm'n, 100 S.Ct. 1945 (1980).
33. United States v. Calandra, 414 U.S. 338 (1974).
34. Most recently, Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979) (access to grand jury transcripts in civil litigation).
35. United States v. Calandra, 414 U.S. at 348.
36. *Id.*
37. 417 U.S. 433 (1974).
38. *Id.* at 444.
39. *Id.* at 447.
40. 428 U.S. 465 (1976).
41. *Id.* at 489–90. In United States v. Payner, 100 S.Ct. 2439, 2446 (1980), the Court remarked, "[a]fter all, it is the defendant, and not the constable, who stands trial."
42. Stone v. Powell, 428 U.S. at 490–91.
43. *Id.* at 491.

44. 428 U.S. 433 (1976).
45. 435 U.S. 268 (1978). The Court balanced essentially the same factors in a decision, not of constitutional weight, allowing a spouse to choose to cooperate with the prosecution in a case against the other spouse; the issue was "whether the privilege against adverse spousal testimony promotes sufficiently important interests to outweigh the need for probative evidence in the administration of criminal justice," and the Court thought it was "far more likely to frustrate justice than to foster family peace." Trammel v. United States, 100 S.Ct. 906, 913–15 (1980). *See also* United States v. Gillock, 100 S.Ct. 1185 (1980) (no "speech or debate" privilege affecting state legislator tried for federal crime in federal court, because of the need for relevant evidence).
46. United States v. Ceccolini, 435 U.S. at 276.
47. *Id.* at 277.
48. *Id.* at 278.
49. *Id.* at 279, *quoting* McGuire v. United States, 273 U.S. 95, 99 (1927).
50. *Id.* at 279.
51. *Id.* at 280.
52. Stone v. Powell, 428 U.S. 475, 481 (1976); similar statements appear in United States v. Peltier, 422 U.S. 531, 537–38 (1975).
53. Dunaway v. New York, 442 U.S. 200 (1979).
54. Moore v. Illinois, 434 U.S. 220 (1977); see text accompanying notes 28–30.
55. North Carolina v. Butler, 441 U.S. 369 (1979).
56. Although not precisely affecting the exclusionary rule itself, recent illustrations include State v. Daniel, 589 P.2d 489 (Alas. 1979) (restricted scope of vehicle inventory seach); O'Connor v. Johnson, 287 N.W.2d 400 (Minn. 1979) (limitation on search warrants against third parties); State v. Slockbower, 72 N.J. 1, 397 A.2d 1050 (1979) (scope of vehicle inventory seach); People v. Settles, 46 N.Y.2d 154, 385 N.E.2d 612, 412 N.Y.S.2d 874 (1978) (counsel required before counsel presence at lineup can be waived); Commonwealth v. Bussey, 486 Pa. 221, 404 A.2d 1309 (1979) (waiver of *Miranda* rights must be specific, not implied from conduct); State v. Benoit, – A.2d –, 27 Crim. L. Rep. (BNA) 2477 (R.I. 1980) (delayed warrantless vehicle search condemned); State v. Opperman, 228 N.W.2d 152 (S.D. 1975) (warrantless vehicle inventory search prohibited). *See generally* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 Va. L. Rev. 873 (1976); Note, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 Stan. L. Rev. 297 (1977).
57. Bunning v. Cross, (1978) 52 A.L.J.R. 561; Hashimoto v. Japan, 32 Keishū 1672 (Sup. Ct., 1st P.B., Sept. 7, 1978).
58. *See* People v. Backus, 23 Cal. 3d 360, 590 P.2d 837, 152 Cal. Rptr. 710 (1979).
59. Code arts. 262–269; Rule arts. 169–175.
60. Bivens v. Six Unknown Named Federal Agents, 403 U.S. 388 (1972). The concept has been extended to cover any violation of any federal guarantee by federal employees. Carlson v. Green, 100 S.Ct. 1468 (1980).
61. *E.g.*, Federal Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3417(a)(1)–(4), and provisions relating to unlawful eavesdropping. 18 U.S.C. § 2520 (1976) (domestic eavesdropping); 50 U.S.C. § 1810 (foreign intelligence surveillance). All provide a minimum statutory recovery, costs and reasonable attorney fees. Attorney fees are also available under federal civil rights statutes. Maher v. Gagne, 100 S.Ct. 2570 (1980); Maine v. Thiboutot, 100 S.Ct. 2502 (1980); New York Gaslight Club, Inc. v. Carey, 100 S.Ct. 2024 (1980).
62. Owen v. City of Independence, 100 S.Ct. 1398 (1980); Monell v. New York City Dep't of Social Services, 436 U.S. 658 (1978).
63. Carey v. Piphus, 435 U.S. 247 (1978).
64. Alabama v. Pugh, 438 U.S. 781 (1978). The counsel fee cases cited in note 61 above are an exception because U.S. Const. amend. XIV, § 5, allows Congress to enforce the due process and

equal protection clauses through appropriate legislation, which qualifies the 11th amendment.

65. Moore v. Sims, 442 U.S. 415 (1979).
66. United States v. Payner, 100 S.Ct. 2439, 2445 n.5 (1980) (failure to comply with regulations requiring reports of infringement of citizen constitutional rights); United States v. Caceres, 440 U.S. 741 (1979) (Internal Revenue Service regulaions on monitored conversations); Beckwith v. United States, 425 U.S. 341 (1976) (administrative warnings in noncustodial setting).
67. On investigation of citizen complaints in England, see Police Act (1964) (c.48), § 49.
68. Ombudsman Act 1976 (federal jurisdiction); Police Regulation (Allegation of Misconduct) Act 1978 (N.S.W.).
69. *See generally* Witness Cooperation (F. Cannavale & W. Falcon eds., 1976); U.S. Nat'l Inst. of Law Enforcement & Criminal Justice, Victims and Witnesses: Their Experiences with Crime and the Criminal Justice System (1977); U.S. Law Enforcement Assistance Administration, Criminal Victimization in the United States (1974).
70. American Bar Association, Reducing Victim/Witness Intimidation: A Package (1980); Bar Leadership on Victim Witness Assistance (1980).
71. The Japanese Code of Criminal Procedure was amended in 1964 to meet this problem. Art. 89 (5) allows bail to be denied if a defendant may injure a complainnant or witness; art. 96 (1) (iv) authorizes revocation of bail or suspension of execution of a detention order if actual efforts are made to assault or intimidate such persons. No conviction of an offender is a prerequisite to denial or revocation under these provisions.
72. The constitutional issue is whether the only objective of bail or other forms of preconviction release is to assure appearance of defendants in court when required. If that is the only lawful purpose, then defendants with ties to the community and other indicia of reliability must be released even though there is reason to believe they will intimidate, assault or kill witnesses or destroy evidence. The Supreme Court has indicated the issue to be one reserved for future determination. Bell v. Wolfish, 441 U.S. 520, 534 n.15 (1979). Test cases undoubtedly will arise from jurisdictions which by state constitutional revision, *e.g.*, Mich. Const. art. 1, § 15(b) (as amended in 1978), or legislation, *e.g.*, D.C. Code §§ 23:132–1324 (1970), have allowed probable commission of future crimes to be taken account of in preconviction release determinations. Precedent is discussed in People v. Edmond, 81 Mich. App. 743, 266 N.W.2d 640 (1978).
73. Under Japanese law, a court may resolve such difficulties by requiring a defendant, but not defense counsel, to withdraw from the courtroom while a possibly intimidated witness testifies; after the witness has testified the defendant is returned to the courtroom, informed of the substance of the witness's testimony and afforded an opportunity personally to examine the witness further. Code arts. 281-2, 304-2. Under the sixth amendment right of confrontation, defendants cannt be excluded from the courtroom unless they disrupt trial proceedings by overt misconduct. Illinois v. Allen, 397 U.S. 337 (1970).
74. A defendant who threatens a witness and thus persuades the latter not to testify waives sixth amendment confrontation rights concerning the prosecution use of the witness's testimony given in an earlier proceeding. United States v. Balano, 618 F.2d 624 (10th Cir. 1979); United States v. Carlson, 547 F.2d 1346 (8th Cir. 1976). It violates first amendment rights of press representatives and members of the public to exclude them from a courtroom, even though with the express concurrence of prosecution and defense. Richmond Newspapers, Inc. v. Virginia, 100 S.Ct. 2814 (1980). A Japanese prosecutor may request a judge to interrogate a witness subjected to pressures, before the first day of public trial. Code arts. 227–228.
75. Under Penal Code art. 105-2, punishment is imposed whether or not a witness actually is intimidated, provided a defendant endeavors to force an intimidating interview. *See* S. Dandō, Keihōkōyō: Kakuron (Textbook of Penal Law: The Special Part) 78 (1964); 3-I Chūshaku keihō (Annotated Penal Code) 136–42 (S. Dandō ed. 1965). Under Shōnintō no higai ni tsuite kyūfu ni kansuru hōritsu (Law Concerning Compensation to Witnesses for Injury or Damage) (Law no. 109 of 1963), public funds are available for witness compensation based on injuries brought about by defendants.
76. The objection is that the inability to cross-examine a complaining witness about past sexual activities infringes the sixth amendment right of confrontation. The weight of authority rejects the premise, *e.g.*, Dorn v. State, 590 S.W.2d 297 (Ark. 1979) (no equal protection denial through improper legislative classification); Marion v. State, 590 S.W.2d 288 (Ark. 1979); People v. Dorff, 77 Ill. App. 3d 882, 396 N.E.2d 827 (1979) (retroactive application to defendant not ex post facto); State v. McCoy, 261 S.E.2d 159 (S.C. 1979), but there is a contrary holding. People v. Williams, 95 Mich. App. 2, 189 N.W.2d 863 (1979). *See generally* U.S. Nat'l Institute of Law Enforcement & Criminal Justice, Forcible Rape: An Analysis of Legal Issues ch. 3 (1978).
77. Webb v. Texas, 409 U.S. 95 (1972).
78. Code arts. 223–225.
79. Code arts. 223 (1), 226, 228; Rule art. 160.
80. Code arts. 223 (1), 227, 228.
81. Code arts. 218–219. Public prosecutors also may conduct or authorize inquiries into the cause of deaths apparently brought about under unnatural circumstances. Art. 229.
82. Code arts. 99–127 (search and seizure), 128–142 (evidence by inspection or examination), 143–164 (witness examination), 165–174 (expert or forensic examination), 175– (interpretation and translations). These processes are separate from requests for the trial examination of witnesses and evidence. Art. 298.
83. Code art. 179. A public prosecutor and defense counsel may inspect evidentiary items gathered in such a way (defense counsel may copy such items only with the permission of a judge), art. 180 (1), and an accused or suspect with permission of a judge may inspect documents or other evidence in court. Art. 180 (2).
84. Davis v. Mississippi, 394 U.S. 621 (1969).
85. United States v. Mara, 410 U.S. 19 (1973) (handwriting sample); United States v. Dionisio, 410 U.S. 1 (1973) (voice recording); *In re* Grand Jury Proceedings (Schofield II), 507 F.2d 963 (3d Cir. 1975) (fingerprinting).
86. *See*, however, the decisions cited in note 74 above.
87. *In re* Melvin, 546 F.2d 1 (1st Cir. (1976).
88. United States v. Doss, 545 F.2d 548 (6th Cir. 1976). A similar limitation affects Internal Revenue Service administrative investigations after a tax fraud case has been referred to the Department of Justice for criminal prosecution. United States v. Euge, 444 U.S. 707 (1980); United States v. LaSalle National Bank, 437 U.S. 298 (1978).
89. *E.g., In re* Fingerprinting of M.B., 125 N.J. Super. 115, 309 A.2d 3 (1973).
90. *E.g.*, People v. Marshall, 69 Mich. App. 288, 244 N.W.2d 451 (1976); People v. Vega, 51 App. Div. 2d 33, 379 N.Y.S.2d 410 (1976).
91. On procedures to establish unavailability and reliability, see Ohio v. Roberts, 100 S.Ct. 2531 (1980).
92. Mancusi v. Stubbs, 408 U.S. 204 (1972).
93. Drope v. Missouri, 410 U.S. 162 (1975), establishes this as a due process concern.
94. Andresen v. Maryland, 427 U.S. 463 (1976); Fisher v. United States, 425 U.S. 391 (1976). Administrative summonses for depositor records must be complied with. United States v. LaSalle National Bank, 437 U.S. 298 (1978); State v. Fredette, 411 A.2d 65 (Maine 1979); Fitzgerald v. State, 599 P.2d 572 (Wyo. 1979) (Postal Service records). Under some circumstances the processes of searching records in response to a summons and respondng in court can incriminate—the so-called "testimonial production." *See, e.g.*, I.C.C. v. Gould, — F.2d —, 27 Crim. L. Rep. (BNA) 2469 (3d Cir. 1980); *In re* Grand Jury Proceedings (Rodriguez), — F.2d —,

27 Crim. L. Rep. (BNA) 2441 (1st Cir. 1980).

95. 12 U.S.C. §§ 3401–3422.
96. The proper scope of federal practice is delineated in United States v. Nixon, 418 U.S. 683 (1974); a subpoena is not to be used as a substitute for discovery under the federal rules. On privilege infringement through the process of response, see *In re* Grand Jury Proceedings (Johansen), — F.2d —, 27 Crim. L. Rep. (BNA) 2507 (3d Cir. 1980).
97. National Conference of Commissioners on Uniform State Laws, Uniform Rules of Criminal Procedure R. 434–438 (1975).
98. Zurcher v. Stanford Daily, 436 U.S. 547 (1978); see also United States v. LaSalle National Bank, 437 U.S. 298 (1978) (bank records); United States v. New York Telephone Co., 434 U.S. 159 (1977) (communications carrier must cooperate in execution of eavesdropping order). In late September 1980, Congress enacted legislation restricting use of search warrants against media offices and personnel; the President was expected to sign it in early October.
99. Coolidge v. New Hampshire, 403 U.S. 443 (1971).
100. *See* text accompanying notes 78–80 above.
101. *See* note 84 above.
102. A citizen has no duty to cooperate with police officers who precipitate an encounter without reasonable suspicion that he or she may be involved in or have useful information about past, present or future activity, and therefore cannot be punished for refusal to give identification or solicited information. Brown v. Texas, 443 U.S. 47 (1979). Accordingly, although it is "an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement," Miranda v. Arizona, 384 U.S. 436, 477–78 (1966), it is not a legally enforceable duty until the legal prerequisites are met for a stop-and-frisk encounter. The leading decisions on the latter doctrine are Pennsylvania v. Mimms, 434 U.S. 106 (1977); Adams v. Williams, 407 U.S. 143 (1972); Terry v. Ohio, 392 U.S. 1 (1963).
103. Conversely, if there is noncompliance, a prosecutor can move to set aside a guilty plea to a lesser charge and can use as admissions statements made during the plea-taking procedure. People v. Cummings, 84 Mich. App. 509, 269 N.W.2d 658 (1978).
104. *E.g.*, United States v. Hudson, 609 F.2d 1326 (9th Cir. 1979) (but actual detrimental reliance is necessary if federal agent acted outside scope of official duties in making promise); United States v. Weiss, 599 F.2d 730 (5th Cir. 1979) (cites conflicting federal decisions on duty to dismiss indictment, but finds no agreement in fact made); United States v. Rodman, 519 F.2d 1058 (1st Cir. 1975) (promises of nonprosecution made by SEC agents required dismissal of indictment); People v. Reagan, 395 Mich. 306, 235 N.W.2d 581 (1975) (prosecutor agreed not to charge defendant if he "passed" a polygraph test); People v. Forney, 88 Mich. App. 5, 276 N.W.2d 498 (1979) (police chief and 19-year-old youth agreed there would be no jail time; shock or "taste of jail" probation violated that agreement) A promise made under duress is nonbinding. United States v. West, 607 F.2d 300 (9th Cir. 1979) (promise of amnesty during prison riot, given to secure release of hostages).
105. Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472 (1972); Kastigar v. United States, 406 U.S. 441 (1972). Testimony thus obtained cannot be used to impeach the source's trial testimony. New Jersey v. Portash, 440 U.S. 450 (1979). Use immunity does not extend to trials of future unrelated crimes, because privilege against self-incrimination itself cannot be asserted in relation to future activity. United States v. Quatermain, 613 F.2d 38 (3d Cir. 1980). It is on such a theoretical analysis that the Supreme Court found no constitutional violation in prosecuting perjury committe.. after a grant of immunity. United States v Apfelbaum, 100 S.Ct. 948 (1980).
106. Federal circuits are divided on the matter: United States v. Turkish, 623 F.2d 769 (2d Cir. 1980), and United States v. Lenz, 616 F.2d 960 (6th Cir. 1980), hold there is no constitutional duty to immunize, while Virgin Islands v. Smith, 615 F.2d 964 (3d Cir. 1980), says there may be, at least under some circumstances.
107. United States v. Apfelbaum, 100 S.Ct. 948 (1980); United States v. Wong, 431 U.S. 174 (1977).

Some Aspects of Arrest and Pre-trial Detention

*by Xavier Connor**

Arrest and pre-trial detention were the themes of the 54th International Seminar conducted by UNAFEI in February/March 1980. These topics are dealt with differently in the countries which were represented by the participants at the seminar. A country tends to develop a legal system which accords with its needs. Geography, ecology, distribution of population, the degree of industrialisation, history, culture, custom and religion may each play a part. It will be a mistake to assume that something which works well in one country will necessarily do so in another. The area of arrest and pre-trial detention is no exception. Even so certain common problems tend to emerge and I shall deal with some of these in this paper.

A person who is under arrest is deprived effectively of his liberty. In general he is not free to go where he wishes to go or to see the people he wishes to see or to do the things he wishes to do. To give one person the right to arrest another is to give him a very considerable power over the person arrested. The Australian Law Reform Commission recently had this to say on the subject of arrest:

> "Arrest has disadvantages for the State as well as for the person arrested. These are obvious enough. Our society quite rightly puts a premium on freedom of movement. Arrest is the complete negation of freedom. As a result it casts a considerable onus on those who would justify it. Further, arrests cost the state a considerable amount of money, both in absolute terms and as compared to other ways of bringing people to court. Innumerable man hours are spent in transporting, guarding and processing the arrestee. American experience suggests that an arrest costs the state on average five times the cost of a summons .... One further disadvantage of arrest which it is appropriate to mention is the fact that there is strong disapproval in many parts of society, of any one who has an arrest record. This may take the form of social ostracism, dismissal from employment or withdrawal of commercial credit."[1]

Having said this it is nevertheless clear that members of the police force must have the power to arrest if good order is to be preserved in the community. The problems are to ensure, so far as possible, in the first place that the power is effective and in the second place that it is not abused.

Lawyers instinctively think of the problem in terms of laws governing the right to arrest, the manner of arrest and the action required to be taken after the arrest. Before passing to these matters I venture one observation of a non-legal nature; and that is to say that in my view there is no substitute for a well trained competent police force. If the members of a police force are taught during their basic training and periodically reminded during their service of the drastic nature of the power to arrest, if they are taught to treat arrest as a last resort, and in fact they do so, the practice concerning arrest will tend to be satisfactory, whatever the state of the law. In the absence of a well trained police force the situation concerning arrest will tend to be unsatisfactory, no matter how enlightened the law may be. That is not to say, however, that the law is irrelevant. It is a considerable advantage to any community—indeed one may say a necessity—to have clear and satisfactory laws concerning such an important matter as arrest. The words of Stephen J. in *Re Castioni*[2] are particularly apposite to statutes dealing with arrest. Speaking of statutes in general Stephen J. said in that case:

> "... it is not enough to attain to a degree of precision which a person reading in good faith can understand; but it is necessary to attain if possible to a degree of precision which a person reading in bad faith cannot misunderstand. It is all the better if he cannot pretend to misunderstand it."

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Criteria for Arrest

The first concern is to determine the criteria for the power to arrest. The test is usually formulated in terms of belief or suspicion on reasonable grounds that a person has committed a crime. It is sometimes assumed that it is a matter of little consequence whether the test is belief or suspicion. I do not think that belief and suspicion can be treated as synonyms without doing violence to the ordinary meaning of each word. Belief involves a state of mind which goes beyond suspicion. In the present context it means that the person entertaining the belief thinks that the person to be arrested has actually committed the crime. On the other hand a police officer may entertain a strong suspicion on reasonable grounds that a person has committed a crime without having a belief that he has done so. I think that a genuine suspicion on reasonable grounds should satisfy the first criterion for arrest. Whether an arresting officer entertains an actual belief that a person has committed a crime may vary greatly with the individual officer, depending on his temperament and his experience. A police officer may have believed on previous occasions that a person had committed a crime only to discover from subsequent investigation that his belief was mistaken. Such an officer may be wary of forming a belief even in the face of what appear to be incriminating circumstances which generate a genuine and reasonable suspicion which, if not acted upon, may result in an offender escaping justice. Moreover the test of belief tends to promote a certain cynicism on the part of arresting officers by tempting them to say that they entertain a belief, whether they do so or not.

I do not think that reasonable suspicion should be sufficient on its own to justify arrest. I think there should be a second criterion, namely that the arresting officer believes on reasonable grounds that proceedings by way of summons would be ineffective. This requires the police officer on the spot to consider whether proceedings by way of summons are feasible; and this raises for discussion the purposes of arrest. Historically the main purpose is to take the arrested person before a court at the first opportunity. It must be acknowledged also, I think, that another purpose in many cases is to place under police control the person found offending and thus bring to an immediate end his criminal enterprise. In many cases where a person is found committing a breach of the peace, arrest will be immediately indicated because proceedings by summons would not be effective to deal with the situation overall. In other cases where there is no ongoing breach of the peace at the time the police officer encounters the offender, the offence in respect of which the offender is being sought may be so serious as to suggest reasonably to the police officer that proceedings by summons would not be effective for the sole reason that the motive for failing to appear at court in answer to a summons would be too strong.

There will of course be other cases where the offender refuses to give his name or address or refuses to identify himself satisfactorily or where the police officer reasonably believes that the offender is giving him false information as to his identity. In such a case the police officer may well reasonably form the belief that proceedings by way of summons would be ineffective. There are merely examples of cases in which it would be reasonable for the police officer to form the belief that proceedings by way of summons would not be effective. They are not intended to be an exhaustive list of such cases.

On the other hand, it is not difficult to envisage cases in which it would be unreasonable for the police officer to form the view that proceedings by summons would be ineffective. The offence may not be a serious one. There may be no ongoing breach of the peace at or about the time the offender is encountered. The offender may produce convincing identification from personal papers which he is carrying

and which are plainly enough referable to him. The offender may not only be able to identify himself satisfactorily but may be in a position to demonstrate to the police officer that he has local family and property ties. It seems to me to be plainly undesirable in such a case that the police officer should arrest this class of offender even though there be strong suspicion that he has committed a crime. If an arrest is made in those circumstances it seems to me that the law ought to be that such an arrest is illegal.

A further criterion for arrest is the necessity to preserve evidence relating to the offence for which the person is arrested. Such evidence may be on the person of the arrestee; and if he is not prepared to surrender it to the police an arrest may be the only feasible means of preventing him from destroying it. In the case of persons suspected of theft an arrest accompanied by a search of their homes or business premises may be the only means of preventing stolen property from being removed from such places. In some cases also an arrest may be the only feasible means of preventing a suspect from warning his accomplices of the turn of events thus enabling them to escape.

Action after Arrest

Because the power to arrest is a drastic one the view is generally taken that it should be hedged about with provisions designed to prevent its abuse. A common provision is that the person arrested should be taken before a judicial officer as soon as practicable after arrest to be dealt with according to law. The advantage of such a provision, if carried out promptly, is that the person arrested comes under the control of a judicial officer, who is independent of the police and who has the power to grant him bail. Arrests are frequently made at a time when it is not always feasible to secure the prompt attendance of such a judicial officer. Presumably to meet this situation it is commonly provided in some countries that the person arrested be delivered forthwith into the custody of the member of the police force who is in charge of the nearest police station and who has power to grant bail. Provided that the arresting policeman adheres to this procedure and provided that the officer in charge of the police station observes proper principles in admitting persons to bail, such a provision provides a prompt opportunity for the arrested person to regain his liberty. Two common pitfalls occur in practice. In the first place there is a strong temptation for the arresting officer to detain the person arrested in his custody for the purpose of questioning or generally facilitating investigations into the suspected crime. In the second place there is often a tendency for the officer in charge of the police station to order photographs and fingerprints as a matter of routine, whether necessary or not, and to postpone the consideration of bail until after these procedures have been completed.

Custodial Investigation

In 1975 the Australian Law Reform Commission made an interim report entitled "Criminal Investigation" in which it dealt with many aspects of custodial investigation. It strongly recommended legislative provisions requiring that persons in custody should be informed:

a) that they are in custody,
b) why they are in custody,
c) their right to refuse to answer questions,
d) their right to access to relatives and friends,
e) their right to access to a lawyer, and
f) if relevant their rights as to identification parades and bail.[3]

On the question of access to friends and relatives the Commission favoured legislation providing for the right of the suspect in custody to communicate with at least one friend or relative except in cases where the police entertain a reasonable belief that the suspect in so doing will warn an accomplice who is not in custody or arrange for the disappearance or destruction of evidence. The Commission also recommended that there should be a formal legal

obligation on the part of the police to answer *bona fide* inquiries from friends, relatives and legal representatives as to the location and status of the person in custody. Although in many parts of the world, including Australia, police practice requires some of these things be done, I agree with the Commission that it is desirable that legislative provision should be made in respect of such matters.

As to the question of access to counsel I cannot do better than quote from the Commission's report:

> "The right to consult with a lawyer during the course of pre-trial police investigations is one of those traditionally claimed civil rights to which almost universal obeisance is paid in principle, but which is greeted with very great circumspection in practice by law enforcement authorities. The "right" has no constitutional or statutory backing in Australia. It cannot be said to have more than the most marginal support from the common law. This is to be contrasted with the situation in the United States. There, building on the already recognised entitlement of every person accused of a crime to have a lawyer at trial, the Supreme Court of the United States has declared, first in *Escobedo* v. *Illinois* (1964) 378 U.S. 478 and later in *Miranda* v. *Arizona* (1966) 384 U.S. 436 that the Fifth and Sixth Amendment constitutional rights to the assistance of counsel and to be free from compulsion to be a witness against oneself require the accused (a) to be warned that he has a right to remain silent, (b) to be warned that he has the right to the presence of an attorney, and (c) to be told that if he does not know or cannot afford an attorney, one will be appointed for him.[4]

If such a right is to mean anything in Australia it will need statutory backing, which it does not now have.

It is sometimes claimed that a right of access to a lawyer during the investigative process unduly hampers law enforcement. If, however, the right to silence is acknowledged, the case for access to a legal practitioner during the investigative stage is a strong one. Otherwise only the knowledgeable and the resolute will enjoy the right. The ignorant and the timid will not. If the right to silence is acknowledged it is difficult to defend such an unequal and unfair enjoyment of it. In any event a legal practitioner is in a position to give advice on matters other than the right to silence, for example identification parades, fingerprinting, medical examinations, bail and so on. A lawyer should not be able to hinder the investigation by unduly delaying his arrival. If the person in custody does not have a lawyer or does not know of one there should be lists of practitioners available at the various police stations who are prepared to undertake such work.

As to fingerprints and photographs the Commission, rightly in my view, points out that there is an aura of real criminality about having one's fingerprints or photograph compulsorily taken in a police station. The Commission recommended that this should be limited to situations where the prints or photographs are reasonably believed to be necessary for the identification of the person with respect to the commission of the offence for which he is in custody. If the suspect does not consent to the taking of fingerprints it should be necessary, as in England, for the police to apply to a magistrate for an order that fingerprinting be permitted before conviction.[5]

As to identification parades, the procedure for these is in general governed in Australia by orders or instructions emanating from police commissioners and not by legislation. There is a dual judicial control over the way in which they are conducted. In the first place the evidence of identification at a parade may be excluded if, by reason of the manner it was conducted, it would be unfair to the accused to admit it. In the second place, on the basis that evidence of the identification parade is admitted, there is still a warning given to juries about the care which is to be exercised in acting upon such evidence. The warning given is along the lines suggested by the English Court of Appeal in *R.* v.

Turnbull.[6] The effect of this is that whenever the case of an accused person depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken the judge should warn the jury of the special need for caution before convicting in reliance on the correctness of the identification. He should instruct them that the reason for that warning is to avoid the conviction of an innocent person by reason of a mistaken identification. The judge is required to make some reference to the possibility that a mistaken witness could be a convincing one and that a number of witnesses could all be mistaken. He should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. If the prosecution have reason to believe that there is a material discrepancy between the description of the accused given to the police by the witness when first seen and his actual appearance, there should be supplied to the accused or his legal advisers particulars of the description the police were first given. In all cases, if the accused asks to be given particulars of any description, the prosecution should supply them. The judge should also remind the jury of any specific weaknesses which have appeared in the identification evidence. Where the quality of an identification is good, the jury can safely be left to assess the value of the identifying evidence even if there is no other evidence in support, provided always that an adequate warning has been given about the special need for caution. Where the judge considers that the quality of the identifying evidence is poor he should withdraw the case from the jury and direct an acquittal unless there is other evidence which supports the correctness of the identification; and he should identify for the jury any evidence which he regards as capable of supporting the evidence of identification.

Identification parades should be recorded by at least a coloured still photograph. If this is done and the photograph is produced at the trial the judge and jury can see for themselves and form their own view of the height, build and appearance of the other persons on the parade with the accused. The effect of doing this is usually to the advantage of the prosecution because it generally puts to rest any argument about the fairness of the parade in this respect. It is desirable also, in my view, that parades should be conducted by a senior police officer who is not in the investigating team and preferably a uniformed officer not in the Criminal Investigation Branch. If arrangements are made for the attendance of a legal adviser of the accused and there is identification at a fairly conducted parade, this again generally tends to strengthen the prosecution evidence. There also seems much to be said for the practice which prevails in some countries of having identification parades conducted in the presence of a magistrate.

As to the matter of identification by photographs, these will generally be used when the police are seeking a lead to the identity of someone who is still at large. Witnesses should be asked to record a written description of the suspect before they are shown any photographs. The photographs which they are shown, including that of the accused, should generally be mounted on a single large backing sheet before they are shown to the witness. This should be preserved and produced at the trial. In this way the jury or other tribunal of fact can see exactly what was shown to the witness; and this removes much argument as to the order and manner in which the photographs were proffered to the witness. A careful written record should be made of anything said by the witness about the photographs shown to him.

If there is an arrest the witness, without being shown the photographs again, should be asked to identify the suspect at a properly conducted identification parade.

Care must be taken to ensure that the impression is not conveyed to the tribunal of fact that the photograph of the accused comes from police records in such a way as to suggest that he has pevious convictions.

The Right to Silence

In the sense in which I propose to discuss it the right to silence consists of the right of anyone not to incriminate himself. This right, where it exists, is protected in a number of ways. In the case of an accused person he cannot be required to give evidence either for the prosecution or on his own behalf at his trial. In the case of a witness he cannot be required to give evidence in a trial which will tend to incriminate him. Alternatively in some jurisdictions he may be required to give such evidence but there is a law enacting that it will not be admissible against him if he should thereafter be tried. In the case of a citizen who is neither an accused nor a witness he cannot be compelled to answer incriminating questions put to him either by the police or by anyone else; and this is so whether he is a suspect or not.

Lawyers tend to discuss the right to silence in terms of constitutional or legal rights; but initially the question whether there should be a right to silence is in the realm of moral and political philosophy. Should there be such a right and if so why?

Before endeavouring to answer this question it is perhaps logical to ask two questions of those who are opposed to the existence of such a right. First, do they contemplate that a police officer could ask any citizen whether he had at any time in the past committed any offence against the law? Secondly, what measures would they countenance to compel truthful and maybe self-incriminating answers to such questions?

Unless the opponents of the right to silence answer these questions with some precision it is not easy to evaluate the right because it is not possible to identify what is the alternative to it. If police officers had the right to ask any citizen whether he had at any time in the past committed any offence against the law I do not think it would be practicable for them to question the person effectively unless either they entered his home or business premises or took him from where he was to a police vehicle or a police station for that purpose. I think it is plain furthermore that, if police were entitled to question people in this way, many people who had committed offences would not at first make admissions. Police officers would then in the course of their duty persist with the questioning; and the invasion of the home or the detention in police custody would be prolonged.

At this stage of the discussion most opponents of the right to silence tend to restate their opposition to it in terms of restricting police activity in this field to cases in which the police have reasonable cause to suspect the commission of a crime. It follows immediately from this that the right to silence is thereby accorded to the vast majority of citizens, as probably no more than a very small section of the community would be suspects at any given time.

Before considering the position of suspects it is useful to ask why there seems to be general agreement that the right to silence should be accorded to the vast majority of the community in respect of whom there are no reasonable grounds for suspicion. If the police had the right to detain them for questioning it may well be that many persons would be convicted of crimes which, given the right to silence, would never be cleared up. I do not think it is possible to give any more satisfactory answer to this question than to say that most people regard the right of the general populace to silence as the lesser evil—the greater evil being the kind of society we would have if citizens in general, not reasonably suspected of any offence, were liable to be detained indefinitely for questioning without any charge being laid against them. Most people would fear that in such circumstances an oppressive police state would emerge.

I think that for practical purposes there are three debatable issues:

(1) Should suspects have the right to decline to answer questions put to them by the police in the course of investigating offences?

(2) Should the prosecution be able, as part of its case, to rely upon a refusal to

answer such questions?

(3) Should the accused have an option to give evidence on oath at his trial?

It is said that the right to silence impedes the proper and efficient investigation of criminal activity because, where it is exercised, it prevents the ascertainment of the truth. There is no convenient or acceptable way in practice to force a truthful answer to an incriminating question. Consequently it is said that the prosecution should, as part of its case, be allowed to lead evidence of the accused's refusal to answer and to rely upon it as indicating guilt. It would follow, of course, that the tribunal of fact, be it judge or jury, could attach such weight to this as it thought fit.

As things now stand the onus of proof is entirely on the prosecution and the accused does not have any obligation to prove anything at all; and he is perfectly entitled, if he so wishes, to remain silent throughout the whole trial and no adverse inference is to be drawn from his refusal to answer questions put to him by the police. The changes advocated by those who would abolish the right to silence would in my view tend to change the onus of proof. The tribunal of fact would inevitably have to ask itself why the accused did not give a proper explanation to the police about this or that. As soon as the tribunal begins to turn its mind to what the accused might or should have said, I think the onus of proof as it stands today would begin to undergo a change, however subtle. The importance of what the prosecution has proved by way of positive evidence would, I think, tend to be diminished by the necessity to consider what the accused has failed to do. Some opponents of the right to silence frankly acknowledge this but say, in effect, that it is about time that the task of the prosecution became less onerous because too many guilty persons are being acquitted.

I think that intelligent people of good will are likely to continue to debate this matter for a long time. It is not the kind of issue which can be proved to the point of demonstration one way or the other by a series of syllogisms. People are likely to be influenced by their own experience. The victim of a crime committed by an accused person who is given the benefit of the doubt will not usually be in a mood to be lectured about the virtues of proof beyond reasonable doubt. A community is likely to consider also whether in a particular sphere the cost of the right to silence is too high. Probably most of us have lived through and observed a change in community attitudes towards persons driving vehicles on public roads whilst under the influence of alcohol. This change, no doubt, has been brought about by the dreadful loss of life and personal injury arising from road accidents. There is now a wide acceptance of the proposition that in this area a suspect should be required by law to provide evidence against himself in the form of breath or blood samples. If criminal activity in other areas appears to be getting out of control, other quite specific and limited exceptions to the right to silence might be indicated. For my part I would be opposed to any sweeping abolition of the right as distinct from the empirical and limited type of exception represented by the breath or blood sample taken from the allegedly intoxicated driver.

I venture to say that very few experienced criminal advocates, who have constantly had to turn their minds to advising an accused person whether or not to give evidence on oath at his trial, will be found in the ranks of the opponents of the right to silence. From time to time they see that a person whom they judge to be innocent and truthful may also be timid, easily overborne, at a loss for words and so on. This could in many cases result in a *bona fide* decision not to submit such a client to cross-examination by a competent prosecutor. I do not think it should be compulsory for such a person to give evidence on oath. By not doing so he runs the risk in certain types of cases that the tribunal of fact will draw an unfavourable inference from his failure to do so. Where the prosecution on a particular issue leads strong evidence which only the accused could contradict, he runs a risk in failing to give evidence on oath. But it is a calculated risk and it seems to me that any accused should

be free to make the choice. There are reasons for silence both during the investigative stage and at the trial which are consistent with innocence. That is not to deny that guilt is frequently the explanation for silence; but in most legal systems the issue is not simply whether an accused person is guilty but whether there is evidence available to demonstrate that guilt beyond reasonable doubt.

I think the quality of justice tends to be higher the less it is necessary to rely upon anything said by an accused in the form of an admission or a confession. In a system which facilitates the obtainment of confessions I think undue emphasis is likely to be placed upon that type of evidence. Confessional evidence is notoriously capable of constituting the best or the worst evidence, depending upon the quality of the confession. A confession to a crime which involves proof of a state of mind, if freely made by a resolute and rational but penitent person, is perhaps the best evidence obtainable. A confession by a frightened, illiterate person who is trying to shield someone else might be the worst evidence. I think there is much to be said for the proposition that a confession or an admission made to a police officer should be the start rather than the end of the criminal investigation. Well trained detectives will certainly use confessional material as a springboard for further investigation in order to mount a strong circumstantial case which will be viable in the event of the confession not being admitted; and where the confession is admitted it will tend to support the truth of it.

I can recall a number of trials in which I have refused to admit a confession and had the distinct impression that the case for the prosecution thereby became more impressive. The jury heard no attacks on the police as to the circumstances in which the confession was obtained and readily acted upon the evidence of eye witnesses and circumstancial evidence. I think it desirable that the obtainment of confessional material should be regarded by the police as just one of many steps open to them in the course of their investigations. The introduction of a system which will highlight what the accused has said or failed to say to the police will make it a task of paramount importance for the police either to obtain a confession or to obtain a refusal to answer; a task in which police officers may well become engrossed to the detriment of other forms of investigation.

Confessions

I turn finally to say something of the situation in Australia concerning confessions and some recent proposals for reform. The first question that will probably be asked is whether a person can be questioned by the police. The answer in Australia is the same as is set out in Rule 1 of the Judges' Rules, namely that:

> "When a member of the force is endeavouring to discover the author of a crime there is no objection to his putting questions in respect thereof to any person or persons, whether suspected or not, from whom he thinks useful information can be obtained."

The next question is whether a person interrogated has to answer such questions. The position in Australia is that he is not required to answer and if he is subsequently charged no inference adverse to him can be drawn from his failure to answer.

If the person being questioned does answer, in what circumstances can his answer be given in evidence against him? The brief answer is that evidence by way of confession or admission is admissible if it was given voluntarily. Dixon J., as he then was in *McDermott* v. *R.*[7] said:

> "If [the accused] speaks because he is overborne his confessional statement cannot be received in evidence, and it does not matter by what means he has been overborne. If his statement is the result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure, it cannot be voluntary. But it is also a definite rule of the common law that a confessional statement cannot be voluntary if it is preceded by an inducement held out by a person in authority and the inducement

has not been removed before the statement is made."

In the State of Victoria and the Australian Capital Territory there is a special statutory provision. For convenience I set out section 68 of the Evidence Act of the Australian Capital Territory:

"68 (1) Subject to the next succeeding sub-section, a confession or admission made by a person charged in a criminal proceeding is not admissible in evidence against that person unless it was made voluntarily by that person.

(2) A confession or admission tendered in evidence against the person charged in a criminal proceeding shall not be rejected only on the ground that a promise, threat or other inducement (not being the exercise of violence, force or other form of compulsion) has been held out to or exercised upon the person making the confession or admission, if the judge is satisfied that the means by which the confession or admission was obtained were not in fact likely to cause an untrue admission of guilt to be made.

(3) The judge has, in a criminal proceeding, a discretion to reject a confession or admission (whether or not it is a confession or admission to which the last preceding sub-section applies) made by the person charged if, having regard to the circumstances in which, or the means by which, the confession or admission was obtained, the judge is satisfied that it would be unfair to the person charged to admit the confession or admission in evidence."

It will be seen therefore that there is a discretion to reject a voluntary statement if it was obtained in circumstances rendering its reception into evidence unfair to the accused, for example if it were improperly obtained by police officers.

The Judges' Rules are adopted in all but two States, generally in the form of rules or instructions issued by the various Commissioners of Police. They are treated as rules which set up general standards of propriety which may be taken into account in the exercise of the court's discretion to exclude evidence which has been unfairly obtained.

As to the exercise of the discretion to reject voluntary statements, the following statement by Street J. in *R.* v. *Jeffries*[8] has been commended by the High Court of Australia in *R.* v. *Lee*:[9]

"It is a question of degree in each case, and it is for the presiding Judge to determine, in the light of all the circumstances, whether the statements or admissions of the accused have been extracted from him under conditions which render it unjust to allow his own words to be given in evidence against him . . . The obligation resting upon police officers is to put all questions fairly and to refrain from anything in the nature of a threat, or any attempt to extort an admission. But it is in the interests of the community that all crimes should be fully investigated with the object of bringing malefactors to justice, and such investigations must not be unduly hampered. Their object is to clear the innocent as well as establish the guilt of the offender. They must be aimed at the ascertainment of the truth, and must not be carried out with the idea of manufacturing evidence or extorting some admission and thereby securing a conviction. Upon the particular circumstances of each case depends the answer to the question as to the admissibility of such evidence."

There are of course problems concerning the Judges' Rules and it has been strongly urged that in many respects the protection which appears to be afforded by them is illusory. For instance Rule 2 requires a police officer to caution a person being interrogated when he has made up his mind to charge that person. It is often difficult even for the police officer to pinpoint the time; and in practice it seems to happen that by that time the caution will be too late. If at the commencement of an interrogation the police officer has not made up his mind to charge the person, but after some time he does so, it will nearly always be as a result of something which the person has said. He will have said it

without having been cautioned. The police officer thinks it is enough to justify a charge and it is not until then that the caution is given.

Rule 3 provides that persons in custody are not to be questioned without a caution. This often gives rise to conflicting evidence as to whether a person was in custody. There is a tendency for the police to say that they invited the accused to come to the police station and he voluntarily cooperated with them. There is a tendency for the accused to say that in the circumstances he did not think he had any option but to accompany the officers to the police station.

The Australian Law Reform Commission has also suggested that the fact that the accused has no right to have a lawyer present while he is being interrogated tends to make the protection afforded by the Judges' Rules somewhat illusory.[10]

The Australian Law Reform Commission made the following recommendations:[11]

"There should be statutory recognition of the suspect's right to silence, a statutory requirement that he be notified of that right and a statutory guarantee that he be afforded the opportunity to obtain such professional assistance as is necessary to enable him to exercise that right.

There should be procedures introduced for ensuring the reliability of confessional evidence and minimising contests as to the circumstances in which it was obtained. Interviews should preferably be (a) recorded by mechanical means or (b) corroborated by a third person and, if these measures are not practicable in the circumstances, (c) checked by a third person after being reduced to writing, or at least (d) reduced to writing and signed by the accused.

Special provision should be made with respect to tape recording of interviews concerning the custody of tapes and the obtaining of copies thereof, the power of the court to edit out, in camera, irrelevant and prejudicial material, and the erasure of such tapes if no proceedings have been commenced within twelve months.

A failure to employ one of the abovementioned safeguards in circumstances where it was practicable to do so should prima facie result in the exclusion of the evidence. Even if the confessional evidence is declared admissible after application of the reverse-onus discretionary exclusionary rule of evidence, the failure to employ safeguards should be treated by the tribunal of fact as going to the weight of such evidence, and legislation should provide accordingly.

The common law voluntariness rule, resulting in the automatic exclusion of confessional evidence involuntarily obtained, should be incorporated in the legislation in modified form. Confessions extracted by violence or the threat thereof should be deemed involuntary, but other forms of inducement should not produce that result unless they are held likely to have caused an untrue admission to be made."

These recommendations, together with many others, were substantially adopted by the government of the day and were incorporated in the Criminal Investigation Bill 1977. It reached the stage of being formally introduced in the House of Representatives of the Federal Parliament by the then Attorney-General who gave an explanatory Second Reading Speech. Subsequently the formal debate on the Bill was commenced and was adjourned. The Attorney-General resigned over a matter not connected with the Bill. Before the debate was resumed the House of Representatives was dissolved and a Federal election was held in December 1977. The government was returned to power and the present Attorney-General has announced that the Bill is still under consideration by the government which has referred it to an inter-departmental Committee.

As to the question of sound recordings,

there is some police evidence to the effect that sound recordings of police interviews would inhibit the person being interrogated from saying anything. Perhaps only experience will show whether this is so or not. I am disposed to think that it is equally if not more inhibiting for a person being interviewed by the police to see and hear every answer being recorded on a typewriter; and yet it is notorious that many people do give and sign typed records of interview. I am also disposed to think that, if sound recording of interviews became the norm, in the course of a few years police might become the most ardent supporters of such a system. I think the sound recording of interviews would go a long way towards protecting the police from the kind of allegations which are almost routinely made against them by seasoned offenders. Sound recording evidence is convincing and enables the interview to be recorded in a way which is impossible for police officers to convey by subsequently reducing to writing such parts of the interview as they can recall. The use of sound recording for police interviews is not without its problems. There is the possibility of falsifying tapes. There may be a necessity to edit tapes. There is also the question of the custody of tapes. There is also the considerable expense involved in provision of the equipment. If it were introduced there would no doubt be some growing pains but I believe that more and more people are becoming convinced that sound recording of police interviews must come.

REFERENCES

1. The Australian Law Reform Commission Report No. 2 Interim "Criminal Investigation" para. 28 (referred to hereafter as "Report")
2. [1891] 1 Q.B. 149 at pp. 167–168
3. Report paras. 100 and 326
4. Report para. 105
5. Report paras. 112–116
6. [1977] 1 Q.B. 224
7. (1948) 76 C.L.R. 501 at p. 511
8. (1947) 47 S.R. (N.S.W.) 284 at pp. 312–313
9. (1950) 82 C.L.R. 133 at pp. 154–155
10. Report para. 140
11. Report paras. 344–348

SECTION 2: PARTICIPANTS' PAPERS

Arrest and Pre-trial Detention

*by Ayub Quadri**

The Constitution of Bangladesh is the supreme law of the country. This is supplemented by other laws of which we may, rather arbitrarily, make two broad categories to facilitate this discussion. These are:

a) ordinary laws inherited from British or Pakistan times and adopted with minor changes in Bangladesh;
b) special laws promulgated since the independence of Bangladesh in 1971.

In category a) the major laws relevant to this discussion are the Penal Code 1860, the Code of Criminal Procedure 1898, the Evidence Act 1872, the Prisons Act 1894 and the Jail Code 1860, etc. In category b) the Special Powers Act 1974 and the Emergency Powers Rules 1975 would be relevant.

Ordinary Laws

1. Arrest and pre-trial detention may be of two broad types:

a) of persons accused or suspected of criminal offences for investigation of the crime and trial of the offender;
b) to prevent persons from committing crimes.

In part III, which deals with fundamental rights, the Constitution of Bangladesh provides safeguards against arrest and preventive detention. These are:

i) No person shall be deprived of life or personal liberty except in accordance with law (Article 32).
ii) No person can be detained in custody without being informed of the grounds for his arrest nor can he be denied the right to consult and be defended by a legal practitioner of his choice (Article 33(2)).
iii) Anyone arrested and detained in custody must be produced before the nearest Magistrate within a period of twenty four hours (excluding time necessary for journey) and no one can be detained beyond this period without the orders of a Magistrate (Article (2)).
iv) Laws providing for preventive detention shall not authorise detention of a person beyond six months without the approval of an advisory board consisting of three members, two judges of the Supreme Court and a senior government official; the committee is required to hear the person detained (Article 33(4)).
v) Any person put under preventive detention must be informed of the grounds of such detention and afforded an opportunity of making a representation against the order (Article 33(5)).

2. This discussion will be limited to arrests made by the police and will not consider special provisions regarding citizens arrest etc.

A person may be arrested by the police on the basis of an order (warrant of arrest) from a court of law, or without any warrant in some cases.

The Code of Criminal Procedure categorises offences under the Penal Code as:

a) cognizable—where a police officer may arrest without a warrant from a court;
b) non-cognizable—where no arrest can be made without such a warrant.

The circumstances under which a police officer may arrest without warrant are detailed in section 54 of the Code of Criminal Procedure (Appendix A). Section 46 of the Code states that in making an arrest the police officer must touch or confine the body of the person to be arrested unless there is submission to cus-

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tody by word or action. It further states that if arrest is resisted, the police officer may use all means necessary to effect the arrest. However, this does not give the right to cause the death of a person who is not accused of an offence punishable with death or with imprisonment. A police officer may enter and search premises to effect an arrest. An arrested person is not to be subjected to more restraint than is necessary to prevent his escape. The Code of Criminal Procedure also contains provisions identical to those of the constitution regarding production of an arrested person before a magistrate within 24 hours etc.

3. Offences are further categorised in the Code of Criminal Procedure as a) bailable, and b) non-bailable.

In bailable cases grant of bail is automatic on production before a court, provided that the arrested person is willing to execute a bond or provide such surety as may be demanded by the court. In such cases bail may even be granted at the police station. In non-bailable cases grant of bail is the discretion of the courts. However, bail is generally not granted to an arrested person if there appear to be reasonable grounds for believing that he may be guilty of an offence punishable with death or with imprisonment for life. In view of the congestion in jails, in actual practice in Bangladesh, the courts grant bail quite liberally.

4. In refusing bail to arrested persons the courts generally have the following considerations in view:

a) to prevent him from absconding and thereby evading the law;
b) to prevent him from tampering with evidence during investigation or trial;
c) to prevent him from committing further crime; and
d) to enable him to be interrogated to assist investigation.

On production of an arrested person before a magistrate he may be released on bail, taken into judicial custody (jail) or remanded to police custody. Remand to police custody is given only when it is absolutely essential for the purposes of investigation and is limited to a maximum period of fifteen days. However, because use of third degree methods by the police is not unknown, remand is allowed very rarely by the courts. The law provides further protection to the accused in this regard. According to the Evidence Act, a confession made to a police officer is not acceptable, as evidence, nor is a confession obtained through inducement, threat or promise.

A person wrongly arrested and detained may seek redress under section 342 of the Penal Code. If bail is refused by a particular court, the affected person can move the next higher court.

5. It will thus be seen that provisions of law regarding quick production of an arrested person before a court, provisions as to bail, nonacceptance of confessions made to police officers or under duress and also the provisions for legal action for wrong arrest or detention provide safeguards against arbitrary arrest and detention. These safeguards may be adequate in an advanced society where people are aware of their rights and able to enforce them. However, in a country like Bangladesh where nearly 80% of the people are illiterate and the vast majority abysmally poor, mere existence of legal provisions may not necessarily provide adequate safeguards. The law provides safeguards against arbitrary arrest, but it also gives wide powers to the police for arrest. When excesses are committed by the police, the people affected may not be aware of the violation of their rights, and even if they aware, may not have the means to seek redress. Litigation is expensive and time-consuming. Though stray efforts are made now and then, no adequate system for voluntary legal aid to victims of such arbitrary action has developed in the country so far. At present, apart from the redress available through courts, some control on excesses of the police is exercised by the supervision of superior police officers over the work of their subordinates. The solution probably lies in developing democratic institutions and making the law-enforcing agencies responsible and accountable for

local elected bodies.

6. As mentioned earlier, bail is granted automatically in bailable offences and it is granted fairly liberally even in non-bailable offences. However, bail is not granted in cases of very serious nature. This would not result in any unnecessary detention if investigation and trial of cases were completed expeditiously. This, unfortunately, is not the case. Bangladesh is a poor country and consequently there is inadequacy in most fields. The country cannot afford the required number of investigating officers and trying magistrates and this contributes significantly to the delay in investigation and trial. At the end of 1979, 12,159 cognizable cases were pending with the police for investigation and 81,217 cognizable cases with magistrates for trial. Appendix B gives a statement of cognizable cases for the years 1972-77. It will be seen that only a small percentage of cases end in conviction. Again, only a small percentage of persons tried are ultimately convicted. It will thus appear that a large number of people detained pending investigation and trial are ultimately acquitted by the courts. Looking into the statistics available, it is shown that, out of the total number of 62,844 cognizable offences cases reported in 1977, 827 cases are still pending investigation in early 1979. Likewise, out of the total number of 64,472 cognizable offences cases reported in 1978, 12,613 cases are still pending in early 1979. People arrested in these cases and not granted bail would therefore remain in detention pending investigation and trial for years. The number of cognizable and non-cognizable cases instituted during the fortnight ending on 30 November 1979 in the courts of magistrates in Chittagong District was 894, whereas that of those disposed of during the same period was 864. It will be seen that the number of criminal cases instituted during the period under report is more than the number disposed. This results in continuous accumulation of cases. The number of cases pending for long period is also large. For instance, details of 13,155 pending cases in the said courts at the end of November 1979 are: those pending over 1 year amount to 990; over 6 months, 1,018; over 3 months, 2,145; and less than 3 months, 9,002. The situation is similar in other districts of the country.

7. Efforts should be made to improve this situation. Special investigation agencies such as the Criminal Investigation Department have to be strengthened for expeditious investigation of cases. In the police stations, officers should be earmarked exclusively for investigation of cases and relieved of other routine duties. In the metropolitan cities of Dacca and Chittagong, Metropolitan Magistracies have been set up. These magistrates will be engaged exclusively in trial of cases and will not have any executive function. Similarly, in the districts and subdivisions efforts are to be made to designate certain magistrates exclusively for trial of cases by relieving them of all executive duties.

Special Laws

A. The Special Powers Act, 1974

1. In February 1974, with a view to controlling the deteriorating law and order situation, the Special Powers Act, 1974 (Act XIV 1974) was promulgated. This provided for trial of certain offences exclusively by Special Tribunals and more stringent punishments are laid down for such offences than are prescribed under the ordinary laws. The offences are made cognizable and grant of bail was prohibited in respect of many of the offences covered by the act.

2. The Special Powers Act also contains provisions for detention of any person to prevent him from doing any "prejudical act" as defined in the act. Any district magistrate, or additional district magistrate may order detention of a person for a period of 30 days. Detention beyond this period requires orders of the government. A person detained under the act is to be informed of the grounds of detention and given an opportunity to submit representation against the order. The act provides for constitution of an advisory committee for such detention. This is a constitutional

requirement for preventive detention. The advisory committee consists of three members, two judges of the supreme court and a senior government official. The government is required to submit each case of detention to the advisory committee within one hundred and twenty days of detention together with the grounds of detention and representation made by the affected person. The committee examines the papers, hears the person detained and gives its opinion on whether or not the detention is justified. The advisory committee is required to give its recommendations to the government within one hundred and seventy days of detention. If the committee considers the detention unjustified, it is obligatory for the government to release the person from detention. The committee is required to review each case of detention every six months even if it finds the detention justified.

3. In addition to the provisions of review of detention orders under the Special Powers Act, detention orders can also be challenged in courts of law. The superior courts in Bangladesh have entertained many such petitions and in some cases detention orders have been set aside.

4. In August 1977, the Special Powers (Amendment) Ordinance, 1977 was promulgated. Among other things this:

a) removed the prohibition on grant of bail;
b) reduced the number of offences triable exclusively by Special Tribunals; and
c) made provision for trial *in absentia.*

B. The Emergency Powers Rules, 1975

1. In December 1974 emergency was declared in the country through the Emergency Powers Ordinance 1974. In pursuance of this, the Emergency Powers Rules, 1975 were issued in January 1975. These rules gave wide powers to the government to tackle prejudicial acts as defined in the rules. The rules also gave special powers to police officers, and other officers empowered by the government, in respect of arrest and detention. Such officers were authorised to arrest 'without warrant any person whom he reasonably suspects of having acted, of acting, or of being about to act in any manner prejudicial to the security, the public safety or interest of Bangladesh or the maintenance of supplies and services essential to the life of the community' [rule 30(1)]. Under this rule any police officer or any other officer empowered by the government, could detain any person for a period of fifteen days. The government could detain any person for a period of two months. Thus any police officer could detain any person for a period of fifteen days without having to obtain any order for detention from any magistrate. No provision was made for communication of the grounds of detention to the person detained or for the review of detention by any committee. This was contrary to the fundamental rights guaranteed by the constitution, but fundamental rights were suspended with the declaration of emergency.

2. In August 1977 the Emergency Powers Rules, 1975 were amended. Provisions similar to those of the Special Powers Act, 1974 in respect of communication of grounds of detention, constitution of advisory committee and review of detention by it, were made. The power to arrest without warrant was limited to police officers of and above the rank of sub-inspector instead of "any police officer." The Emergency Powers Rules have been rescinded with the lifting of the emergency in November 1979 and people detained under it have been freed.

The Situation in Jails

1. As mentioned earlier, Bangladesh is a poor country and as a result there is inadequacy in almost every field. This general situation prevails in her jails also. Appendix C gives the registered capacity of jails and the actual number of inmates over the last ten years. It is evident that there is overcrowding in the jails. The high number of under-trial prisoners in comparison with that of convicts is also patently evident. This is indicative of the delay in investigation and trial of cases and of the fact that

people have to spend long periods in custody before sentences in their cases are passed. Admitting these constraints of overcrowding due to lack of physical facilities and prolonged detention due to delay in investigation and trial of cases, it may be said that the administration of jails is conducted fairly strictly in accordance with the provisions of the Prisons Act, 1872 and the Jail Code, 1860.

2. It will also appear from Appendix C that during the last four years there has been a significant decrease in the number of prisoners. The ratio between convicts and under-trial prisoners has also improved. This has been possible because of persistent efforts to expedite investigation and trial of cases and release persons detained for long periods. There appears to be an awareness of the problem of congestion in jails and the reasons for it and efforts are made to improve the situation. These consist of measures to improve investigation and trial, but more important and effective is the periodic release of prisoners from jails.

3. Apart from the temporary measures to remove the congestion in jails, basic reform is necessary and is being undertaken. Jails are administered according to the Prisons Act and the Jail Code. It is felt that the provisions of these need to be adjusted to suit the present times. With a view to bringing about basic reform in the system of jail administration, the government set up a Jail Reforms Commission in November 1978.

The Commission has submitted an interim report containing seventeen recommendations. Most of these have been accepted by the government and some have already been implemented. The final report of the Commission is expected to be submitted soon. Some of the recommendations are:

a) Discontinuation of such punishments for violation of jail discipline as are in conflict with human dignity and may cause physical suffering and mental debasement; the Commission identified such punishments as the use of fetters and confinement in tiny cells;
b) Improvement of accommodation, sanitation, food and dining facilities;
c) Provisions of facility for prayers;
d) Provision for outdoor games and sports;
e) Provision for regular visits by family and friends, improvement of facilities for visitors; giving liberal mailing rights to prisoners;
f) Provision for adequate supply of newspapers;
g) Provision for prisoners to work on payment for prescribed hours;
h) Provision for segregation of convicts and under-trial prisoners; youthful prisoners to be kept in correctional homes and not jails;
i) Activation of the system of Board of Visitors as provided in the Jail Code to ensure improvement in practices relating to treatment of prisoners by jail officials;
j) Provision for training in modern methods and practices of jail administration for jail officials; and
k) Liberal use of bail; with some exceptions, under-trial prisoners whose trial do not begin within 6 months of admission into prison should be released on bail.

Appendix A

Section 54(1) of The Code of Criminal Procedure

Any police officer may, without an order from a Magistrate and without a warrant arrest;

Firstly, any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists of his having been so concerned;

Secondly, any person having in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house breaking;

Thirdly, any person who has been proclaimed as an offender either under this Code or by order of the Government;

Fourthly, any person in whose possession

anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing;

Fifthly, any person who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts escape, from lawful custody;

Sixthly, any person reasonably suspected of being a deserter from the armed forces of Bangladesh;

Seventhly, any person who has been concerned in, against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been concerned in, any act committed at any place out of Bangladesh, which, if committed in Bangladesh, would have been punishable as an offence, and for which he is, under any law relating to extradition or under the Fugitive Offenders Act, 1881, or otherwise, liable to be apprehended or detained in custody in Bangladesh;

Eighthly, any released convict committing a breach of any rule made under section 565, sub-section (3);

Ninthly, any person for whose arrest a requisition has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition.

Appendix B

Statement of Cognizable Cases

Year	Total no. of cases including carry-over from previous years	Cases completed	Percentage of completed cases to total cases	No. of cases ending in conviction	Percentage of conviction to completed cases	Total no. of persons tried	Total no. of persons convicted	Percentage of persons convicted to persons tried
1972	228,793	61,753	27.0	8,872	14.4	246,571	14,818	5.9
1973	251,323	102,846	40.9	8,284	8.1	128,902	16,609	12.9
1974	272,075	102,670	37.7	7,914	7.7	132,114	15,004	11.4
1975	263,056	93,067	35.4	11,324	12.1	156 465	25,220	16.1
1976	278,632	66,870	24.0	9,057	13.5	125,307	11,653	9.2
1977	242,750	90,520	37.3	22,310	24.6	246,342	46,738	19.0

anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing;

Fifthly, any person who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts escape, from lawful custody;

Sixthly, any person reasonably suspected of being a deserter from the armed forces of Bangladesh;

Seventhly, any person who has been concerned in, against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been concerned in, any act committed at any place out of Bangladesh, which, if committed in Bangladesh, would have been punishable as an offence, and for which he is, under any law relating to extradition or under the Fugitive Offenders Act, 1881, or otherwise, liable to be apprehended or detained in custody in Bangladesh;

Eighthly, any released convict committing a breach of any rule made under section 565, sub-section (3);

Ninthly, any person for whose arrest a requisition has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition.

Appendix B

Statement of Cognizable Cases

Year	Total no. of cases including carry-over from previous years	Cases completed	Percentage of completed cases to total cases	No. of cases ending in conviction	Percentage of conviction to completed cases	Total no. of persons tried	Total no. of persons convicted	Percentage of persons convicted to persons tried
1972	228,793	61,753	27.0	8,872	14.4	246,571	14,818	5.9
1973	251,323	102,846	40.9	8,284	8.1	128,902	16,609	12.9
1974	272,075	102,670	37.7	7,914	7.7	132,114	15,004	11.4
1975	263,056	93,067	35.4	11,324	12.1	156 465	25,220	16.1
1976	278,632	66,870	24.0	9,057	13.5	125,307	11,653	9.2
1977	242,750	90,520	37.3	22,310	24.6	246,342	46,738	19.0

Appendix C

Jails

Date	Registered capacity	No. of convicts	No. of under-trials	Total
1 Jan. 1970	12,553	9,009	10,921	19,930
1 Jan. 1971	12,553	1,729	36,636	38,356
1 Jan. 1972	12,993	4,152	6,174	10,326
1 Jan. 1973	13,364	4,463	38,231	42,694
1 Jan. 1974	14,100	7,029	37,754	44,783
1 Jan. 1975	14,100	4,626	33,684	38,310
1 Jan. 1976	14,257	5,409	32,591	38,000
1 Jan. 1977	15,507	8,905	25,220	34,125
1 Jan. 1978	15,707	8,176	20,602	28,778
1 Jan. 1979	15,707	8,055	19,544	27,599
1 Jan. 1980	16,381	6,480	18,861	25,341

Anticipatory Bail – A New Experiment in India

*by Hukam Chand Goel**

Grant of bail to a person suspected or accused of an offence is a civilised society's response to the possibility that he may be innocent or that he may merit punishment less serious than imprisonment in jail. Grant of bail on arrest in bailable (minor) cases had been the right of an accused in India even during the British Rule. It was in serious non-bailable offences (usually punishable with maximum imprisonment of 3 years or more) that bail could be asked for only after arrest by police and the matter was within the discretion of the judiciary.

An independent judiciary is universally regarded as the greatest bulwark against arbitrary arrest or detention. The development of Indian bail law can be related to the enlargement of powers of the judiciary in this field.

The earlier Code of Criminal Procedure, 1898 authorised the police to investigate into cognizable offences reported to have been committed and to arrest persons suspected or accused therefor without reference to any judicial authority. It was only when such person was intended to be detained for more than 24 hours that the police was required to produce him before a magistrate who could authorise detention in police-custody for a period of 15 days in the maximum. When judicial interference in this matter was sought under inherent powers of the High Courts, the Privy Council negatived the existence of any such power in the judiciary:

> "In their Lordships' opinion, however, the more serious aspect of the case is to be found in the resultant interference by the Court with the duties of the police. Just as it is essential that every one accused of a crime should have free access to a Court of justice so that he may be duly acquitted if found not guilty of the offence with which he is charged, so it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. In India, as has been shown, there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities, and it would, as their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the Court. The functions of the judiciary and the police are complementary, not overlapping and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always, of course, subject to the right of the Court to intervene in an appropriate case when moved under Section 491, Criminal Procedure Code, to give directions in the nature of habeas corpus."[1]

Arrest and thereafter interrogation in police custody for 24 hours without interposition of magistracy was expressly authorised by the Code. Effective investigation into serious crimes was deemed to require these powers for the police.

After independence the right to personal liberty was accepted as a Constitutional right in 1950. It was not found practicable to restrict the power of arrest by police without obtaining a magisterial warrant only to cases where the suspect was found in *flagrante delicto* (committing the crime), or in urgent cases when arrest could not be safely delayed until a written warrant could be secured from a magistrate. India is a large country and means of communication and transport are not fully developed in all parts of India. The power of police to arrest persons without warrant in cognizable cases is considered necessary

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and unavoidable.

However, arrest is considered too serious a matter to be left to the police alone, with scope for misuse and abuse of the power to arrest. That independent judgment should be brought to bear on this point is the ground for requirement of a magisterial warrant for arrest. In India a new approach has been evolved. While police power to arrest without warrant in cognizable cases remained, the new Code of Criminal Procedure, 1973 simultaneously introduced judicial control of superior judiciary in the matter. The instrumentality of that control is what is called "anticipatory bail" provided for in section 438.

The Law Commission of India in its 41st report recommended a provision for anticipatory bail in India. The basis for the recommendation is formulated thus:

> "The necessity for granting anticipatory bail arises mainly because sometimes influential persons try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. In recent times, with the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false cases, where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail."

The provision for anticipatory bail in section 438 of the new Code of Criminal Procedure is in the following terms:

> 438(1) When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence he may apply to the High Court or the Court of Session for a direction under this section; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.
>
> (2) When the High Court or the Court of Session makes a direction under sub-section (1), it may include such conditions in such directions in the light of the facts of the particular case as it may think fit, including:
>
> i) a condition that the person shall make available for interrogation by a police officer as and when required;
>
> ii) a condition that the person shall not directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or to any police officer;
>
> iii) a condition that the person shall not leave India without the previous permission of the Court;
>
> iv) such other condition as may be imposed under sub-section (3) of section 437, as if the bail were granted under that section.
>
> (3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail; and if a magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person he shall issue a bailable warrant in conformity with the direction of the court under sub-section (1).

The usual factors to be considered in granting bail may be enumerated as under:

i) The nature of the accusation.
ii) The nature of the evidence in support of the accusation.
iii) The severity of punishment which the conviction will entail.
iv) Whether there is likelihood of course of justice being thwarted by the applicant either by escape or by tampering with witnesses against him.
v) The antecedents of the applicant, particularly whether his previous record suggests likelihood of his committing a serious offence while on bail.

These factors have relevance to grant of application for anticipatory bail as well.

But no exhaustive enumeration of the

factors that have to be considered and have bearing on the matter of grant of anticipatory bail is possible. The Law Commission of India conceded its inability to do so. In the 41st report it was observed as under:

> "We considered carefully the question of laying down in the statute certain conditions under which alone anticipatory bail could be granted. But we found that it may not be practicable to exhaustively enumerate those conditions and, moreover, the laying down of such conditions may be construed as prejudging (partially at any rate) the whole case. Hence we would leave it to the discretion of the court and prefer not to fetter such discretion in the statutory provision itself. Superior courts will undoubtedly exercise their discretion particularly and not make any observations in the order granting anticipatory bail which will have the tendency to prejudice a fair trial of the accused."

The courts do not insist on surrender of the accused applicant in court before grant of his application for anticipatory bail in view of the fact that the provision is intended to save the applicant from harassment/humiliation of an arrestee at the hands of the police.[2] While granting anticipatory bail the usual conditions imposed by the courts are the following:

1) A condition that the person shall make himself available for interrogation by a police officer as and when required.

2) A condition that the person shall not directly or indirectly make an inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or to any police officer.

3) A condition that the person shall not leave India without the previous permission of the court.

4) That the person shall furnish both a personal bond and a surety bond to the police in the event of his arrest in a monetary amount fixed by the court, which is usually Rs.1,000 (¥30,000) or more.

Additional conditions may be imposed by the court in any particular case when these are considered necessary in the interest of justice. For breach of any of the conditions imposed the order granting bail can be cancelled at any time by the court. It is of course the procedure that the final order granting anticipatory bail and the order cancelling such bail have to be made after notice to the public prosecutor and the accused respectively.

The provision of anticipatory bail is often availed of by the citizens. Two leading cases may be cited to show as to how this provision has been interpreted and how it works. That will also save this presentation from being merely descriptive or assertive.

Mr. Bal Chand Jain[3] was a business man of a Cantonment Area in the State of Madhya Pradesh and was carrying on retail business of selling miscellaneous goods including kerocene oil for a large number of years and was maintaining records. On 23rd July, 1975 a magistrate along with a food inspector and some police officers visited his shop and took some account books into possession to verify their correctness regarding sales of kerocene oil. On 25th July, certain earlier account books kept in a shop were taken away on a second visit in his absence. Bal Chand Jain apprehended that he might be arrested for contravention of the provisions of Defence of India Act and rules made thereunder in respect of sales of kerocene oil by him and sought anticipatory bail for the non-bailable offence under the Defence of India Regulations. It was pleaded by the State that rule 184 of the Defence and Internal Security of India Rules, 1971 had repealed section 438 Cr.P.C. in relation to offences under those rules and rule 184 was relied upon for such repeal. The said rule enacted as under:

> 184: Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (V of 1898), no person accused or convicted of a contravention of these Rules or orders made thereunder shall, if in custody, be released on bail or his own bond unless;
>
> (a) the prosecution has been given an opportunity to oppose his application for such release, and
>
> (b) where the prosecution opposes the application and the contravention is of any such provision of these Rules or orders made thereunder as the Central Government or the State Government may by notified order specify in this behalf, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such contravention.

The Supreme Court did not accept the eclipse of the right to anticipatory bail and ruled that Bal Chand Jain could be allowed bail under section 438 Cr.P.C. The only effect of rule 184 of the Defence of India Rules was that he had to satisfy the court in addition that there were not reasonable grounds for believing that he was guilty of contravention of the Defence of India Rules. The court took the opportunity of stressing the fact that the provision for anticipatory bail was an extraordinary remedy made available to higher courts for relieving apprehensions in respect of arrest and detention and the superior courts were expected to exercise the power of granting bail in their discretion after notice to the State. The attempt made was to reconcile extraordinary powers under the Defence of India Rules with the safeguards of liberty of individual available under section 438 of Cr.P.C. and there was refusal to extend the net of rule 184 of the Defence of India Rules, 1971 so wide as to prevent relief under anticipatory bail provision in the Criminal Procedure Code enacted in 1973.

The general elections in March, 1977 brought about a great change in India and a number of parties joining together as Janta Party obtained sweeping majority in Parliament. The State assemblies in a number of States were dissolved and the new elections in the States also brought Janta or Janta Party supported governments into power. In Punjab also such a government was formed. Mr. Gurbaksh Singh Sibia[4] was a Minister in the earlier Congress Government headed by Shri Zail Singh, Chief Minister. On 26th August, 1977 Superintendent of Police Vigilance Squad forwarded a special report to Police Station Civil Lines Ludhiana, on the basis of which a case under section 5(1)(d) and (e) read with section 5(2) of the Prevention of Corruption Act and sections 406, 409, 477A and 120B of the Indian Penal Code, was registered. In the said report, it was alleged *inter alia* that Shri Zail Singh, former Chief Minister of the Congress Government in Punjab along with some members of his Council of Ministers, some office bearers of the Punjab Pradesh Congress Committee, some appointees to high public offices and senior ranking government officials had conspired to collect huge funds for the holding of the Congress Party Session at Mattaur near Chandigarh and to personally amass wealth by abuse of authority and misuse of powers.

Mr. Gurbaksh Singh Sibia, then State Irrigation & Power Minister, was said to have purchased 600 chairs costing nearly Rs.37,000 and eight geysers worth Rs.12,000 to be installed at government expense for the purpose of Congress Session at Mattaur near Chandigarh in pursuance of the said conspiracy for the benefit of the delegates to the said All India Congress Committee Session, for which lacs of rupees were collected and the allegation was that these had been collected for the Congress Party by use of Ministers' powers and abuse of their official positions, through public servants. Mr. Gurbaksh Singh Sibia sought anticipatory bail in a blanket fashion not only in respect of the case registered but also in respect of other cases that may be registered against him alleging that the new government had *mala fide* motives against him for political reasons and that he apprehended arrest at the hands of the State Police.

The State Government opposed his prayer for grant of anticipatory bail and a full bench of the High Court of Punjab and Haryana refused to grant anticipatory bail in respect of offences of which no first information reports had yet been recorded. It was ruled that the power under section 438 Cr.P.C. was of an extraordinary character and had to be exercised sparingly in exceptional cases only.

The High Court further held that the

limitations on the power to grant bail under section 437 Cr.P.C. which lays down the powers of magistrates to grant bail to arrestees were implicitly imposed in relation to the power to grant anticipatory bail under section 438 Cr.P.C. and the power to grant bail was controlled by considerations similar to those which operated when bail after arrest was claimed under discretionary powers of the court.

The court took notice of the fact that serious economic offences involving corruption at the higher rungs of the executive and political power may require investigation and interrogation of an accused in custody. It was observed that reason the discretion to grant anticipatory bail under section 438 Cr.P.C. may not be exercised in their favour in such cases. The mere allegations of *mala fides* in a general manner were said to be not sufficient for holding that the accusations were false or groundless.

It would thus appear that the courts are anxious to safeguard individual liberty while at the same time there is no effort on their part to foreclose police investigative efforts into serious crimes alleged to have been committed even by influential and highly placed public servants, including Ministers. It is important to mention that the provision for anticipatory bail under section 438 Cr.P.C. contains safeguards against improper exercise of the powers. The first thing to be noted is that the power is vested only in the superior judiciary, namely the High Courts and the Courts of Sessions, ensuring exercise of the power by mature persons with sufficient judicial experience. The second thing is that the power is exercised only after notice to the Public Prosecutor and after opportunity given to him to oppose the same. This practice ensures dismissal of frivolous or baseless applications for grant of anticipatory bail. The conditions imposed while granting anticipatory bail further ensure that police investigation and availability of accused are not hampered and conduct of trial in court is not affected, and wherever necessary the power to cancel bail earlier granted is exercised.

However, the provision of anticipatory bail is a recently introduced provision. No definitive opinion can be given at this stage about its permanence on the Indian state. The Metropolitan Police in Delhi look upon this provision as impairing their authority. They feel that their ability to deal with habitual/dangerous offenders is adversely affected by courts' liberal attitude towards grant of bail. Their point of view is that grant of anticipatory bail is not exceptional or extraordinary but has become a matter of course in most cases. The fact however, remains that a fairly large number of persons have successfully invoked this provision, but for which they might have suffered the agony and humiliation of arrest. It may be worth while for co-participants from sister countries of Asia to examine this Indian experiment of novel provision of anticipatory bail as an attempt at reconciling police power to arrest without warrant with judicial control in this sphere of personal liberty.

NOTES

1. AIR 1945 PC 18.
2. Hazi A – v. – State. 1976 Raj. C.R.C. 220.
3. Bal Chand v. State of Madhya Pradesh, AIR 1977 SC 366.
4. Gurbaksh Singh v. State, AIR 1978 Punj. and Haryana 1 (F.B.).

Arrest and Pre-trial Detention in Singapore

*by Jeffrey Chan Wah Teck**

Introduction

In any discussion on the law and practice relating to arrest and pre-trial detention, it is inevitable that one is confronted with the conflict between the right of the individual not to be deprived of his liberty before a conviction by a court of law and the right of the State to preserve its security and the security of its citizens. It is the dilemma of the lawmaker to resolve this conflict in setting guidelines through legislation and it is the responsibility of the judiciary and the various agencies charged with the duty of law enforcement and crime prevention to ensure that a proper balance is struck in the individual cases.

Article 9 of the Universal Declaration of Human Rights proclaims the fundamental rule that no one shall be subject to arbitrary arrest, detention or exile, a rule further amplified in Article 9 of the International Covenant on Civil and Political Rights, 1966. Though fairly recent in their promulgation, these provisions set out basic human aspirations and, though often more noted in their breach rather than their observance, remains as an internationally recognized standard of conduct for States to emulate in their domestic policies.

The fundamental provisions in Singapore guaranteeing the rights of individuals with respect to arrest and pre-trial detention are to be found in Part II of the Malaysian Constitution, as applied to Singapore, and in particular Article 5. Article 5 guarantees the right to life and personal liberty, *habeas corpus,* the right to be told the grounds of arrest, the right to legal representation and to judicial scrutiny of the grounds of arrest. These fundamental rights are reflected in the procedural law governing the administration of criminal justice.

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The Scheme of the Criminal Procedure Code

The provisions governing the administration of criminal law in Singapore are found largely in the Criminal Procedure Code (CPC). Modelled on the Indian Criminal Procedure Code, it classifies all offences into either seizable or non-seizable and bailable or non-bailable and it is on these distinctions that all the rules governing arrest and pre-trial detentions are based.[2] A seizable offence is defined as an offence for which a police officer may ordinarily arrest without a warrant and a non-seizable offence is one where a police officer may not ordinarily arrest without a warrant. This corresponds roughly with the distinction between felonies and misdemeanours recognized in some other jurisdictions.

A bailable offence is an offence for which bail can be asked for as of right and a non-bailable offence is an offence which the court has a discretion to grant bail. In the case of non-bailable offences, a magistrate, district judge or police officer may grant bail in all cases except where there are reasonable grounds for believing that the accused is guilty of an offence punishable with death or imprisonment for life.

Whether an offence is seizable, non-seizable, bailable or non-bailable would depend on its classification under Schedule A of the Criminal Procedure Code. Apart from the Criminal Procedure Code, the particular statute setting out the offences may also specify whether it is seizable, non-seizable, bailable or non-bailable. If no such provisions are present, then the general provisions of the Criminal Procedure Code would apply.

Instances When Arrest Can Be Made

The Criminal Procedure Code contemplates essentially two instances of arrest: arrest under the authority of a warrant of arrest issued by a magistrate, district

judge or coroner and arrest without a warrant of arrest. In practice it is the latter that is the more common instance.

A magistrate may issue a warrant of arrest in a number of instances. For offences where the Schedule 'A' of the Criminal Procedure Code states that a warrant shall be ordinarily issued at the first instance, a magistrate may, where he has knowledge that the offence has been committed by any person, issue a warrant for the arrest of that person. The usual mode for the offence to be brought to the attention of a magistrate is by a complaint laid under the provisions of the Criminal Procedure Code. A "complaint" is defined by Section 2 of the Criminal Procedure Code as "the allegation made orally or in writing to a magistrate with a view to his taking action under this Code that some person whether known or unknown has committed or is guilty of an offence." Such complaints are normally laid by the officer investigating the case but there is no bar against private citizens invoking such a procedure. Warrants of arrest are also issued in a number of other instances, e.g. when a person under compulsion to attend court fails to do so or when it has been reported that a debtor is attempting to flee the jurisdiction in order to defraud his creditors.

In such instances, arrest is a mode of compelling appearance before a court, and would be inappropriate if there are other modes of compelling appearances. Seldom is the person arrested detained in custody, for on being arrested he is brought straight to a police station or to a court and immediately released on bail.

The position is quite different in a case where a person is arrested without a warrant, for here arrest is not merely a means of compelling the person's attendance before a court of law but also to prevent him from committing other offences and to enable investigations to be made into the alleged offences. The main provision for such arrests is Section 31(1)(a) of the Criminal Procedure Code which permits a police officer to arrest any person concerned or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of him having committed a seizable offence. A magistrate or police officer may also arrest any person who has committed any offence in his presence, whether the offence is seizable or not and a private person may arrest any person who, in his view, commits a seizable and a non-bailable offence. Section 31 also enumerates other instances where a police officer may arrest without a warrant and he can also arrest a person committing or is accused of committing a non-seizable offence if that person refuses to give his name and residence, gives a name or residence which the police officer believes to be false or gives a residence not within Singapore. Besides this, the Criminal Procedure Code preserves the police officer's right of arrest without a warrant under any other law. Besides police officers, other law enforcement officers are empowered to effect arrest under the statutes they administer, *e.g.* customs officers for offences under the Customs Act; immigration officers for offences under the Immigration Act and Corrupt Practice Investigation Bureau special investigators for offence under the Prevention of Corruption Act.

The point to be noted here is that all law enforcement officers are empowered to effect arrest on reasonable suspicion that the person arrested had committed a seizable offence. What is a reasonable suspicion must necessarily depend on the facts and circumstances of each case. Inevitably the danger of abuse of such powers would be present and such dangers can be minimized by having honest and efficient law-enforcement officers.

Nature and Effect of Arrest

An arrest has to be executed formally. In making an arrest, the arresting officer must actually touch or confine the body of the person to be arrested unless there is a submission to his custody by word or action. A mere oral declaration is insufficient. In affecting arrest, the arresting officer is permitted to use necessary force and to break into and search premises where he reasonably suspects the accused person to be in. Unless the arrest is properly executed, it is ineffective and a person who resists such arrest or aids another to resist such an arrest cannot be charged with the offences of resisting or aiding another to resist an arrest which are offences under the Penal Code.

Although the Criminal Procedure Code does not state that the person arrested should be told of the grounds of his arrest, it has long been held that any person who is arrested has the right to ask the officer arresting him what power he has to do so. Article 5 of the Malaysian Constitution, as applied to Singapore, guarantees the right of the arrested person to be told the grounds of his arrest but it would appear that unless he asks, the arresting officer is under no obligation to do so.

When an arrest has been effected, the arrested person is in the custody of the arresting officer and the arresting officer is empowered by the Criminal Procedure Code to search his person and seize any weapons he has in him. By Section 27(1) of the Criminal Procedure Code, the arresting officer is not permitted to use more restraint that is necessary to prevent his escape and by Section 27(2), a woman arrested can only be searched by another woman.

Unlawful Arrest

An unlawful arrest is a tort and renders the government and, in the case of an arrest by a private person the person effecting the arrest, answerable to a claim for damages in tort for false imprisonment.[3] The liability of the government is made possible by the Government Proceedings Act which enables a private person to bring an action against the government. This constitutes an effective deterrent against any inclination to abuse the powers of arrest.

Another safeguard against the abuse of the power of arrest is provided by Section 388 of the Criminal Procedure Code. By this Section, if an accused person is acquitted and the court is of the opinion that the prosecution was frivolous or vexatious, it can order the complainant to compensate the accused for the costs of his defence. A District Court or the High Court can order the complainant to pay the accused his full costs, the sum to be determined by the registrar, while a magistrate court can award up to $50 as compensation. The court is empowered to enforce payment of such compensation by various means including imprisoning the complainant. Further, the payment of such compensation is no bar to an action for false imprisonment.

Whilst unlawful arrest gives rise to an action in tort for false imprisonment, it has no effect on the criminal proceedings. The illegality of an arrest does not affect the jurisdiction of the court to try the accused and he may be tried and convicted notwithstanding the fact that his arrest was unlawful.[4]

Procedure after an Arrest Is Effected

After being arrested, the person arrested is in the lawful custody of the person effecting the arrest. If he escapes or is rescued, he can be immediately pursued and re-arrested at any place within Singapore. The ultimate purpose of all arrests is to produce the accused person before a court for him to answer the offence alleged against him and while the ideal situation is for him to be produced forthwith before a court, in practice this is not always possible. Investigations may not have been completed at the time of his arrest or witness may not be available forthwith to testify against him. Further, to produce him forthwith for trial would mean that he would have no opportunity of preparing his defence or obtaining legal advice. It is inevitable that in all instances of arrest, some time would lapse before the person arrested can be tried.

When a person is arrested, if the arrest is by a private person, he must forthwith be handed over to a police officer and if the arrest is by any law enforcement

officer, the practice is for him to be brought to a police station and for an arrest report to be made out. Section 34 of the Criminal Procedure Code states a police officer arresting without a warrant must, in cases where the person is not released on bail or otherwise, take or send the person arrested before a magistrate's court. By Section 35, he cannot detain such a person for a period longer than is necessary in the circumstances of the case and, in any event, the period of custody must not exceed 24 hours.

Appendix A shows the number of arrests made from 1974 to 1978 as compared with the number of seizable cases reported and the number of persons charged in court. It is noteworthy that only 69.7% of the persons arrested were charged in court. It can be safely presumed that the remaining 10,247 persons were not charged in court because of the intervention of the public prosecutor's office for it is the practice of the police not to withdraw any proceeding commenced against any persons without a direction from a deputy public prosecutor. Section 333 Criminal Procedure Code provides that the Attorney-General shall be public prosecutor who shall have the control and direction of criminal prosecution and proceedings under the Code. This means that the public prosecutor is empowered to intervene in any criminal proceeding and this acts as a check against abuse of the powers conferred on law enforcement officers.

Even if a person is produced forthwith before a court, unless he chooses to plead guilty, he is never tried forthwith.

The procedure adopted by the courts is that all arrest cases for the day are first mentioned in a "mention" court (Court 26). Here, the accused persons are produced before the court and the charges are read to them. The accused may be represented by counsel but as a high proportion of such "mention" cases are of persons arrested within the past 24 hours, it is not often that counsel appears to represent the accused when he is first brought before Court 26. At Court 26, for cases triable in the Subordinate Courts, if the prosecution is ready with all its papers, the accused is asked to plead to the charge. If he pleads guilty, he is dealt with forthwith but if he claims trial, he will be asked whether he wishes to engage counsel and if he does, the case is adjourned to another date for him to brief counsel. If he does not and is ready to proceed the trial, the magistrate would then proceed to fix a date for trial in one of the hearing courts. When an accused person is represented by counsel, a date for trial will be given only when both counsel and the prosecutor are ready to take a date for the trial. In cases triable only in the High Court, a magistrate is not empowered to record a plea but if the Accused intimates that he intends to plead guilty to the charge in the High Court, the magistrate in Court 26 can either forthwith record this and proceed to commit the accused for trial in the High Court or he can transfer the case to another magistrate to do so. If the accused does not indicate that he intends to plead guilty to the charge, then a date is fixed for a preliminary inquiry in a hearing court.

All these mean that some time would lapse before the person arrested is tried for the allegations made against him. The lapse of time between the date when the case is fixed for hearing in Court 26 and the actual date of hearing is normally under three months for cases triable in a magistrate court and four months for cases triable in a district court. However, the lapse of time between the time a person is arrested and the time of his trial could be even longer if the case is adjourned for further mention in Court 26 before a hearing date is finally fixed. Then again the experience of hearing courts is that trials often do not begin on the first date fixed for some reason or other, *e.g.* witnesses may not be available, counsel may be engaged elsewhere or further investigations may be necessary. It is during this lapse of time that the possibility of pre-trial detention arises.

Bail

The distinction drawn by the Criminal

Procedure Code between bailable and non-bailable offences is of crucial importance in determining when a person arrested and charged in court for an offence can be released or remanded pending his trial. A person is admitted to bail when he is released from the custody of law enforcement officers and entrusted to the custody of sureties who are bound to produce him when required to do so or he may be released on his own bond to appear in court as and when required. The purpose of bail is merely to secure the appearance of the accused person at a certain day and place to answer a charge against him.[5]

When a person is arrested for a bailable offence, he is entitled to be released on bail as of right. No court or police officer has any discretion to keep him in custody beyond the period permitted by Section 34 and 35 of the Criminal Procedure Code. At common law,[6] to delay or refuse bail to any person accused of a bailable offence is an offence against the liberty of the subject. Further, a court or police officer has no discretion, when releasing the accused in the case of a bailable offence, to impose any conditions on the bail or bond.

A non-bailable offence is one which the accused is not entitled to bail as of right. It does not, however, mean that he cannot be released on bail. All it means is that the granting or denial of bail is a matter to be exercised by the court or, where the accused has not been brought before a court, by a police officer. Here again, the general rule is that bail should be granted but a magistrate, district judge or police officer has no discretion to grant bail where there are reasonable grounds for believing that the accused had committed an offence punishable with death or imprisonment for life. The rationale here is that the severity of the possible sentence is sufficient to cause the accused person to abscond but even here there is a discretion to grant bail if the accused person is either under 16 years of age, a woman, sick or infirm.

These provisions are novel for, in the case of bailable offences, bail is entitled as of right and, in the case of non-bailable offences, the release of the accused person on bail is the rule rather than the exception. With such provisions, there would appear to be no reason why, except in cases where the possible sentence is so severe that it is worthwhile for the accused person to take flight, an accused person should be detained in custody till the date of trial if the purpose of arrest is to ensure that he appears in court for trial. In instances where the accused misbehaves himself whilst released on bail, *e.g.* if he attempts to intimidate the witnesses against him, bail can be cancelled and the accused committed to custody. Here, the accused is remanded not to compel his appearance but to ensure that he does no further harm. Such instances are rare.

Pre-trial Detention

Although the general rule is that persons arrested should be released on bail pending trial, for the years 1969 to 1979, a total of 15,683 or 44.49% of the prison population were remanded for varying periods before their trial as shown in Appendix B.

The thought of a person being detained before his trial is abhorrent, for it runs counter to the principle that the accused is presumed to be innocent until such time as he is proven guilty and thus should not be subjected to both the loss of his liberty or the rigours of a prison regime. However, there are several reasons, which in the public interest, necessitate that an accused person be remanded before his trial and it is being increasingly accepted that in certain cases it is necessary to cause an accused person to be remanded before trial. The rule to be observed here is that such detention should be confined to as few persons and to as short a period as possible.

One obvious and fairly common reason why an accused person is remanded before his trial is observed when there is a doubt as to whether he is of unsound mind such that he is incapable of making his defence. The Criminal Procedure Code lays a duty on the magistrate or district judge holding a trial or inquiry who has reason to suspect that an accused person is of unsound mind and consequently unable to make his

defence to first investigate the fact of such unsoundness If he is not satisfied that the accused is capable of making his defence, he is under a duty to postpone the inquiry or trial and remand the accused person in a mental hospital for observation for a period not exceeding one month. The medical superintendent must then certify his opinion as to the state of mind of that person and if he is unable to form any definite conclusions during the period, he can ask for a further period of remand. The court can then extend the period of remand for another two months. A court may also invoke such a procedure on the application of the public prosecutor.

If the accused is found to be of sound mind and capable of making his defence, the case may proceed but if he is found to be unable to do so by reason of unsoundness of mind, then the trial or inquiry must be adjourned. In such a case, where the offence is bailable, the accused can be released on bail until such time as he is able to stand trial and, where the offence is not bailable or where sufficient security is not given, the court must report the case to the Minister who has the discretion to order the accused to be confined in a mental hospital or some other institution. Such a period of remand may extend to such time as and when he is capable of making his defence.

Remanding an accused person for the purpose of ascertaining whether he is capable of making his defence is an instance where it is necessary to remand the accused in his own interest. This is not the case in the other instances where the accused is remanded before his trial. Appendix C gives a breakdown on the figures of persons remanded pending trial from 1969 to 1979. Of these, an average of 5,050 were remanded because bail was refused, 5,431 were remanded because they were unable to raise bail and 9,227 were released within one week.

The statistics in Appendix C also suggest the following reasons why persons not suspected of being of unsound mind were remanded: (a) application for bail was refused; (b) the amount of bail offered was excessive; or (c) sureties were not available immediately.

Each of these reasons merits separate consideration.

a. Refusal of Bail

In non-bailable cases, the court or police officer has a discretion whether to release the accused person on bail except where there are reasonable grounds for believing that he had committed an offence punishable with death or life imprisonment. In the latter case, unless the accused person is under 16 years, a woman, sick or infirm, he is refused bail. Although it has been held that the mere fact that a charge has been preferred against him is not sufficient to give rise to reasonable grounds for believing that he has committed such an offence, as a matter of prudence, magistrates and district judges are inclined to refuse bail or set bail at a very high amount in such cases. All such cases are triable in the High Court and after an accused person is committed for trial at the High Court bail is refused as magistrate has no longer any discretion to grant bail. The High Court, however, has power to grant bail in any event and it is open to the accused person to apply by way of a criminal motion to the High Court for bail. As a rule, bail is refused when the offence alleged against the accused is punishable with death but there have been instances where the High Court has granted bail when the offence alleged is punishable with life imprisonment.

Apart from these instances, a magistrate or district judge does not refuse bail unless the prosecution opposes bail and, such instances, when they occur, would arise in Court 26 when the accused is first produced. The reason commonly advanced by the prosecution for objecting the bail is that the accused is believed to be involved in similar offences and it is necessary to have him remanded to permit further investigation to be carried out. Other reasons advanced for opposing bail include the fact that the accused's accomplices are still at large and there is a possibility of collusion if the accused is released on bail and the

fear that the accused may intimidate the complainant if released on bail. Often applications for the accused to be remanded are accompanied by an application that the place of remand be specified as the lock-up of the Central Police Station and that the police be granted permission to bring out the accused for further investigation. Although the thought of the accused being remanded before trial is distasteful, it is recognised that such a period of remand is necessary to permit investigations to be carried out or to ensure a proper trial and unless the accused can adduce exceptional reasons, bail is often refused and the prosecution's application for remand is granted. A magistrate or district judge cannot remand a person for a period exceeding 8 days at a time, this means that the accused must be brought before a court again. Further applications for remand may be made by the prosecution but with each further mention of the case, if the prosecution continues to oppose bail, it risks its application becoming increasingly suspect in the eyes of the court. Instances where an accused person has been refused bail up to the date of trial for an offence which the court has a discretion to grant bail must be exceedingly rare, if any.

b. Excessive Bail

As bail is to ensure the attendance of an accused person at his trial, the amount of bail should be no more than necessary for this purpose. The difficulty faced by all magistrates and district judges in determining the amount of bail to be offered is that at the time when the accused is to be offered bail, there is no independent information before the court to indicate what amount of bail would be sufficient to ensure the appearance of that particular accused person. Often the prosecution is invited to suggest the amount of bail to be offered and the accused is asked whether he can furnish it and if not, why not. Over the years it is possible to discern a tariff emerging of the amount of bail to be offered depending on the offence charged and the station of the accused. The amount initially offered is at best a hazardous estimate by the court as to the amount required to ensure both that the accused is not detained pending his trial and his appearance on the day of trial. The difficulties faced by the court in reaching such an estimate because of the lack of information before it at the time when the offer of bail has to be made are often highlighted when the accused has to be remanded because of his inability to raise bail or, more dramatically, when he fails to appear on the date of trial.

c. Inability to Find Sureties

An accused person, when released on bail, is released into the custody of his sureties. This presupposes that the accused person is able to find persons willing to stand surety for him. This is not always the case. It is not always that a person who is produced before a court has sufficient time to gather his friends or relatives to stand surety for him. In such cases, he will have to be remanded until he is able to get in touch with his potential sureties.

In this respect, Singapore has a unique problem. With full employment, a strong economy and a shortage of labour, there is a large proportion of foreigners in our labour force. These are mostly Malaysians but include Indonesians, Thais, Sri Lankans, Indians and Filipinos. Further, as a tourist destination and by virtue of its proximity and easy access to Peninsular Malaysia, large numbers of visitors are attracted to the Republic. With such a large number of foreigners within our boundaries, it is inevitable that some would run foul of our criminal laws and when such persons are arrested, charged in court and offered bail, the condition is often imposed, for obvious reasons, that their sureties be Singaporeans or permanent residents of Singapore. It is not often that this condition can be met by such persons and inevitably they end up being remanded before their trial.

Treatment of Persons Detained before Trial

Prisoners under remand are persons

whom the law still presumes to be innocent and to treat them in the same manner as convicted persons would make a mockery of the rule of law. In Singapore, persons are remanded either at the Queenstown Remand Prison, the Central Police Station lock-up, the Singapore Boys' Home Remand Wing for juveniles and the Woodbridge Hospital for persons suspected of being unsound mind. Persons remanded at the Remand Prison enjoy privileges not accorded to convicted prisoners, *e.g.* he wears his own clothes, gets food from home if he desires, is allowed to meet visitors more often and for longer periods, gets his mail and is allowed unlimited reading materials. Unlike convicted prisoners, he is not compelled to work and if he chooses to do so, he is paid for it.

Also, every opportunity is given to him to consult his counsel but such consultations can only be conducted at the place of detention. This means that the counsel must first be disposed to travel there and this necessarily restricts the amount of time the accused can spend with his counsel.

Keeping a person in custody is a costly affair. Because of the privileges he enjoys and because of the necessity to escort him to court each time, additional staff are required and more expenses incurred. It costs more to keep a person in custody pending trial rather than to keep a convicted person. Whilst remanded, the accused person ceases to contribute to the national economy, further adding to the loss that the accused as well as his family suffers the deprivation of confinement. It is, thus, only logical that wherever possible, pre-trial detention should be avoided.

Safeguard against Pre-trial Detention

A person can be detained before trial only on the authority of a warrant of remand signed by a magistrate or a district judge and the Criminal Procedure Code only empowers a magistrate or district judge to order a person to be remanded for a period not exceeding eight days. This means that when a person is remanded for one or other of the reasons stated earlier, at the end of each week in custody he must be brought before a magistrate or district judge for a change of remand. This compels the magistrate or district judge to review each week the reasons why the person is still under detention.

In the instances where a person is remanded to ascertain his mental state or because the court has reason to believe that he had committed an offence punishable with death or imprisonment for life, such proceedings are merely a formality and are normally confined to ascertaining from the accused whether he has any complaints about the place of his detention or any reasonable requests to make. But where the accused is remanded for some other reasons, these proceedings are highly useful in ensuring that the accused is not detained longer than is necessary. The court before which the accused is produced can reconsider all aspects of the proceedings against the accused so far and can take measures to ensure his release.

In cases where the accused was refused bail at the first instance because of objection from the prosecution, the prosecution must make a fresh application for remand each time the accused is brought up for change of remand. The court must then consider anew this application and if such applications are continuously repeated, the court would be progressively less sympathetic to the prosecution.

It is when the accused was remanded for inability to raise bail or find suitable sureties that these proceedings are of greatest effect. Each time the accused is brought up for change of remand, the court can reconsider the terms of the bail offer and can vary both the amount of bail and the requirement as to sureties. The fact that the accused was unable to raise the amount specified is *prima facie* evidence that the amount is excessive. The court can reduce this amount or vary it, *e.g.* it can vary a bail offer of $2,000 with one surety to $1,000 with two sureties.

Where the accused is unable to furnish sureties, the court can vary the bail offer to a mere personal bond on the part of the

accused although for serious offences, particularly those punishable with mandatory imprisonment, this would be inappropriate. If an accused person is unable to get in touch with his potential bailors, the court can assist him to do so. By the time an accused person is brought up for a change of remand, he would have been detained for at least seven days and he would have been accorded facilities to get contact with his potential bailors. The fact that he still could not find a bailor could only mean that his potential bailors cannot be contacted by either post or telephone. In such instances, the court can direct the police to proceed forthwith to the home of the potential bailor to inform him of the accused's plight. Because of Singapore's compact size, this can be done within a day.

Finally, if there are no means whatsoever to enable the accused to take up the offer of bail, the court can minimize the accused's period of detention by ordering the date of trial to be brought forward. This is not always possible, for witnesses may not have set aside any other days apart from the dates originally fixed for the trial to attend court but whenever possible, this is done.

Habeas Corpus

A person under detention for whatever reason and who desires to challenge the legality of his detention may apply for a writ of *habeas corpus* from the High Court.[7] This application is made when he desires both release and a probe into the legality of his detention. In this respect, his position is different from that of a bail applicant who accepts the legality of his detention but seeks release from it.

The writ of *habeas corpus* is a common law writ but it has been held that it exists in Singapore independently of statute and it is now a right entrenched in Singapore Law by Article 5(2) of the Malaysian Constitution.

Habeas corpus is also available as a remedy where a person alleges that he is being illegally detained whether in public or private custody or where he claims to be brought before the court to be dealt with according to law. It thus affords redress for a person under pre-trial detention.

A person already on bail cannot obtain a writ of *habeas corpus,*[8] but if he is taken into custody whilst on bail, this remedy can be obtained. On an application for *habeas corpus,* the court may dismiss the application, order the accused to be released unconditionally or may order that he be released on bail.

Alternatives to Arrest and Pre-trial Detention

An arrest is a cumbersome procedure for compelling the attendance of a person before a court and it is fraught with the dangers of abuse. The act of arrest is relatively simple but the administrative procedures and facilities needed to deal with an arrested person up to the time he is produced before a court necessitates both expenses and effort. Even after being produced in court, the persons arrested may suffer the indignity of being detained before he is found guilty without anyone intending that he should be so detained. By any reasoning, where the attendance of a person in court is desired, and nothing more, arrest should be used as a last resort if there are other means of achieving the same purpose.

In Singapore there are two other means of achieving this end without effecting an arrest. The first is the use of the summons under the Criminal Procedure Code and the second is the use of the appearance ticket. A summons is simply an order issued by a magistrate requiring the person named therein to appear before a court at a certain date and time to answer a charge which is stated in full in the summons. A summons can be issued when a complaint under the Criminal Procedure Code is laid before a magistrate and, as a rule, is served personally to the person summoned.

If the person fails to attend court on the date and time stated, a warrant of arrest is then issued to compel him to attend

court. The accused person is thus permitted an opportunity to attend court without the indignity of being arrested.

More recently the appearance ticket has been used to compel attendance before a court. This is a notice in a prescribed form requiring the person to appear in court on a date and time specified to answer a charge. Brief particulars of the charge are given in the ticket. Failure to attend court itself is a separate offence for which the person served with such a ticket is liable to a fine or imprisonment or both and a warrant of arrest can be issued to bring the alleged offender to court. In this respect, it is more effective than the summons. The appearance ticket is issued by the enforcement officer and can be served to the alleged offender on the spot or subsequently either by personal service or by registered post. The trend at present is to use the appearance ticket to compel attendance for an increasing number of offences.

It is undeniable that for certain offences, especially offences involving violence or where the likely sentence is such that persons charged are not likely to attend court on their own violation even when afforded an opportunity to do so, the summons and the appearance ticket would be ineffective. However, for other offences, the increasing use of such modes of compelling appearance before a court is encouraging.

Conclusion

The power to arrest a person and to detain him in custody pending his trial is extremely grave and should be used only when absolutely necessary. It cannot be doubted that such powers are essential for the apprehension of criminals and the preservation of the security of the public but it also cannot be doubted that such powers can be abused and, even when properly used, may result in unintended and unnecessary deprivations to the person subjected. These can be minimized by proper administrative procedures and careful judicial supervision at every stage of the pre-trial proceeding. Ultimately, however, the best safeguard against the improper use of such powers lies in ensuring that only honest, conscientious and efficient persons are empowered to exercise them.

NOTES

1. Malaysia Federal Constitution. Singapore was a self-governing British colony up to 14 September 1963 when it merged with Malaya, Sabah and Sarawak to form Malaysia. On 9 August 1965, Singapore separated from Malaysia and became an independent Republic. By virtue of the Republic of Singapore Independence Act, certain provisions of the Constitution of Malaysia were continued in force. The fundamental liberties provision of the Malaysian Constitution are among the provisions.
2. For a complete commentary on the Criminal Procedure Code, see Mallal, B. "Mallal's Criminal Procedure Code" 4th ed. (Singapore, Malayan Law Journal 1957).
3. See Christie v. Leachinsky (1947) A.C. 573; Vairuvan Chettiar v. A.G. (1933) M.L.J. 13.
4. Saw Kim Hai v. R (1956) M.L.J. 21; Saminathan v. P.P. (1973) M.L.J. 39.
5. For a comprehensive discussion on every aspect of bail in Singapore, see Chandra Mohan S. "Bail in Singapore" (Singapore, Malayan Law Journal 1977).
6. The term is used to mean the law of England. The laws of Singapore are still largely based on English law and legal concepts. Although the Criminal Procedure Code is a codifying statute, English law on criminal procedure may still be applicable by virtue of Section 5 which reads: "As regards matters of criminal procedure for which no special provision has been made by this Code or by any other law for the time being in force in Singapore the law relating to criminal procedure shall be applied so far as the same does not conflict or is not inconsistent with this Code and can be made auxiliary thereto."
7. See Tan Chor-Yong, J.: "Habeas Corpus in Singapore" (1960), 1 Malayan Law Review 323.
8. Re Onkar Sharian (1970) M.L.J. 28.
9. See Section 84(1) Road Traffic Act RS (A) 1 of 1973, and various provisions of the Environmental Public Health Act.

Appendix A

Year	No. of seizable cases reported	No. of persons arrested for seizable offences	No. of persons charged in court for seizable offences	%
1974	19,295	5,535	4,138	74.76
1975	18,553	5,815	4,271	73.45
1976	17,937	7,245	4,955	68.39
1977	20,040	7,826	5,109	65.28
1978	19,370	7,431	5,132	69.06
Total	95,195	33,852	23,605	69.73

Appendix B

Year	Total no. of persons admitted to prison (excluding debtors)	Average no. of persons in the prison's muster (excluding debtors)	Total no. of persons remanded in custody pending trial	%
1969	4,097	2,199	833	37.88
1970	4,076	2,216	857	38.67
1971	4,181	2,321	1,058	45.58
1972	5,618	2,399	1,278	53.27
1973	7,824	2,758	1,608	58.30
1974	7,546	3,136	1,475	47.03
1975	7,821	3,589	1,375	38.31
1976	8,141	4,165	1,959	47.03
1977	7,301	4,079	1,970	48.29
1978	6,909	4,216	1,903	45.13
1979	5,314	4,169	1,367	42.79
Total	68,828	35,247	15,683	44.49

Appendix C

Year	No. of persons remanded in custody pending trial (excluding debtors)	No. of persons refused bail (%)	No. of persons unable to raise bail (%)	No. of persons released after being remanded for 1 week (%)
1969	833	230 (27.6)	414 (49.6)	189 (22.8)
1970	857	258 (30.1)	386 (45.0)	213 (24.9)
1971	1,058	399 (37.7)	186 (17.6)	473 (44.7)
1972	1,278	536 (41.9)	222 (17.4)	520 (40.7)
1973	1,608	478 (29.7)	335 (20.8)	795 (49.4)
1974	1,475	356 (24.1)	488 (33.0)	844 (57.2)
1975	1,375	385 (28.0)	449 (32.6)	834 (60.7)
1976	1,959	774 (39.5)	693 (35.4)	1,467 (74.9)
1977	1,970	686 (34.8)	807 (50.0)	1,493 (75.8)
1978	1,903	549 (28.8)	827 (43.6)	1,376 (72.3)
1979	1,367	399 (29.2)	624 (45.6)	1,023 (74.8)
Total	15,683	5,050 (32.2)	5,431 (34.6)	9,277 (58.8)

SECTION 3: REPORT OF THE SEMINAR

Arrest and Pre-trial Detention

Summary Report of the Rapporteur

Session I: Safeguards against Arbitrary Arrest and Detention

Chairman: *Mr. Mohammad Khan Raisani*
Advisor: *Mr. Tōichi Fujiwara*
Rapporteur: *Mr. Julio Francis Ribeiro*

Introduction

Following the presentation of individual papers on Arrests and Pre-trial Detention, general discussions were held on four main topics connected with the subject. The first topic taken up for consideration was "Safeguards against Arbitrary Arrest and Detention" as it was considered basic to the main theme of the Seminar.

Grounds for Arrest and Detention

The Government of every country, whether democratic or otherwise, is armed with powers of arresting and detaining a citizen with a view to bringing justice for a wrong alleged to have been done by him against society. No administration can survive unless it is able to protect its law-abiding majority against the wrongs done by fellow-citizens who disrespect the laws as exist in that country.

At the same time, every civilized society guarantees to each of its citizens certain basic human rights even if that individual has deviated from the correct path. The real problem then is to ensure the bifocal interests of justice to the individual and of justice to the society affected. To strike a correct balance between these two interests should be the constant concern of the criminal justice system in every country.

While constitutions define basic human rights of individual citizens in many countries, the substantive criminal laws elaborate on such rights in more practical terms, prescribe penalties for deviation and describe procedures to be followed in the pursuit of justice. In the common law countries, as in the countries that follow the European continental form of criminal administration, the necessity for arrest and detention is recognized and provided for under proper safeguards. Remedies for wrongs suffered by improper or arbitrary arrest are also prescribed.

Each participant explained the laws in his country in very clear terms. On close examination of their papers it was seen that the basic requirements to prompt an arrest was "reasonable grounds for suspicion" that the individual to be arrested was in fact responsible for the crime. The question that naturally followed was: "What is the minimum permissible objective standard of suspicion or belief for arrest and detention?"

There was general agreement among the participants that this question was not easy to answer but the courts of each country must have ruled on the norms to be adopted by the investigation agency, according to the cultural and historical traditions of that country and its economic or other imperatives. One of the participants from the police emphasised that illegal or arbitrary arrests would react unfavourably on the officers making such arrests and this knowledge alone would act as an internal sanction against misuse of powers. Another participant said that in his country a complete inquiry usually precedes an arrest, thus obviating chances of injustice.

Despite these opinion negating the possibility of any extensive injustice through arbitrary arrest and detention, the participants felt that the scope for such arrests should be reduced to the minimum by effective and closer supervision of senior officers of the investigation agency, who should be as jealous in guarding the interests of the innocent as they usually are in

bringing the guilty to book. The participants agreed with Mr. Jinde of Japan that standards should be laid down with the following criteria as guides:

1. The reason for the arrest
2. The necessity for the arrest
3. The preponderance of evidence
4. The chances of the suspect absconding
5. The chances of the accused tampering with the evidence
6. The safety of the witness and sometimes of the accused himself.

During the course of discussion it was revealed that some countries, like India, Pakistan and Bangladesh, have provisions in their criminal procedure laws for arrests meant to prevent the commission of cognizable (the more serious forms of crime punishable generally with imprisonment for three years or more) offences even prior to the actual commission thereof. Some participants said that such arrests were unknown to their legal systems and expressed doubts about the ethics of such arrests. Mr. Kaku of Japan mentioned that the police in Japan did not arrest suspicious characters, but only stopped and warned them. Mr. Ribeiro of India explained the historical genesis of these laws in the Indian subcontinent and also the present necessity of such provisions in the Indian context. In the discussions that followed, it was learned that some countries had in fact criminalized preparation to commit offence which was not the case in India, Pakistan and Bangladesh. In these three countries, therefore, preventive arrests were substitute remedies to deal with those who had made preparations to commit offences or disclosed in some overt manner their intentions to do so.

As the provisions in the Indian, Pakistani and Bangladeshi laws were now understood by all the participants in the light of the discussions, it was agreed that closer supervision by senior officers would be the only solution to the problem of non-essential or arbitrary arrests made for the ostensible purpose of preventing cognizable crime. The compulsion of statistics should give way to the overriding need to respect the liberty and human rights of individual citizens, particularly the poor and the defenceless.

The third point discussed with reference to the grounds for arrest and detention was: "Can the need to interrogate a suspect or accused justify arrest and detention?"

In this context it was first brought to the notice of the participants by the chairman that certain systems of law required the police to arrest a suspect if there were grounds to believe that he was concerned in a cognizable offence. Bearing that position in mind, the participants proceeded to discuss whether it was necessary to detain a suspect merely to question him about his probable part in the commission of a reported crime, and also whether it was correct and proper to interrogate an accused against whom sufficient evidence had already been collected to implicate him in a specific crime.

Some participants opined that such arrests or detention would not be justified, whereas Mr. Seneviratne of Sri Lanka said that the investigation agency would arrest and detain only after sufficient evidence was first collected to implicate the suspect. The general opinion was positively against an arrest or detention effected only with the purpose of forcing the suspect to clear himself from suspicion, but some of the police participants did express the opinion that interrogation of an accused against whom there was sufficient evidence in one specific case could result in his implication in several other cases, specially where acquisition of property was the motive for the crimes. Incidentally, Mr. Ichikawa of Japan in his paper submitted to the Seminar had referred to an empirical study conducted by James W. Witt, Head of the Department of Criminal Justice, Armstrong State College, U.S.A. on "Non-Coercive Interrogation: The Impact of Miranda on Police Effectuality." The study showed that in the post-Miranda period police effectiveness did not decline except to the extent that 8% fewer offences were solved due to the non-availability of accused for interrogation. The figures of course could be different in other countries if similar Miranda rules were applied.

Alternatives to Arrest and Detention

Considering the adverse psychological effect of an arrest or detention on the mind of the individual concerned and also the economic costs of such arrests and detention to the state can such police or prosecutorial action be minimized without impairing effective investigation? This was the next question posed for consideration and discussion. Much ground had already been covered in the earlier part of the discussions. The position could be summed up as under:

1. In India and some other countries governed by the Criminal Procedure Code, the police were bound to arrest individuals accused of cognizable crime if there was sufficient evidence to conclude that they were the perpetrators. The disposal of the arrested men then devolved on the trial judges.

2. In minor or non-cognizable offences, including violation of traffic regulations or municipal laws, the police in most countries do not arrest the accused but issue tickets, summons or other forms of notice to appear in court on a given date to answer the charge. Many countries, including India and Singapore, even dispense with the appearance of the accused in court for traffic law violations if a prescribed monetary penalty is paid or sent to the court before the prescribed date.

3. In Japan, the public prosecutor can decide not to prosecute an offender, even if there is sufficient evidence against him, if the prosecutor feels that society will benefit more from such a course of action. The mental, psychological and other conditions of the accused at the time of the commission of the offence and after are taken into account by the prosecutor before arriving at his decision. The power to let off the accused without legal action has been delegated by prosecutors to the local police agencies in respect of specified minor transgressions. In this method many persons who would have carried with them the psychological scar of an arrest or detention have been provided with an opportunity to reform.

4. In Japan again juvenile offenders and even adult transgressors of less heinous crime are not arrested but requested to appear before the family or regular courts, as the case may be, through issue of summons. The system has worked well in Japan where respect for authority is ingrained in the national consciousness.

Mr. Ichikawa of Japan expressed the opinion that it is preferable not to arrest than to arrest. He pointed out that in Japan only 20 percent of suspects in cleared cases were ultimately arrested. Mr. Chan of Singapore said that where arrests were utilized only for the purpose of getting the accused to court, then substitute methods, like issue of summons, or appearance tickets could be utilized. For example, this was being done extensively in Singapore in the case of minor transgressions including traffic law violations. Mr. Seneviratne of Sri Lanka said that in his country a natural form of diversion from the normal process of arrest and detention takes place daily when many victims and perpetrators of crime decide the issues themselves through mutual agreement even before the matter is agitated with the police. More concrete forms of such diversion, sanctioned by usage and custom are found in many societies. For example, in Western Samoa as Mr. Alai'asa projected in his paper, the 'fono' (council meeting of village chiefs) decides many disputes which might otherwise have found their way into the law courts and police stations. In India and Pakistan, village panchayats or 'jirgas' decide many minor issues in the same manner.

Such alternatives to arrest and detention are naturally not available in urban settings. It is here, then, that the relevance of the Japanese experience becomes obvious. It would be profitable to consider the application of the principles used in Japan, *mutatis mutandis* in other participating countries, within the ambit of the existing law, if possible, or if necessary by amend-

ments in the law and criminal procedures. In the Japanese system, the public prosecutor has wide powers which he uses to rehabilitate first offenders and others who have been guilty of petty crimes but have repented for their acts. It is not uncommon for police agencies of various countries to apprehend young boys for stealing cars or bicycles or young girls for shoplifting. Many such young offenders commit these acts when overcome by sudden temptations or often merely for a lark. The fright generated by a warning from authority will serve to prevent repetition. On the other hand the ignominy of an arrest or detention could hurt his psyche irreparably and remove the individual further from the pale of accepted behaviour. The balance in societal costs, therefore, would weigh heavily in favour of more humane and corrective action in such cases. The modalities will have to be worked out by each country according to its needs and values and the genius of its people.

Safeguards at Various Stages of Criminal Proceedings

The third important problem debated by the participants was that of safeguards at various stages of criminal proceedings. The first question that came up was "How can investigating agencies (police and public prosecutors) effectively prevent or eliminate arbitrary arrest and detention while maintaining necessary independence of action?"

Some participants favoured administrative checks and elaborated by mentioning that senior officers should demand periodical reports in order to monitor the actions of their subordinates. One participant of Japan commended his country's system where arrest and detention were reduced to the minimum by effective intervention of the public prosecutors and the judges, while the chairman and other participants remarked that the judiciary in the common law countries performed this role to the fullest extent and advocated detailed and effective documentation to facilitate adequate supervisory intervention.

It was obvious from the trend of the discussions that the participants agreed on the necessity of responsible supervision as the only or main weapon against possible wrongs to which suspects, whether innocent or even guilty could be subjected by junior echelons of the investigation hierarchies. The need to raise the standard of education required for entry at the lowest ranks of the police force, where maximum damage to individual human rights was caused, was stressed by Mr. Quadri of Bangladesh. To this need can be added the concomitant need of educating and motivating the investigation agencies, at all levels of initial entry and later by in-service training, seminars and conferences, of the importance of respecting individual liberty and the human rights of suspects. Incidental to the above suggestions was that made by Mr. Kaku of Japan of the imperative necessity of improving the status, salary and welfare of policemen and officers and extending the period of training of the less educated entrants into the force, even if this meant increased costs to the exchequer.

"How can the judicial branch (magistrates, judges) quickly and effectively promote the same goal?" This was the second question posed in the context of safeguards against arbitrary arrest and detention. Mr. Chan of Singapore opined that 24 hours were not sufficient to gather sufficient facts for a judicial decision on the necessity for detention or the quantum of bail to be offered. Yet, in common law countries only 24 hours were prescribed as the outside limit within which the police were bound to produce the arrested suspect before a judicial tribunal. It was true, on the other hand, that the advantage of an independent, judicial discretion was introduced at an earlier stage of the process.

In his paper presented at the Seminar Mr. Goel of India had expostulated at length on the concept of anticipatory bail, recently introduced into the Indian Criminal Procedure Code. The law in India now permits superior courts to order the police to release on bail a particular individual in case that individual is later arrested. The court makes this order on the petition of the individual concerned or his lawyer and is meant to avoid the ignominy of an unnecessary detention, however short in duration. This provision if wisely used can avert arbitrary detention and is even more efficacious than intervention at a later stage after the initial damage is done.

The third and last question discussed by the conference with regard to safeguards against arbitrary arrest and detention was: "What measures or remedies must be immediately available to suspects and accused persons against arbitrary arrest or detention?"

Naturally, though unfortunately, these measures can only serve as poor consolation for a wrong already committed, but they could take the form of compensation as well as retribution to bring some measure of redress, however small. The remedy of *habeas corpus* has been and is always available in common law countries. In Japan, a collegiate body of three judges sits and decides an appeal against detention on the very day on which such an appeal is made.

But a little more positive action was called for. So, Mr. Ichikawa of Japan stated that in his country those guilty of arbitrary arrests and detention were punished while the State paid compensation (if demanded) to those acquitted. The chairman mentioned that action against errant officials was taken even in his country and Mr. Ribeiro of India corroborated this position in respect of his country also.

Conclusion

The power to arrest and detain those who transgress criminal laws forms the very basis of organized societies. It has existed in every society from the dawn of history and will continue to exist for all the time. But since the power exists for the ordered existence of the members of society, a correct appreciation of the point at which a balanced existence is threatened has to be constantly made by intelligent and responsible minds so that individual liberty and basic human rights are not sacrificed at the alter of political or other expediency. Besides, societal costs should be measured in precision terms by minds alive to human and psychological problems, so that reformation rather than retribution becomes the creed to which the country is committed.

The imperatives of careful manpower selection and training and an effective and enlightened supervision in all branches and at all levels of the criminal justice system assume paramount importance if the ends mentioned above are to be achieved. The restructuring of criminal laws and procedure, indeed the criminal justice system itself, within the compass of national character, culture and history, may require constant appraisal and study in each individual country in its march towards the above goals.

Allowing the non-hardened petty culprit or suspect to go free without arrest or trial, as is done in Japan, settling minor cases in village quasi-tribunals as is done in the Philippines, Western Samoa and the Indian subcontinent and the introduction of the concept of anticipatory bail as is in India are forms of diversion which if applied judiciously and wisely in similar context will go a long way in avoiding unnecessary arrest and detention to the advantage of the individual and without loss to society.

Session II: Procedural Rights of the Arrestee or Detainee

Chairman: *Mr. Takao Ichikawa*
Advisor: *Mr. Makazu Ikeda*
Rapporteur: *Mr. Jeffrey Chan Wah Teck*

Introduction

The premise on which all systems for the administration of criminal justice operates is that a person is presumed to be innocent until proven guilty. Nowhere is this basic assumption more endangered than in the instance when a person accused of a crime is arrested and detained before any finding of his guilt is made by a court

of law. It is imperative that if the presumption of innocence is to be preserved as the cornerstone for the administration of criminal justice, the person who is arrested and detained before conviction must be granted certain rights which would not only enable him to meet fully the accusation against him but would also set him apart from convicted persons. It is recognized that every legal system must establish certain basic procedures to enable this end to be achieved whilst at the same time not impeding fair and thorough investigation into the accusation by the enforcement agency concerned.

Understandably there cannot be a common procedural code setting out the procedural rights of all detained persons for all the nations of the world, for each nation must devise its procedures according to the characteristics of its people, their values and priorities, the nature of its geography and other characteristics peculiar to itself. But it is thought that having regard to the common experience of mankind and the principles expounded by the many internationally agreed declarations touching on the rights and status of such persons, there are certain procedural rights which has traditionally been recognized as basic to all mankind. The discussion sought to identify some of such rights and to examine them in the light of the circumstances and experiences of the nations represented in this Seminar. The emphasis was on whether such rights existed and if so, to what extent, and the guarantees and remedies available to enforce such rights in the participating countries. Abstract discussions as to the philosophical basis of such rights or whether such rights should be granted at all were deliberately avoided.

The Right to Counsel

Whatever rights accorded to a person after he has been arrested and detained would be illusory unless the person knows that he is entitled to them. The experience of most criminal justice systems is that such person tend to come more often than not from the less affluent sectors of society and in developing countries, such persons tend to be both poor and illiterate. It is therefore imperative that such persons be given an opportunity to be advised by a practicing lawyer. This is recognized by the constitutions of all the participants of this Seminar and the right to counsel is in all cases, enshrined as a fundamental constitutional guarantee.

Notice of the Right to Counsel

The guarantee of the right to counsel is by itself meaningless unless it is accompanied by certain other procedural rights. One obvious procedure which is necessary in order to give effect to this right is that the arrestee or detainee must be given notice of such a right. This may be superfluous in countries where the population is generally educated and well informed but in most of the countries represented in this Seminar, most of whom are still in the process of development, this procedure is an absolute necessity.

The notice of the right to counsel must be given as soon as reasonably practicable and it must be communicated to the arrestee or detainee in a language which he understands.

Access to Counsel

Granting an arrestee or a detainee the right to counsel must mean that the arrestee or detainee is to be allowed reasonable access to his counsel. What constitutes reasonable access would depend on the circumstances of the case but at the very least, the person should be afforded an opportunity to meet his counsel in order to brief him and to receive advice. The question which was in issue here was whether the arrestee or detainee should be allowed to meet his counsel without the supervision of the custodial authorities. To permit such an encounter could give rise to opportunities whereby the ends of justice and the security of the detainee could be jeopardized. The rule often adopted in most countries is that such a meeting could take place but it should be within sight but

out of hearing of the custodial authorities. Such a procedure would appear to strike a balance between the right of the detainee to brief and receive advice from his counsel and the necessity to insure that the security of his detention is preserved.

When Should Counsel Be Permitted to Represent the Detainee?

The laws and practices of the participating countries differ as regards the point of time when the detainee can be represented by counsel. The Seminar had been informed through lectures that in the United States, the arrestee is entitled to be represented by counsel from the moment he is arrested. The same is true of some of the countries represented in this Seminar e.g. the Philippines where the position is similar to that of the United States. If the arrestee demands to be represented by counsel, he cannot be questioned further. It was impressed on the participants that in many instances, such a procedure would work in favour of the prosecution's case rather than against it, for when a detainee is represented by counsel, it would be difficult if not impossible for him to challenge evidence elicited against him, particularly his own confessions, if such evidence was obtained in the presence or with the knowledge and concurrence of counsel.

However, in the case of other countries represented in the Seminar, counsel is not permitted to appear on behalf of the arrestee or detainee until such time as a final decision is taken to proceed against him in court or until he is finally produced in court itself. A number of reasons were advanced for this. It was disclosed that in some countries e.g. Singapore and Sri Lanka, it is not usual for persons to engage counsel the moment they are arrested or the moment they come to know that investigations are being made against them in respect of an accusation. Such persons would prefer to wait for the outcome of the investigations and only after a final decision is taken by the law enforcement agency concerned to charge them in court would they proceed to engage counsel. This is because until such a time, there is always a possibility that the authorities may decide not to proceed against them, in which event if counsel had been engaged, it would be a waste of money. For countries with such experiences, to advance the preposition that counsel should be permitted to represent the suspect at the investigation stage would be contrary to their general practice.

Some participants from countries which do not permit the accused to be represented by counsel at the investigation stage expressed concern that if this is to be permitted, the investigations would be gravely impeded. Mention was made that the ethics of the legal community in their countries were such that counsel would not be adverse to indulging in improper conduct in order to ensure that their clients are cleared of the accusation. Even for countries e.g. Japan and the Republic of Korea where no aspersions were cast on the integrity of defence counsel, it was believed that the presence of defence counsel with the suspect during investigations may pose serious obstacles to a fair and thorough investigation.

The Proper Role of Defence Counsel

The role of a defence counsel at a trial is well understood and clearly defined. What is not so clear is the role of defence counsel before the trial. He is to represent the interest of his client but the extent to which he should be permitted to intervene in the investigation in the name of protecting his client's interest and the means whereby he should be permitted to do so are matters for concern. Where counsel is permitted to present the suspect at the investigation stage, it is accepted that he should be permitted to give advice to his client. In this respect, it was noted that the advice often given is that the suspect should remain silent when questioned. However defence counsel often demand for more rights e.g. to be present when witnesses are interviewed, to be granted access to real evidence for independent examination, to be present during identification

parades etc. It was thought that some of such demands e.g. the right to be present when witnesses are interviewed, cannot be granted as it would amount to interference in investigation but where the suspect is being questioned, he should, if he wishes, be permitted to have the advice of counsel in answering the investigator's queries.

In this respect, a point to note is that for jurisdictions which do not permit confessions made to the police to be used as evidence against accused person, the role of defence counsel at the investigation stage is limited.

Duty of the State to Appoint Counsel for Indigent Persons

The discussion there concerned not only the duty of the state to provide a counsel for an indigent person at his trial but also whether counsel should be appointed for such persons at the investigation stage. It was agreed that at the stage of trial when a person is unable to engage counsel because of poverty, the state should appoint a counsel for him. Failure to do so would mean that an indigent person would be placed in a more disadvantageous position at a trial than a person with more means. Such a situation is socially unacceptable. However it was recognized that for the state to provide counsel to every person charged in court who cannot afford to engage counsel himself would mean a tremendous financial burden on the state and most developing countries are unable to sustain such a burden.

All countries have schemes whereby indigent persons are provided with counsel for cases where the offence tried is punishable with heavy penalties. The class of such offences varies with each country. But for relatively minor offences, where the defendent is unable to engage counsel, he must present his case in person. Realizing the disadvantages faced by such persons, the judiciary of some countries often depart from their traditional role as umpires of a contest between two adverse parties and, in a way, assume the role of defence counsel, by cross-examining themselves the witnesses for the prosecution from the defence's viewpoint.

A few countries e.g. the U.S. and the Philippines provide counsel for indigent suspects at the investigation stage but it would appear that most of the countries represented in the discussion do not permit counsel to participate in the investigation process and accordingly the question of a state-appointed counsel at this stage does not arise.

Waiver of the Right to Counsel

Can a person waive his right to counsel? This question can be re-phrased as: Can a trial begin if the accused refuses to permit counsel to appear on his behalf even if the state appoints one for him? This would be an unlikely scenario but not without precedent. In most of the participating countries, if an accused person elects not to be represented by counsel at his trial, the trial can still proceed. But the Seminar was informed that in some countries the presence of counsel for the accused at a trial is not regarded only as a right of the accused but as a fundamental pillar of the criminal justice system and until such time as the accused is represented by counsel, the trial cannot begin. A faithful adherence to this principle, however, can cause problems and frustrations for those involved in the criminal justice process. Japan experienced this at a recent trial of some radical students when defence counsel deliberately failed to appear and thus prevented the commencement of the trial.

It was also mentioned that sometimes accused persons refuses to be defended by counsel because he has no confidence in the counsel's competence. An amusing anecdote was given when a person refused state-appointed counsel and conducted his defence personally and the presiding judge thought that he did so far than counsel could have done.

The Right to Silence

The right to silence is traditionally recognized as a basic procedural right in

Anglo-American jurisprudence and is also recognized as such by most other legal systems. It is thought to be fundamental to the privilege against self-incrimination which is guaranteed by the national constitutions of all the participating countries. As in the case of the right to counsel, the right to silence carries with it the right to be notified of this right. The doctrine as to the kind of notice which should be given and the procedures to be followed has been highly developed by the United States Supreme Court and has been accepted by many other countries. Apart from these, all countries have same procedures laid out, whether statutory or in the forms of administrative directives, to ensure that accused persons are informed of this right. This right of silence takes effect from the moment a person is arrested. This means that he should be informed of such a right preferably at the time of his arrest.

In practice, however, it transpired that except for a few countries, arrested persons are not informed of this right at the time of arrest. However, they are always informed of this right and if they have been informed earlier, they are reminded of this right, at the time when they are questioned by the investigator.

The method used to inform persons of this right is not always satisfactory. It is best when a printed form containing a notice of this right is read and explained to the suspect and he is then given this document for his retention. But in some countries, the notice of this right to silence, often accompanied with the caution that if he chooses to waive this right, then anything he says may be taken down and used against him, is printed at the beginning of the sheet of paper used for recording the suspect's statement. This is merely shown to the suspect without explanation and the investigator then proceeds to question him and record his statement. Such a practice, where it exists, should be revised. In this respect, the position in Singapore is somewhat different from the other countries represented at the Seminar. Singapore recently adopted the recommendations of the United Kingdom Law Commission, and amended its Criminal Procedure Code to provide that at the time an accused person is charged or officially informed that he will be prosecuted, he must be served with a notice giving him particulars of the proposed charge and a warning that if he has anything to say, he is advised to mention it otherwise it may have a bad effect on his case at the time of his trial. Some participants viewed this measure as a reversal of the traditional right to silence. The participant from Singapore informed the Seminar that in practice, this provision has not effected any drastic change of trial procedure in Singapore. Many persons still elect not to say anything in response to the notice and whether this has a bad effect on the person's case at his trial is entirely a matter for the trial judge to decide. The trial judge is not bound by law to draw an adverse inference from the person's failure to make a statement persuant to this notice.

Waiver of the Right to Silence

It is the common experience of the participants that despite notice of the right to silence and the caution, many persons still proceed to make statements which may amount to a confession. This is especially true in Japan. In some countries e.g. India, Pakistan, Bangladesh and Sri Lanka, this fact is irrelevant because all such confessions made to the police are inadmissible at trials. These confessions can only be aids to the investigator in uncovering other evidence supporting the prosecution's case. Only confessions made to magistrates are admissible and even as the case of such confessions, the weight attached is very slight.

Where the confession of a suspect is admissible and especially if it alone can be the basis for a conviction, then it becomes crucial to examine closely the maker's waiver of his right to silence to ensure that the waiver was done not only voluntarily i.e. without any threat, promise or inducement, but also done with full knowledge of the right to silence and the consequences of making such a statement. Ultimately it

is the responsibility of the trial court to decide on this issue and in coming to its decision, the court must take into account all the circumstances under which such a statement was made. It was thought that a prolonged period of detention would be an important factor effecting the voluntariness of a confession. Confessions not voluntarily made should not be admitted in evidence.

Right to Be Told of Grounds of Arrest and Detention

Most constitutions provide that an arrested person is to be told the grounds of his arrest. Very few, however, proceed to state clearly when this right arises. It would appear obvious that at the time of arrest or as soon as reasonably practicable after an arrest is effected, the arrestee should be informed of, at the very least, the generic type of crime which he was suspected to have committed. In most instances, arrest is made at an early stage of the investigation where the precise offence which the arrestee is suspected to have committed is not yet ascertained. However, when this is done, the arrestee should be told of it. This is imperative if he is to prepare an adequate defence.

Different considerations apply in respect of grounds for continued detention. The power to hold arrested persons beyond a certain limit of time is reposed with different agencies in different countries. In the countries which adopt the Criminal Procedure Code similar to that of India, the power of the police or other investigating agency to detain a person is limited to a period of 24 hours. Within this period the detainee must be produced before a magistrate and any further detention can only be under an order of a court. In such cases, there can be no doubt that the detainee would be aware of the reasons for his continued detention because the prosecution would have to adduce reasons in support of its application for his continued detention to the magistrate.

In some other countries e.g. Japan, the Republic of Korea and Indonesia, the investigating agency is empowered to hold the detainee for a much longer period of time and, in case of Japan, after the first 48 hours, the detention can be further extended for 24 hours by a public prosecutor before the detainee is finally brought before a judge. For such countries, the duty to inform the detainee of the grounds for his detention rests also on the investigating or prosecuting agency. Failure to do so at this stage would mean that the suspect is not given an opportunity to dispute the reasons for his detention. This enhances the possibility of wrongful detention.

Right to Notify Relatives or Friends of the Fact of Detention

It is not often that a person is arrested and brought to a police station in the presence of his friends or relatives. When a person is detained, in the mind of friends or relatives who are not aware of his arrest and detention, he has suddenly disappeared from their sight. The effect of such a mentality on the general morale of a nation's population and the problems that can arise from such a situation both for the detainees' family as well as for society in general are tremendous. Arrested persons who are subsequently detained must be allowed an opportunity to inform their relatives or friends of the fact that they are detained.

This means that such persons should be afforded access to means of communications e.g. telephones or the post. In many countries where means of communications are comparatively underdeveloped or where the arrestee or the people whom he wishes to contact are illiterate, granting a detainee access to means of communication would be of no effect. In such cases, the police should take upon themselves the duty of informing the relatives or friends of a detained person about his detention. In all nations, the police force is organized to cover the entire country and often possess the best available means of communications. Executing this simple duty should not pose much problems.

The right to have friends or relatives

notified about the detention is especially important when the arrestee could be released on bail, either by the police or by the court. Bail is normally granted with sureties and failure to inform the arrestees' friends or relatives can only mean that when the offer of bail is made, he would be unable to take it up. This renders the purpose of bail meaningless. Furthermore this right has a direct effect on the right to counsel as often it is the friends or relatives of the arrestee, not the arrestee himself, who briefs counsel to represent him.

There was concern that in cases where suspected accomplices of the suspect are still at large or where easily disposed-off real evidence has not yet been seized, informing the arrestees' friends or relatives would result in investigations being impeded. Here, perhaps a balance can be struck by granting the arrestee the right to have one or more of his friends or relatives informed of the fact of his detention as soon as practicable after his arrest but with the provision that any information to be passed to such persons or any requests made to such persons must be channelled through the investigating agency which should have the power to vet them.

Right to Understand and to Be Understood

Unlike Japan which is a homogenious society, most of the countries represented at this Seminar are either multiracial or are composed of many linguistic groups. The official languages may not be understood by every member of the citizenry. Further, in many developing countries, the rate of illiteracy is still very high. All these pose serious problems for the criminal justice system.

In order for a person to exercise his rights, he first must know what his rights are and he must be able to express his response to those rights. All this means that where he is unable to speak the language of the investigator, interpretation facilities must be made available.

The ideal situation would be for all interpreters to be attached to an agency independent of the investigating agency and to be available at any time something needs to be said to the suspect or when the suspect wishes to say something. The advantages are enormous, not the least of which is the fact that there would be an independent witness as to the voluntariness or otherwise of whatever statements the suspect might make.

But such a system would require an enormous pool of competent personnel and would entail great cost. Many countries would not be able to sustain such a cost. The actual situation often is that suspects are either shown printed forms on the assumption that they can read for themselves whatever is contained therein or the investigators themselves act as their own interpreters with varying degrees of competency. This leaves the investigators open to allegations of impropriety in the conduct of the investigation. Where such a situation exists, improvements must be called for but it is realized that cost and the availability of competent personnel would pose serious difficulties.

Remedies for the Violations of the Procedural Rights of Detainees

In order to give effect to the procedural rights of detainees, the laws and practices of the countries represented in the Seminar have provided that in the event of a violation of the rights of the arrestee or detainee, certain legal consequences would result. Some of the consequences take the form of remedies for the aggrieved party, others are directed against the person responsible for the violation and yet others are directed towards the evidence which was obtained as a result of the violations. It is useful to examine each in turn.

a) Remedies for the Arrestee or Detainee

Most countries provide that when a person is wrongfully arrested or detained, he is entitled to compensation. In some countries, e.g. Japan, when an arrested person is acquitted after a trial, he is automatically entitled to compensation by the state for the period spent in detention and

compensation is paid according to a rate fixed by statute. In other countries e.g. Singapore, the aggrieved person has to bring a suit against the government and has to prove his claim in a civil court. For such purposes, the legislature had provided that the government, normally immune from suits under the doctrine of sovereign immunity, can be sued in court. But there are other countries where it is not permitted to sue the government at all. In such cases, the only remedy for the aggrieved party is to sue the person responsible for the violation. This poses problems, for if the violator is impecunious, even if the suit is successful, the aggrieved person would in effect be left without a remedy.

One issue which arises here is whether an aggrieved party can look to both the government as well as the violator for compensation. The law here is not fully developed and much thinking along these lines is taking place in the United States where some states recognize this right but others do not.

It is recognized that damages are merely compensatory and that they do not prevent the wrongful act from taking place or continuing. Where a person is held in detention in violation of his procedural rights, most criminal justice systems provide for some form of immediate relief. In the Anglo-American legal system, this often takes the form of *habeas corpus* proceedings whereby a superior court can be moved to investigate the legality of detention. In Japan, the detainee can immediately apply for an emergency review of the detention order and a collegiate body of three district judges can be convened to hear such applications forthwith. In most instances, a time limit is necessary within which the judgement of the reviewing court must be delivered.

However, it was agreed that in order for the aggrieved party to avail himself of these remedies, it is imperative that he be represented by counsel. Most countries have some form of legal aid programme but only in developed countries e.g. Australia and the United States, is legal aid available regardless of the nature of the case. Most other countries restrict legal aid either only to civil or to more severe criminal cases. It was recognized that the situation here calls for improvement.

b) Evidence Obtained as a Result of the Violation

Almost all the countries represented in this Seminar provide that cofessions obtained as a result of a violation of the rights of the suspect are inadmissible in evidence. The voluntariness of a confession is a matter to be decided on by a trial court at the time of trial. In India, Bangladesh, Pakistan and Sri Lanka, this question does not arise as all confessions made to the police, voluntary or not, are inadmissible. However, evidence obtained as a result of these confessions can be admitted. A question was raised here as to why this should be so and it was noted that the United States Supreme Court, in developing its exclusionary rule doctorine whereby all evidences obtained as a result of a violation of the suspects' right are excluded, based its reasoning on the concept of "the impeccability of judicial integrity." The reply to this was that the evidence obtained could stand on its own and in such instances, to say that relevant and highly probative evidence should be excluded may result in obviously guilty men being set free at great cost to society.

The fact that evidence obtained as a result of violations of the procedural rights of the detainee will be excluded is obviously a deterrent against any temptation to violate the detainee's procedural rights but the scope of this rule may differ from one country to another. It was noted that many countries feel that except for confessions, an extension of this rule may result in perversion of justice.

c) Consequences for the Person Responsible for Violations

In all countries, where the procedural rights of the detainee are violated as a result of force, the violator would have himself committed an offence against the penal laws of the country and he can be prosecuted in court. Also, as in most

countries the procedural rights of an accused person are provided for by statutes, case-law, administrative directives or long-established practice, any violation of these rights would be, at the least, a disciplinary offence on the part of the violator. However, it is the common ground that it is difficult, if not impossible, to move the violator's own agency to proceed against him either in court or departmentally in a disciplinary action.

Some countries e.g. India, Malaysia, Bangladesh and Singapore, permit private prosecution of certain offences and in some, magistrates are enpowered to conduct independent investigation of accusations, particularly against law enforcement officers. Here, the right to take the violator to court and have him punished for his misdeeds is present but the gathering of evidence may be a problem as the investigation agency concerned may refuse to render assistance.

The position is even more difficult in the case of departmental disciplinary actions. All agencies regard their internal affairs as their sole prerogative and are reluctant to allow persons outside their organization to dictate the course of action to be taken against their errant members. As agencies are often reluctant to take action against members who violate rights of suspects, if the violation is not actionable in court, the violator is free to continue with his misdeeds. This has been recognized in the United States where moves have been made to create independent agencies which can investigate allegations of misconduct within the agency concerned and commence action against the offenders. The aggrieved party is permitted to be represented at such actions.

In this context, it was noted that some countries e.g. the United Kingdom, uses the office of the Ombudsman or Parliamentary Commissioner to the same effect. This system merits further consideration.

Conclusion

It was clear from the discussion that all the participating countries have provisions in their domestic laws and administrative directives for ensuring that persons arrested and detained before trial are accorded basic procedural rights. Procedures are also laid out for the enforcement of such rights and remedies for their violation are also prescribed. But it was also clear that in many countries, in practice, not all such rights are enjoyed by arrestees and detainees and where such rights are fully accorded, there are instances of abuse. The participants of this Seminar strongly felt that measures should be taken by all countries to ensure that at the very least, the provisions of their laws are observed in practice and that justice is not perverted on the excuse of upholding the human rights of the arrestee or detainee.

Session III: Measures for Preventing Prolonged Detention

Chairman: *Mr. Edgar Dula Torres*
Advisor: *Mr. Susumu Umemura*
Rapporteur: *Mr. Adityapala S. Seneviratne*

Introduction

In every form of society founded by man from time immemorial, there has always been a code of ethics which guided him in his behavioural patterns. This was the basis for the law promulgated as man and society advanced. It therefore became necessary that some action should be taken against persons who violated the law practised in each society giving rise to a system of committing offences and imposition of punishment. This basic pattern changed from each social group and as countries developed a legal system akin to the requirements of each country was formulated. The need for standardization of procedures wherever practicable came up and resulted in the exchange of views between the countries. It was felt that such codified procedures would at least from guidelines which could become ideal situa-

tions to be looked up to keeping in mind the situations and requirements in each country.

It was in this context that the United Nations prepared a series of papers on subjects in this field and although these maxims may not be possible to the fullest extent in each country, they are being considered as the main guidelines in this regard.

Detention and Bail

The Draft Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment defines detention as: "the period of deprivation of personal liberty from the moment of arrest up to the time when the person concerned is either imprisoned as a result of final conviction for a criminal offence or released". Taking a soberer look at this definition, it includes (1) deprivation of personal liberty, (2) the necessity for quick action within the criminal justice system, (3) speedy release if the criminal justice system cannot contain the detainee within its folds.

When a person is arrested, he becomes a cog in a wheel of a vast machine and the machine which is the criminal justice system has to turn at full speed if his case is to be handled speedily and for his quick release from detention. Unfortunately, in most countries, as came up in the Seminar, this is not so and the criminal justice system moves slowly thus extending the period of detention.

Detention could result from non-completion of investigation or due to slow handling of trial. To overcome the problems of this nature, various countries have adopted various systems to have persons in detention released subject to certain restraints pending either completion of investigation or trial.

Bail and provisional release are methods most widely used among countries that participated in the Seminar. Whilst in certain countries bail is available after completion of investigation, or as a provision of law giving mandatory period for completion of investigation or release through courts, in certain other countries such as the Republic of Korea and Japan bail is granted only after institution of formal prosecution. In Peru, however, the provisions on bail do not exist at all. This is also true of Indonesia.

In common law countries bail is granted at the police station itself in bailable offences and in non-bailable offences, the suspects when produced before magistrates are granted bail in most instances except in cases where other measures have been adopted. A case in point is Sri Lanka where according to the Criminal Procedure (Special Provision) Law the magistrate has no power to grant bail in certain offences. It was however pointed out that this law was being used very sparingly due to its strong features.

As mentioned earlier, in Indonesia altnough there is no legal provision for bail, provisional release suited to the customs and traditions of its people is being practised. Identical practice also exists in Peru. In the Philippines and Iraq, bail is denied in offences that could be punishable by death when the evidence of guilt is strong. In some countries, persons without fixed abode are denied bail.

The procedure regarding the availability of bail is enshrined in the laws of the land, and where such provision does not exist, it was mentioned that such action was a matter of policy in respect of the respective countries who were satisfied with the legal systems now being practised. Some of the participants mentioned that there was no outcry to the functioning of the system in their countries and perhaps one could talk only in terms of friendly banter in respect of such situations.

In certain participating countries, granting of bail is not resorted to, in respect of offences punishable with death, whilst in certain other countries bail is available under certain conditions. As an alternative to bail, conditional pre-trial release was put forward and it was mentioned that in some countries, this system had already been adopted. In Japan, the Republic of Korea and Nepal, such pre-trial releases are available and in common law countries, such releases depend, to a large extent, on the judicial officers hearing each of such cases. However, it was pointed out that although the discretion of decision was left with the judicial officer, pre-trial releases were being resorted to, very often in the day to day activities. While the Philippines has a blending of the common law and continental legal systems, in minor offences, the accused is, under certain conditions, entitled to release on his own recognizance.

Speedy Investigation

When the subject of speedy investigation was taken up, divergent views were expressed by the various participants. Some participants stated that trials were delayed due to:

1) Lack of dedication on the part of investigators;
2) corruption in the police;
3) indifference of the public;
4) lack of resources facilitating investigation;
5) non-cohesion between police and judiciary;
6) non-enforcement of minimum required standards by police officers at supervisory levels;
7) the factor of fear or revenge and the feeling of the waste of time in attending investigation and trial;
8) limited availability of transportation and communication;
9) geographical conditions;
10) poor coordination between police and public prosecutors.

On a dissertation of these factors, they could be broadly categorized into:

a) Factors affecting judiciary, public prosecutor and police;
b) geographical factors;
c) limited resources, equipment and expertise;
d) feelings of the public.

Several participants were critical of the police in their respective countries and in no uncertain terms expressed what they had to state. The situation in these countries seems to be that the power of police seems to be quite strong thus making the police a monster by itself.

In certain countries the correlation between the police and the judiciary was reported to be poor and they were isolated to each other, whilst in some countries there was a better rapport between these two agencies. A case in point is Bangladesh, where monthly conferences are arranged at the level of senior officers, where common problems are discussed freely.

The office of the public prosecutor is working well in Japan and in some other countries. In some countries investigation is prolonged at times due to the fact that coordination between police and the public prosecutor is not very effective.

Much emphasis was laid on the geographical factors affecting investigations. The difficulties of access particularly did hamper speedy investigation, and this was more so in Nepal, Peru, Pakistan and some parts of Indonesia and India. Due to this difficulty, particularly in Nepal a time limit is also given before which a compaint has to be made, as against making prompt complaints in other countries. It is also legally prohibited in Nepal to effect any searches between sunset and sunrise. The difficulties of access was also brought into focus particularly in Baluchistan area of Pakistan.

Most participants commonly agreed that limited resources, equipment and expertise made it almost a Herculean task for them to conduct investigation speedily. As against the speedy response time of Japan, it was mentioned that in some countries it could take the better part of a day or more to start the process of investigation. It was stated that, in developing countries, the emphasis was more on development rather than expenditure on agencies which did not produce a return. As against this, it was explicitly mentioned that even the United Nations had now readjusted their programmes where stability of society was considered a primary factor for development. The inadequate facilities of most participating countries made it difficult to effect speedy investigation, whilst in some countries, the available facilities were

located only in important places, thereby causing a delay in obtaining the services of such services or expertise. Shortage of forensic science, laboratories and experts and inadequate staff at their offices often account for long delay in completion of investigation.

The consensus of opinion of the participants was that in most instances public cooperation was lacking for the investigator to really go ahead. It was stressed that public cooperation was the most vital consideration in an investigation. The reason for the lack of such cooperation was reported to be that police were way out of the public and that they had not gained the full confidence of those whom they served in the final analysis. In this instance it was pointed out that in Japan the cooperation between the public and the police was excellent. Visits by police to houses, the establishment of crime prevention associations and mass media have helped in maintaining this trend.

As remedies to this situation, the following were suggested:

a) Investigations should be conducted diligently and honestly;
b) effective investigation with the cooperation of the public;
c) balance between justice and morality;
d) effective use of mass media and public relations on a productivity oriented basis.

It was also emphasized that a sound police-community relations programme anchored on police efficiency should also be the concern of any police agency.

Speedy Trial

Criminal trials in most countries took a considerably long period of time. The delay in trial causes concern among the members of the community that a wrongdoer remains unpunished, whilst the accused person remains in a state of mental agony not knowing what would happen to him. Most participants stated that in respect of normal trials the period of time taken to complete was comparatively short, and was between two to six months. However, in certain instances, lengthy trials lasted for very long periods of time.

The main reasons adduced for delay in trial were:

a) Nonavailability of sufficient number of judicial officers as well as court houses;
b) nonappearance of witnesses and experts;
c) uncooperative attitude such as dilatory tactics on the part of defence counsel;
d) the poor system of fixing cases for trial by court staff;
e) the attitude of police;
f) frequent transfers of investigating officers from the police station concerned during the trial of the case;
g) shortage of public prosecutors in some countries.

It was considered a universal problem by all participants that there was a dearth of judicial officers. It was mentioned that in many countries the magistrates were overburdened with work. Another participant mentioned that due to lack of space in courts, magistrates took turns in hearing cases at the same premises. It was pointed out that other than judicial officers, ancillary staff required to run a court too were lacking and that this had aggravated the situation. The net result of this form of organization would be a vast accumulation of cases resulting finally in delayed trials. This situation normally existed at the level of the lower courts.

Another area where trials were delayed was found in the system of committal procedure as adopted in certain countries. The magistrate has to commit the case to a higher tribunal. Hence it becomes a trial at two different points. The nonappearance of accused persons and witnesses is directly related to the procedures adopted by court and generally the public view this money and time consuming process with abhorrence. Every time a case is postponed, the public would be inconvenienced. The same parameters would apply to the accused who also marks his presence in court on every such occasion. Then again, attention was focussed on the accused absenting

himself from courts. It was indicated that the absence of witnesses or accused worked *vice versa*. In certain countries the law has laid down that trial against an accused could proceed in his absence, whilst in some other countries such legal provisions were nonexistent.

The nonappearance of counsel representing accused is a matter which causes grave inconvenience all round. Some counsel deliberately refrains from appearing in court and in some instances it is not uncommon to cancel the proxy thus leaving the accused undefended. Such action does not appear to be uncommon in most countries and it is indicated that some remedial action is required in this regard.

The biggest problem confronting courts in most countries is that there is no proper guideline in procedure in respect of the disposal of cases. There is also no priority rating. It was observed that some cases are called up at the expense of others, whilst the latter category go down for further dates, without being heard for long periods of time. The supervisory control over the working of court appears to need revitalization in this respect.

Pre-trial Diversion

It was mentioned that pre-trial diversion was available in Sri Lanka, Western Samoa, the Philippines, the Republic of Korea and Japan.

In Sri Lanka under the Code of Criminal Procedure, police are empowered to compound certain offences. This is extended not only to the offence itself but also to abetment and also attempt to commit such offence. The requirement here is that a prosecution should not be pending in magistrate's courts. If such a prosecution is pending the person eligible to compound the offence may do so with the consent of the magistrate. Another form of diversion practised is in respect of traffic offences, where police are empowered to stay prosecution on the issue of a warning ticket. In courts diversion as mentioned earlier could take place but over and above these, court could compound certain other offences without proceeding to trial.

In Western Samoa the Matai-Aiga System, where the traditional chiefs settle cases at their level without proceeding to trial is being practised.

In the Philippines the Barangay System which is in force makes it imperative that minor offences are placed before the Barangay Chairman, in the first instance. No prosecution would be entered in respect of such cases in the absence of a showing that amicable settlement was first tried but failed.

In respect of Japan, diversion is available in instances where the public prosecutor is of view that a prosecution should not be entered upon in respect of any offence. This is a system which is unique in Japan and the Republic of Korea due to their criminal justice systems prevailing in these countries. It should also be mentioned that the traffic infraction system prevailing in Japan could be taken as a model which may be modified to suit the requirements of other countries.

Remedies Suggested

The following remedies were suggested by participants to prevent prolonged pretrial detention and delays in the trial procedure;

1) Judicial officers should exercise judicial functions and not executive functions as done in some countries at present.
2) Police should only be investigators and prosecutors must handle the entire court procedure.
3) The necessity for trained personnel and expertise by way of scientific aids was felt by the participants.
4) In certain countries the criminal procedure code is antiquated and therefore militates against speedy trial. This is a situation which requires remedial action.
5) Committal procedure as done in some countries is a duplication of work.
6) Trials preferably should be completed within three months.
7) Cooperation between law enforcement agencies and public should be agitated.

8) Legal reforms should be made for conducting research on effective function of criminal justice system in each country.

Session IV: Human Rights of Arrestees and Pre-trial Detainees

Chairman: *Mr. Ayub Quadri*
Advisor: *Mr. Akio Yamaguchi*
Rapporteur: *Mr. Jamaludin Haji Abdul Hamid*

Introduction

The group was entrusted to examine problems and find remedies towards the effectiveness in implementing the principles embodied in the United Nations Declaration of Human Rights concerning persons under detention. Those under detention are predominantly the accused or suspects who are denied bail due to the seriousness of their offence for which they are charged or who, because of poverty, cannot afford bail. There are also those who are forced to be detained for precautionary measures justified solely by necessity. These offenders should at least be treated with some measures of personal dignity as laid down in the basic standard set by the United Nations Congress on the Prevention of Crime and the Treatment of Offenders. The group then discussed the legal consequences of unlawful arrest and detention and the liability on the part of the officers concerned or the government for damages. It further examined the need for improvement of training programmes for all those involved in the arrest and detention.

Effectiveness in Implementing the Standards and Principles

Mr. Chan of Singapore believed that most of the United Nations Declarations, Covenants and Bills have not as yet been ratified by many governments. If such is the case these documents remain only for the records and do not as yet have the force of an international agreement, though many governments would agree to the principles during the conventions which was called for the purpose of enacting them. One reason, he gave, why the governments are reluctant to ratify was because many of their existing laws already embodied UN principles and therefore governments would not bind themselves moreover as regards their future conduct.

Though, all rights of citizens under arrest and detention are well protected by the constitutions as well as the criminal procedure codes there are still irregularities in many countries. For instance there were people who were under detention for very long period of time because they were not able to produce the bail required for release. In India, the Supreme Court after reviewing cases and hearing the *habeas corpus* petitions, released all these people who had been in detention for periods beyond the maximum terms of imprisonment that could have been given to them. Following this, the Supreme Court issued directives requiring periodic returns and those under detention for period beyond their maximum terms of imprisonment prescribed for the offences for which they were charged were to be immediately released.

The problem of overcrowding in prisons exists in many countries and Thailand is no exception. Mr. Somboon of Thailand speaking of the situation in his country expressed that the United Nations Standard Minimum Rules were not being effectively implemented due to the overcrowding. However, he added that his country was trying hard to apply and to conform to the Standards as far as the situations in the prisons allowed. In Japan, according to Mr. Kihara, this problem of overcrowding does not arise and the Prison Law and Regulations are in conformity with that of the Standard Minimum Rules.

It is generally believed that whether the United Nations Standards are formally ratified by a government or not is to a large extent found in the laws of the country. However, it is a difficult problem to know whether they are implemented or not

particularly in developing countries where there exists a problem of resource constraints. This was the view of that of Mr. Quadri of Bangladesh. In a situation of resource constraint, priority for allocation of resource has to be worked out and the implementation of standards with regard to prisons does not merit priority in developing countries. When situation of overcrowding in the prisons exist, the basic standards of living conditions could not be effectively implemented even though there may be principles embodied in the prison rules. As to the situation in Sri Lanka, Mr. Seneviratne said that, although there have been constant overcrowding in the remand prisons, relatively adequate living conditions in prisons have been guaranteed under normal circumstances except during emergency in 1971 when about 5,000 suspects were arrested and detained. Mr. Torres of the Philippines stated that "Barangay Justice" is practised in the village level in the Philippines. Under this scheme, no prosecution for minor offences will be obtained in the absence of a showing that attempts at amicable settlement was made by the Barangay Arbitration Committee. This system largely helps to reduce remand prisoners in the Philippines. Out of compassion, the President even releases yearly thousands of suspects charged for violating laws against national security.

Mr. Shikita, Director of UNAFEI, who have had experienced working in the United Nations Secretariat observed that anything that concerned crime and criminals did not merit priority in the technical assistance proposed by each and individual government. Economic assistance has always come up priority whereas crime prevention and treatment is the opposits. By 1970, after realizing this trend, the United Nations set more emphasis on the social development programmes in which crime prevention and treatment of offenders is an important part. He advised that it is the responsibility of those in the criminal justice system to make the government or the planners realize that emphasis on social development programmes will lead to more sound economic development of the country. Though it is quite unrealistic to expect the drastic increase in the amount of budgetary allocation for the criminal justice field, there still is considerable room to go to maximize the limited resources allocated to the field. With more coordination of the effort between the police, the courts, the correctional organization, criminal justice administration will have a bit further to go even though resources are limited. The participants agreed that the Director has touched upon the crucial issue as this reflects the position of the criminal justice administration in the developing countries.

Setting-up New International Standards and Guidelines

In giving his opinion Mr. Chan of Singapore viewed that, it might be important to consider before going on to consider the necessity to set up standards or guidelines further, whether those presently agreed upon standards are being observed and practiced. So far not all the standards which had been agreed upon in the various international documents have been promulgated in the domestic laws of all the countries of the world. The rights which are regarded as basic practice and procedures to any fair system to any administration of criminal justice has already been agreed upon, thus it is then for the individual countries to develop this concept in accordance with their own peculiar conditions. Though in the United States and some Scandinavian countries, many of these concepts have developed to a very high degree in favour of the criminals but some of those ideas would not be acceptable in some Asian countries at this stage of development. Mr. Lee of Korea opined the necessity to have new guidelines because psychologically it will compel the countries to improve their present situations. While Mr. Torres felt that some countries were more developed than others and were more prepared for the new guidelines, thus new guidelines should be set up for those who are in position to comply with them.

Detainees' Rights and Living Conditions

In all the participating countries, the unconvicted prisoners are segregated from the convicted. These unconvicted prisoners whom our law presumes to be innocent unless proved guilty, are mainly confined pending trial under conditions which are more oppressive and restricted than those applied to convicted prisoners. These people should not be kept in custody pending trial as a punishment but primarily to insure their appearance at trials and to protect such persons who may be called to appear as witness from being tampered by the accused.

The practice and procedure as provided in the criminal procedure code in each country is usually that persons under arrest are firstly kept in police lockup, which is under the police administrative authority for the purpose of investigation. They are then sent to detention centres, jails or prisons, which are administrated usually by the prison authority, on an order by the court until such time they are ordered to be discharged by the said court. Although the accused loses many of his rights and privileges by virtue of his detention, he does not need to lose all his civil rights. The due process and equal protection clauses of the constitutions give the detainee full protection from unconstitutional administrative actions by custodial authorities. For example, prison authority should never be permitted to inflict cruel or unusual punishment upon detainees even if they are those who violate prison rules.

In many countries, it is confirmed that most of the principles for the treatment of offenders as laid down in the United Nations Standard Minimum Rules are already embodied in their constitutions. As such it is beyond doubt that the basic human rights for incarcerated suspects or offenders are guaranteed. However for various reasons, it is also inevitable that many of their human rights shall be restricted to the extent necessary in order to attain the objectives of confinement, i.e., the prevention of escape, destruction or alteration of evidence. Further, their freedom and rights shall be subjected to administrative restrictions so as to maintain the discipline of the prison.

In Thailand, most of the minor medical treatments for prisoners are administered by nurses due to the shortage of medical officers. Those found seriously ill are sent to the outside hospitals. Like in Malaysia, Bangladesh, Sri Lanka and many other countries, Thailand is facing the overcrowding problem and naturally accommodating them each to an individual cell is impossible.

Referring to Mr. Martin's paper about the situation in Peru, it was reported that the living conditions for prisoners were quite insufficient due to the lack of full attention by the government. Most of the prisons had no medical care. Even in the principal jail, Lurigancho, there was only one hour of running water daily for 6,000 prisoners. Most of the prisoners were not given beds and matresses.

Mr. Quadri of Bangladesh pointed out that as Bangladesh was a poor country, there was inadequacy in almost every field and this situation prevailed in the jails administration also. Overcrowding was evident and this was indicative of the delay in investigation and trial of cases. The administration of jails was conducted in accordance with the provisions of the Prisons Act 1872 and the Jail Code 1860. With a view to bringing about basic reform in the system the government has set up Jail Reform Commission in November 1978. Some of the recommendations by this commission have already been implemented.

Mr. Kaku of Japan told the group that the living conditions and facilities in the police lockup, which was managed by the police authority, have been improved as compared to the situation of ten years ago. The living conditions provided in some lockups might be in fact better than the conditions in some detention houses. This was mainly because some of the police stations were newly built and modernized thus providing better facilities for the arrestees. The control and supervision of the police lockup is under separate and independent division of the police and not by the investigation officers to ensure the human rights of the arrestees and detainees more sufficiently.

Mr. Chan observed that the conditions and facilities in the police lockup are generally poor as compared to the conditions in the prisons. He attributed this to the lack of supervision and independent check. He felt that the United Nations Standard Minimum Rules should also be applied to the police lockup.

Legal Consequences for Unlawful Arrest and Detention

In India, according to Mr. Goel, Sections 341 to 346 in the Indian Code of Criminal Procedure deal with the wrongful arrest and detention. There were few cases in which prosecution was lodged against police officers. As the police power of arrest is very wide and unless it is shown by the complainant that it was a wanton or a *mala fide* act on the part of the police, public prosecution would not succeed. In some serious cases where some police officers have wrongfully confined detainees for a long period and when death have taken place through torture, the case will be taken up at the government level. He added that under tort, the officer concerned might be liable for compensation if a case was made out. However, to hold the government liable under tort might be extremely difficult although technically that is also possible.

In the Philippines, for an act of unlawful arrest and detention the officer concerned is liable to criminal sanction or administrative proceedings. Also the immediate supervising officer is equally liable to be charged.

In providing the solution to this practice of unlawful arrest and detention, Mr. Ribeiro opined that only supervision by the senior police officers could be effective because most of those arrested are poor and have no means to take any further actions. Immediate and proper departmental action must be taken against those defaulting officers for their wrongful arrest and detention.

In Japan, according to Mr. Jinde, it is stipulated in the Criminal Compensation Law that if an accused is acquitted after his detention in custody for the investigation and trial, he should be compensated the amount of money by the government for his detention calculated with the rate ranging from 1,000 yen to 4,800 yen per day of detention.

Training of Personnel Involved in Arrest and Pre-trial Detention

Mr. Jamaludin explained that as far as the prisons are concerned it is essential that the prison officers be trained in order to carry out their duties efficiently. Skilled and intelligent supervision of prisoners is basic to competent prison administration. Mr. Martin felt that judges in many countries were not fully aware of the practice of arrest and detention as being done by the police and also whether the police has much concern for the human rights of the arrestees.

Dr. George, the UNAFEI visiting expert for this Seminar, mentioned that there was a need for closer liaison and cooperation between the prosecutors and police officers so that they could discuss departmental policies and practice in the jurisdiction. In some places, the relationship between police and prosecutors was sensitive because police usually did not want too close supervision from prosecution on their activities. While on the other hand the prosecutors regret receiving cases that have not been adequately investigated. He further added that some legal advisers should be provided to the police department so that the police could get specific guidance in matters of law.

Conclusion

The criminal justice system was formulated to effectively control crime while protecting human rights of the accused under arrest and detention. In order to realize both of these principles the coordination of various agencies under its administration is vitally important.

For many years the United Nations has expressed concern regarding the protection of human rights for those people under detention. Various standards, principles and recommendations have been set up and intensified for this purpose. The question here is whether these standards, principles and recommendations are actually adhered to.

The problem in most of the developing countries is that the average daily population of prisons has increased to a large extent over a short period of time. The existence of overcrowding in many of their prisons or detention houses would suggest that our practice in criminal justice falls short of the ideal. It is without doubt that this burden is crippling the efforts of the correction agency to render the decent conditions and secure rights of the incarcerated as required by the United Nations Standards.

Something has got to be done. It can be seen that inadequacies in the bail system and delay of trials are directly responsible for the overcrowding in remand prisons. Thus there is a need for a close examination into this matter. Only with more understanding and coordination of the various segments of the criminal justice system this problem and many others could be solved successfully.

PART II

Material Rroduced During The 55th International Training Course On the Institutional Treatment Of Adult Offenders

SECTION 1: EXPERTS' PAPERS

Some Practical Problems in Asian Corrections

*by J. P. Delgoda**

Introduction

The current correctional policies in Asian countries are a mixture of Eastern and Western philosophies of the past few centuries. Many of these countries boast of a cultural heritage that goes back several centuries and of ancient civilizations predating those of western nations by hundreds of years. Many of them have been under foreign domination of the Portuguese, the Dutch, the French and the English at various times during the past few centuries and regained their independence during the last three or four decades. During the period of foreign domination the western powers introduced their own criminal justice systems into these countries in order to facilitate their administrative control over them. As a result the criminal justice systems of countries in the region include both the Anglo-Saxon as well as the continental types mixed with the traditional forms of legal administration plus the less formal traditional forms of social control based on Hindu, Buddhist and Muslim conceptions of social structure.

With the attainment of independence in many of these countries there was a revival of cultural and national activities. Many countries have adopted their own language as their official language. Others have adopted new constitutions and made changes in the forms of government. Yet there has been little or no drastic change in the correctional or criminal justice systems in the region. There has been no return to the harsh and severe methods of punishing criminal offenders which perhaps existed in these countries before the foreign domination. On the contrary the trend towards the more humane and less punitive methods of dealing with the offender introduced by the western powers have been continued by and large. The picture is one where slowly but steadily more and more countries in the region have been adopting the treatment techniques that have been tried out in America and Europe. This is evidenced by the new methods that have been introduced into the correctional systems of many countries in the region during the twentieth century such as probation, parole, home leave, work release and suspended sentences. This is no doubt due to the influence of the United Nations and allied agencies that have encouraged global perspectives in the treatment of offenders and prevention of crime. Many correctional administrators from the Asian region have benefited from the training programmes made available under the United Nations and Colombo Plan programme and on their return to their own countries attempted to introduce the new concepts in operation in other countries. In this context the work of UNAFEI has been particularly valuable in that during the past eighteen years of its existence it has offerred training facilities to a very large number of officials employed in the criminal justice systems of Asian countries. There are alumni of UNAFEI in almost every country in the region and the training given to these officers must have some impact on the correctional and criminal justice systems of these countries.

The introduction of change in the correctional system is a slow and difficult process even among affluent societies. It is far more difficult in the Asian setting. In this paper it is proposed to examine some of the practical difficulties experienced by correctional administrators in the Asian region both in their day to day administrative functions as well as in their attempts to introduce changes into the existing systems.

* Commissioner of Prisons, Sri Lanka

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administrators. For example many countries in the region are managing with prisons which were built during the last century. These antiquated buildings do not often have the facilities necessary for a modern correctional institution. They lack adequate security facilities such as gun turrets or watch towers and modern electrical and electronic equipment. Some of them do not have even basic facilities such as water service and drainage. Many of them are barely held together with much difficulty and the expenditure of considerable sums of money on repairs and maintenance. When no new prisons are built, the tendency to cope with increased population is to build temporary structures in the limited space available within the boundary wall of an existing prison. This in turn leads to congestion inside the prisons and reduces the space available for recreational facilities for prisoners. The difficulties of managing an antequated, congested, overcrowded prison without basic amenities can be better imagined than described.

Again, there are some countries where the funds provided are inadequate to give the convicted offenders their basic requirements. There is one country where adequate funds have not been provided for prisoners' clothing and as a result prisoners have been allowed to wear their own private clothing. In another country adequate funds have not been provided for vehicles for the transport of prisoners. As a result prisoners are taken about by public transport in buses or trains or in hired vehicles. This has resulted in increased escapes while on transit and disciplinary action against prison officials. The use of restraints on prisoners who are taken about in public transport has also raised unfavourable comment from members of the public. The inadequacy of funds has also resulted in the shortage of staff in many prisons in the region. There may be many similar instances where facilities and services available to the prisoners or the prison officers are reduced or even totally omitted in order to accommodate a reduction in the budgetary provision. This in turn could lead to serious repercussions because in any prison in the world dissatisfaction among staff and inmates could easily terminate in a riot. The fear of a riot and the consequent danger to life and property is any prison officer's biggest bugbear.

Overcrowding of Prisons

The second major problem for correctional administrators in the region arises from the acute overcrowding of prisons in almost all the countries in the region. The overcrowding is often due to the presence of an excessively large number of remand prisoners and short term offenders. In many countries well over half the daily average population of convicted prisoners are those serving sentences under six months. A large percentage of this number again are those serving short sentences in default of payment of fines. In the case of both these categories the period of imprisonment is not long enough for any kind of vocational training in a planned programme for rehabilitation. These prisoners are exposed to all the evil effects of imprisonment without receiving any benefits from their imprisonment. For them prison administrators can only guarantee all the negative results such as break up of the family, loss of employment, association with hardened criminals and so on. Since their period of imprisonment is too short for any rehabilitative programmes they can only be employed on jail service labour such as washing, sweeping, cleaning, and cooking services in the prison. Recently however some countries in the region have introduced the work camp concept for short term offenders. Under this scheme short term offenders are taken out of the prison and sent to work in open work camps where they are employed on agriculture and animal husbandry and detained under minimum security conditions. This training is considered valuable as in many of these countries the large majority of offenders come from an agricultural background.

Many Asian prisons are overcrowded owing to the presence of a large number of

remand prisoners. In some countries the average daily number of remand prisoners is more than fifty percent of the daily prison population. When prisons are called upon to detain such a large number of remand prisoners what invariably happens is that they are compelled to use up the accommodation meant for convicted prisoners for remand prisoners. When there is no accommodation in the remand prisons, they are provided accommodation in sections of the convicted prisons. This leads to several other problems. The segregation of the remand from the convicted prisoners becomes less effective. Security is weakened. Additional staff has to be diverted for additional visits for remand prisoners. All this means more work for the staff whereas there is no provision for the recruitment of additional staff. The facilities and programmes for the convicted prisoners would be restricted. They will have less accommodation and less facilities. The people who will suffer most by the location of remand prisoners in a convicted prison are the convicted prisoners.

There may be several reasons for the detention of such a large number of remand prisoners for long periods. One of them could be the attitude of the Police. In countries where the Police officers do the prosecutions in courts quite often they object to the offender being released on bail. The reasons adduced by them are that the accused might intimidate the witnesses or harm them or even commit further offences when he is out on bail. There could also be delays in completing the police investigations or again technical reports or medical reports could be delayed as most of these countries are experiencing a shortage of officers with this type of skills. The court procedure itself may cause a certain amount of delay. Many courts are overburdened with a large number of cases on their roll and therefore it is not possible for magistrates to dispose of cases early. Cases are often postponed for non availability of witnesses or lawyers or even police officers. There are also some magistrates who order bail with high security which the accused is unable to furnish. At present in many countries in the region there is no system whereby the court is appraised of the accused's ability or inability to furnish the bail fixed by court or for that matter any information at all which might help the magistrate to determine whether the accused can be released on personal bail. He has to rely only on what the police tell him. There is no doubt that many persons who are now detained on remand could be released on personal bail if investigations are made regarding their background. The court could make a better decision on this matter if such information as to whether the accused has a permanent job, or is married and has a home and family in a particular area is made available to court. The presence of such a large number of remand prisoners creates problems regarding their production in courts or at identification parades which are further aggravated by the inadequacy of vehicles for their transport or shortage of officers to escort them. In view of the acute overcrowding among remand prisoners quite often first offenders and hard core recidivists are located together as remandees. Sometimes even youthful offenders are not segregated. There is therefore much contamination and a great deal of damage caused during the period offenders are detained as remand prisoners in overcrowded prisons.

Staff Problems

There are many problems regarding staff matters in the Asian prison systems. Unlike in the western countries most countries in the region do not provide specialised staff for social jobs such as clerical and accounting work or food services or even for maintenance of buildings and plant. Custodial officers attend to all the clerical and accounting work in prisons. The maintenance of buildings and plant is also attended to by custodial officers using prison labour. The superintendent or jailor in charge of an institution is expected to be able to supervise building and maintenance, electrical equipment and plant and even cooking and accounting work. A similar situation is the

absence of adequate doctors, psychiatrists and psychologists. In almost all the countries in the Asian region there is an acute shortage of qualified doctors, psychiatrists and psychologists and when the whole country is short of this type of personnel it is impossible to expect them to be available to the prison service.

A far more serious problem is that in addition to the shortage of these specialists, in some countries, there is a shortage of even ordinary custodial staff. The staff inmate ratio within the region varies from 1:4 in some countries to 1:40 in others. When there is a shortage of staff, welfare and rehabilitational programmes are set aside and emphasis is placed on the prevention of escapes. There is always the fear of an outbreak of violence inside the prisons and this in turn effects the attitude of the staff both towards the prisoners as well as towards their own work. The shortage of staff may be due in some countries to budgetary problems but in others it may be due to the difficulty of finding persons who are willing to serve in the prisons. It may be that persons are not willing to join or even those who join, not willing to remain in service owing to poor job satisfaction and the low status which prison officers occupy in the community. In many countries in the region prison officers are looked upon as mere guards and are designated accordingly. Their status in the hierarchy of the public service in these countries is comparatively low and they are poorly paid. The conditions under which they work are both unattractive and unsatisfactory. In many countries they have to work long hours without overtime pay. They have to work under gloomy and unpleasant surroundings under the ever present threat of a possible outbreak of violence. They cannot be sure of their leave and off duty owing to shortage of staff. All these conditions render it impossible to attract and retain the services of the educated and intelligent type of persons in the prison service. The result is that many young persons accept this job only because there is widespread unemployment in the region and it is a government job. They remain in it only until they can find something better. Only those who fail to find anything better continue to make a career in the prison service.

A further staff problem is that in some of the countries in this region there is little or hardly any training given to prison officers particularly in the lower ranks. Only some of them have recently started training centres for prison officers. The result is that a large percentage of the older staff have had no training and are punitive oriented in their attitude. They have no knowledge and no faith in the new rehabilitational techniques.

Yet another staff problem which is perhaps not frequently seen in western countries is that created by bribery and corruption among prison officials in the region. Incidents of bribery, trafficking with prisoners, the introduction of contraband and other corrupt practices by prison officers are a constant threat to good administration and proper management of prisons in the region. Although this is not a problem confined only to the prison service in these countries it is more dangerous than in other branches of the public service when prison administrators have to rely on officers whom they cannot trust.

In addition to all these problems regarding staff correctional administrators have to contend with low morale among prison officers. This is due to the general feeling among prison officers particularly of the lower ranks that while much attention has been given in recent years to improve facilities for the prisoner little or nothing has been done to improve the lot of the officer. They have many grievances against the administration in many of these countries. In addition to the poor pay and working conditions already mentioned above they do not receive some of the fringe benefits given to other uniformed services such as the police or the army in these countries. Their housing facilities are woefully inadequate. Many countries do not have any organisation for staff welfare. Risk insurance or compensation schemes are not available. Further in many of these countries prison officers are not allowed

to form trade unions and they have no means of ventilating their grievances. All these factors put together tend to create a situation where the most important people in the business of rehabilitating criminal offenders, namely the rank and file of the prison service have more problems than the prisoners themselves and are at cross purposes with the administration.

Problems Regarding Prisoners

The presence of political prisoners who are often held for long periods without trial in some of these countries creates another problem for correctional administrators. This is a problem that has arisen in many countries after the attainment of independence. Very often these prisoners are politicians from the opposition who command some influence in the community. They are not interested in following the prison rehabilitational programmes and only try to behave in such a manner as to attract public attention. They attempt to carry on their struggle with the government in power by creating disturbances within the institution. Quite often the fact that they were in prison enhances their political prestige. There may also be certain officers who sympathise with them and contribute to their political views and such a situation would create further problems for the administrator.

The presence of special types of offenders is another peculiarity in this region. These are members of secret societies or gangster groups or such groups as the dacoits of India. These prisoners would continue to have their own groups and followers in prison and thereby create special problems for the administration. When such groups are known to be violent even officers would be reluctant to antagonise them while they are in prison for fear of reprisals. This could in turn effect their duties. Such groups require special attention and special programmes which the administrator cannot provide in an overcrowded prison which is short of staff.

The changing patterns of criminal behaviour in the community constitutes another problem for correctional administrators in this region. Many of the countries in this region are in the process of rapid urbanisation and industrialisation. In many of them there is political and industrial unrest. While the prisons have not changed, the attitude of the masses towards the administration is fast changing. The masses today are more vociferous, more demanding and less submissive than their counterparts of a generation ago. This situation is reflected inside the prisons also. Today's prisoners too are more violent, more assertive and more conscious of their rights and privileges than those of a generation ago. In many Asian countries there has been an increase of gang violence with the use of firearms. There are more armed robberies and bank holdups. In many of these countries there is an increase of the number of offenders in the age group under thirty years. The handling and treatment of these younger, more educated, more violent and more demanding men is more difficult than they were in the past. Prison officers are called upon to manage under these changed conditions without any of the facilities available to prison officials in western developed countries.

Lack of Coordination between Agencies in the Criminal Justice System

Many countries in the region suffer from a lack of coordination between the different branches of the criminal justice system and thereby create problems for prison administrators. The police, the judiciary, the prison and probation departments in many of these countries work in separate water tight compartments. Quite often each of them come under different ministries. Many of the personnel in each of the branches do not have a proper understanding of the functions of the other branches. Quite often they are suspicious or openly hostile towards each other. For example the police officers do not believe in corrections. Many judges do not know what goes on inside the prisons. Very often the prison administrator is at the receiving end of the connected problems because in

Non-Availability of Funds

The foremost problem in almost all these countries is that of obtaining adequate funds for crime prevention and treatment of offenders. In the allocation of funds, crime prevention and treatment of offenders ranks as a very low priority item in the national budgets throughout the region. There is one very good reason for this state of affairs. Almost all the countries in the region except Japan, would come under the category described as "developing nations." In a developing country the prime national effort is on economic development. In planning for development emphasis is on attempts and strategies to improve the gross national product rather than on social problems. Planners in the region are primarily concerned about development of agriculture and industries where the results are more tangible and immediate. Even when there is concern about planning for social welfare, the emphasis would be on improving services such as health, education and employment. It is no doubt true that in many of these countries there is large scale unemployment, poverty, illiteracy, malnutrition and disease on near epidemic levels which require prior attention. These problems are far more apparent than the crime problem and their solution is far more urgent and important. In comparison planners in the region do not see crime as a serious social problem. They are therefore reluctant to make an investment in programmes for crime prevention and corrections.

Another reason for this attitude on the part of the planners would be the operative correctional philosophies in each country. Although correctional workers have their own views in keeping with the latest trends in the field there is no wide acceptance of some of these new concepts of rehabilitation. The punitive ideology is what is widely accepted and there is a reluctance on the part of planners and treasury officials to provide for expenditure on new concepts in the treatment of offenders. They are content with imprisonment and the provision of the barest minimum facilities for the offender despite the increasing per capita cost of maintaining offenders in prison.

Not only the planners but even the general public in many of these countries have maintained a rather negative attitude towards corrections. Until recently there was little or no community involvement in corrections. The general attitude was one of apathy and indifference to the problems of the offender after his conviction and sentence by court.

Whatever the reasons may be planners in the region do not seem to realise the gravity of the crime problem as against the perspective of more pressing economic and social problems although during this century every country has shown a tremendous increase in crime. The costs of crime and its social consequences both in terms of hard cash as well as human sufferring do not seem to be taken into account adequately in the preparation of the national budgets in the Asian region. The result of this kind of policy is that correctional administrators find it extremely difficult to obtain funds for correctional programmes and the introduction of reforms. Treasury officials are prone to omit new proposals that are likely to involve additional expenditure and allocate only minimum funds to carry on. This attitude and the failure to provide funds often acts as a damper on enthusiastic correctional administrators and precludes the introduction of innovations in corrections and criminal justice.

Quite often in many countries in the region not only is it extremely difficult to obtain funds for new concepts but even the recurrent financial provision is barely adequate for the services that have been going on in a situation where there is an increase in the prison population accompanied by an increase in the per capita cost of feeding and maintaining each offender in prison. It may not be incorrect to state that in many countries there has been a deterioration of the facilities available owing to non-provision of adequate funds. This in turn creates a host of problems for correctional

SECTION 1: EXPERTS' PAPERS

Some Practical Problems in Asian Corrections

*by J. P. Delgoda**

Introduction

The current correctional policies in Asian countries are a mixture of Eastern and Western philosophies of the past few centuries. Many of these countries boast of a cultural heritage that goes back several centuries and of ancient civilizations predating those of western nations by hundreds of years. Many of them have been under foreign domination of the Portuguese, the Dutch, the French and the English at various times during the past few centuries and regained their independence during the last three or four decades. During the period of foreign domination the western powers introduced their own criminal justice systems into these countries in order to facilitate their administrative control over them. As a result the criminal justice systems of countries in the region include both the Anglo-Saxon as well as the continental types mixed with the traditional forms of legal administration plus the less formal traditional forms of social control based on Hindu, Buddhist and Muslim conceptions of social structure.

With the attainment of independence in many of these countries there was a revival of cultural and national activities. Many countries have adopted their own language as their official language. Others have adopted new constitutions and made changes in the forms of government. Yet there has been little or no drastic change in the correctional or criminal justice systems in the region. There has been no return to the harsh and severe methods of punishing criminal offenders which perhaps existed in these countries before the foreign domination. On the contrary the trend towards the more humane and less punitive methods of dealing with the offender introduced by the western powers have been continued by and large. The picture is one where slowly but steadily more and more countries in the region have been adopting the treatment techniques that have been tried out in America and Europe. This is evidenced by the new methods that have been introduced into the correctional systems of many countries in the region during the twentieth century such as probation, parole, home leave, work release and suspended sentences. This is no doubt due to the influence of the United Nations and allied agencies that have encouraged global perspectives in the treatment of offenders and prevention of crime. Many correctional administrators from the Asian region have benefited from the training programmes made available under the United Nations and Colombo Plan programme and on their return to their own countries attempted to introduce the new concepts in operation in other countries. In this context the work of UNAFEI has been particularly valuable in that during the past eighteen years of its existence it has offerred training facilities to a very large number of officials employed in the criminal justice systems of Asian countries. There are alumni of UNAFEI in almost every country in the region and the training given to these officers must have some impact on the correctional and criminal justice systems of these countries.

The introduction of change in the correctional system is a slow and difficult process even among affluent societies. It is far more difficult in the Asian setting. In this paper it is proposed to examine some of the practical difficulties experienced by correctional administrators in the Asian region both in their day to day administrative functions as well as in their attempts to introduce changes into the existing systems.

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the existing hierarchy of the administration he dares not challenge an order made by a judge. It would certainly be much easier for everybody concerned if all these arms of the criminal justice system had a proper understanding of each other's functions and problems. What is required is the organisation of proper training for police, prison and judicial officers in the correctional process. At present in many of these countries judicial officers have only their legal education as lawyers and this is considered to be adequate. They do not receive any training as judges in sentencing techniques. As a result it is difficult to see any sentencing policy as such in many of these countries. There is plenty of scope for joint seminars and training programmes for judges, police officers and prison and probation personnel in order to solve the existing problems.

Lack of Research in Corrections

Correctional administrators are also handicapped by the woeful inadequacy of research or studies on correctional work in the region. There are hardly any publications on crime and corrections in the region. There is no research or information on the impact of the introduction of innovations into the correctional systems of countries in the region except of course the material published by UNAFEI. Even the universities in the region have little or no research on crime and corrections. Unlike in America or Europe there is very little coordination between the universities and the departments in charge of corrections. None of the correctional administrators have any ongoing research projects in their own countries on any aspect of their work. In fact correctional administrators in the region do not seem to be oriented towards the need for research and study in their field.

There is also no uniformity in the collection of prison statistics or for that matter any crime statistics in the region. Even at a national level each government department merely collects the statistics required for the publication of its administration reports annually. Therefore in the assessment of the crime situation in any country correctional administrators have to go by mere hunches rather than on any systematic statistical basis. In such a situation the introduction of change is like a game of blind man's bluff.

Inadequacy of Community Involvement in Corrections

The last but not the least important problem for correctional administrators in the region is the inadequacy of community involvement and poor support from the community in their efforts to rehabilitate criminal offenders. This is evidenced by the poor aftercare services available to discharged offenders. This is largely due to the general attitude that the business of dealing with the offender after conviction should best be left in the hands of public officials alone without interference from the community. In the past correctional officers themselves have tended to create this situation when they locked the door on the community and took the prisoner in. The community did not know what was happening within the four walls of a prison and therefore its attitude towards the ex-offender was one of mistrust and fear. In many of these countries there is a great deal that can be done by the community to help the discharged offender and thereby facilitate the work of correctional administrators. Many ex-prisoners are from the poorer classes and have no resources at all when they come out of prison. Governments also do not provide funds for programmes for ex-offenders. Therefore there is a great need in the region for organised community assistance for the discharged offender. Fortunately the situation is now changing gradually in a few countries where there have recently been some efforts made to educate the community through the mass media and increase their involvement in corrections. There is however a need for the community to be organised and led in this effort and this is a role that should be filled by correctional administrators themselves if they need the

assistance of the community in their efforts to rehabilitate criminal offenders.

The problems confronting the Asian correctional administrators and the difficult conditions under which they run their prisons have been examined above. They are managing without adequate funds, without adequate staff, in antiquated buildings without any of the modern facilities under very difficult conditions. Yet there have been few escapes from custody and fewer instances of violent riots in the prisons in this region. It is indeed a tribute to their devotion and personal involvement in the daily business of managing their prisons that they have been able to maintain this state of affairs under such trying conditions. They have been able to do so also because of the humane treatment given to the offender in the Asian prisons. The relationship between staff and inmate in the Asian prisons is much better than the staff-inmate relationship in many European or American prisons. Also the prisoner in this part of the world accepts the authority of the government official more readily than his counterpart in the European and American prisons. This is perhaps due to the Asian cultural heritage of accepting the authority of those placed in positions of control.

The fact that there have been no serious incidents and that correctional administrators have managed to run their institutions without any violent outbursts however should not lead to complacency on the part of Asian governments. There are twin dangers to be seen in the continuance of the present system whereby crime prevention and corrections are starved of funds and we continue to deprive the prisoner and the subordinate officer and create dissatisfaction among them. On the one hand there is the danger that the Asian prisoner will not continue to be humble and submissive and tolerate all the deprivations imposed on him for very much longer. The indications are that the new prisoners are younger, more violent, more aggressive and more ready to fight for their rights and privileges. The second danger is that the rank and file of the prison staff will not tolerate very much longer their neglect and unsatisfactory working conditions which have been imposed on them by the administration. They too are becoming more educated, more vociferous and demanding. It is not possible for any administrator to carry on if both the staff and inmates are antagonistic towards the administration. Therefore it is necessary that planners and treasury officials should be appraised of these dangers ahead of Asian corrections so that the necessary funds are made available before there is a violent outburst. In the long run the investment of funds now is much cheaper than rebuilding a prison after it has been destroyed by a riot and several lives have been lost.

Recent Changes in Correctional Policies and Practices in Sweden

*by Knut Sveri**

1. Background—1940 to 1965

Since the 1940s a great many changes in crime policy have taken place in Sweden, all of them directly or indirectly influencing the correctional system, its structure and daily work. In 1945 a new Prison Law abandoned the principle of the solitary system (in actual correctional work abandoned earlier) and introduced a system of joint activities for the inmates in the correctional institution. In 1944 special attention was given to young offenders in order to avoid the stigmatization of a court proceeding. The public prosecutor was given the opportunity not to prosecute 15 to 18-year-old delinquents and could from this year choose between court proceeding and referral to the local Child Welfare Board. In 1948 a new Criminal Procedure Law was introduced, changing the court proceedings to a less formal system than it had been earlier. Especially important was the changed role of the prosecution, which following the principle from the 1944 year law on young delinquents was given greater freedom to choose between prosecution and other measures, such as summary penalty (fines ordered by the public prosecutor himself) or decision not to prosecute.

The greatest change, however, came with the introduction of a new Criminal Code in 1962 (in force from 1 Jan. 1965). The work on this Code had been started in the late 1930s by two committees, one in charge of the definition of the criminal behavior itself, the other in charge of the sanctioning system—the penalties.

The latter committee presented its proposal in 1956, which internationally arouse great interest.[1] The reason for this was that the committee suggested that all sanctions should have a rehabilitative aim. The word "punishment" did not appear in the proposed law at all, but was replaced with "social and individual reactions" showing clearly that the committee wanted to make away with any trace of punishment for general preventive reasons. After a long and sometimes bitter debate among all concerned, the Minister of Justice presented his bill for a new Criminal Code to the Parliament in 1962, reinstating the word "punishment," but at the same time suggesting as a guideline for the courts that they, when deciding between different sanctions, should "with due consideration for what is necessary in order to maintain the law-obedience of the public, give special attention to the rehabilitation of the offender" (C.C. Chapter 1, Section 7). In order to balance these two contradictory principles, the Code gave the courts a great variety of reactions to choose between: Two reactions, imprisonment and fines were called "general punishments" while conditional sentence, probation, youth prison, internment and commitment for special care (by psychiatric institutions, child welfare institutions, etc.) were called "sanctions". While imprisonment and fines mainly should be used for general preventive reasons, the other measures should be used in order to forward the offender's adjustment to society or (in the case of internment) to protect the public from habitual and dangerous criminals.

With some amendments, the Criminal Code is still in force. Important to notice is, however, that not only the committee making the proposal for the new system of reactions, but even the Ministry of Justice bill did point out that imprisonment had many detrimental consequences from the standpoint of readjustment of the offender. This view was fully endorsed by the Parliament. In practice, this statement had an important effect. It has greatly influenced the courts, which generally try to avoid using imprisonment. Comparing sentencing practice before the introduction of the Criminal Code (1960-64) with the practice of today (1974-78) it can be shown that

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the number of sentences involving imprisonment has not increased, in spite of an increased crime rate and an increase of 50 percent in the number of persons sentenced.[2] Furthermore, the length of the sentences has been shortened considerably—of the 11,404 offenders who were sentenced to incarceration in 1964, 38 percent had sentences for 6 months or more, while of those 11,034 who were sentenced in 1978 only 25 percent received such comparatively long sentences. This changed practice, together with extensive use of parole, has also led to a sharp decrease in the daily average of offenders in closed prisons, from 3,500 in 1965 to 2,000 today, while the daily average in open prisons has been the same—1,500 since 1965.[3]

2. Reforms—1965 to 1980

Although the principles and the implementation of the Criminal Code of 1962 and the Prison Law of 1945 may be described as very liberal, they were from the end of the 1960s attacked from many quarters of the Swedish society. The critic was to a large extent directed towards the use of incarceration and the situation of the prisoners—both those remanded in custody awaiting trial and those sentenced—and led to the formation of a private organization (KRUM—the association for more humane treatment of prisoners) to which many intellectuals and prisoners became affiliated. Although looked upon with some reluctance from the prison administration, the general program of the association was by no means foreign to the administration itself, neither to the Department of Justice and its Minister. The Association wanted less use of imprisonment (ideally it should be abandoned completely), more openness between daily prison life and the surrounding society and more specific rules regulating the rights of the prisoners. Although these principles could be considered as extensions of the principles laid down in the Criminal Code, it is no doubt that the work of the Association speeded up the process of the reform work.

While this critic mainly was based upon an ideological evaluation of the prison system—albeit with examples from practical life of its injustices—at the same time empirical evidence of the detrimental effects of prison life appeared from criminological studies carried out in many western countries.[4] This increased the knowledge and led to more systematic studies of the effectiveness of imprisonment and other penal measures in general, showing that the expectations of the policy makers seldom were met in actual life. The critic and its consequences were in 1977 summed up in a report from the National Swedish Council for Crime Prevention called A New Penal System.

This different ideological and empirically based views had a great impact upon the reform work in the period with which we are concerned. In order to decrease the use of punishment the Parliament decriminalized drunkenness in public places and changed the definitions of burglary and robbery in 1976 (thereby restricting the number of cases to be punished with long-term imprisonment), and made similar changes even concerning some other quantitatively less important crimes. On the other hand the necessity for new criminalization led to increased punishments for drug-trafficking and tax-fraud. In order to diminish the length of imprisonment, the Parliament in 1965 changed the rules concerning parole and introduced in 1973 a general rule concerning credit for time spent in remand prison prior to the sentence—from that year the time counted runs from the moment of arrest.

In 1979 the Parliament further accepted some principally important changes in the sanctioning system. Most prominent was the abolishment of youth prinson.[5] This type of sanction was introduced in 1937 and kept in the Criminal Code without any changes. Youth prison was meant to be a rehabilitative instrument for young offenders between 18 and 21 years of age, it included both institutional and non-institutional care, it was indeterminate in length, but could not be extended over 5 years of which no more than 3 years in institution.

At the same time another measure, probation with institutional care, was abolished. This sanction, introduced in the Criminal Code, was a combination of probation—which was the main content of the sanction—and a relatively indeterminate prison term of 1 to 2 months immediately after the sentence had been pronounced. Furthermore, the reform included a change in the restrictions concerning use of imprisonment for offenders under 18 years—these restrictions were extended to persons under 21 years of age. And lastly, the hitherto existing rule that a person, serving a sentence of 4 months and less could not be paroled was changed to 3 months, and the prescriptions for revocation of parole in general was strengthened.[6]

As the main reason for these changes the Minister of Justice stated, that both youth prison and institutional care of probationers are indeterminate sanctions, which as such "are contrary to the values which have formed the basis for recent crime policy."[7] Obviously, this statement refers to and accepts the critic of the rehabilitative model for institutional treatment and the negative attitude towards imprisonment expressed in the Swedish debate. Even the relatively short "indeterminate" sentence included in probation with institutional care is not left untouched, and instead of this the court can from this year give a sentence of 1-3 months length to be combined with probation, but it has to state the exact time to be served.

Lastly, a proposal for the abolishment of internment is pending before the Parliament. Instead of this indeterminate measure for habitual offenders, the Ministry of Justice suggests, that in exceptional cases the court may increase the sentence with up to 2 years.[8]

3. The Prison and Parole System

3-1 Prison reform—1973 to 1974

In order to be ready for the changes which would come with the new Criminal Code in 1965, the prison administration presented in 1962 a plan for a reform of the prison system, including the erection of a series of new prisons. The country should be divided into sections, each of which should have all types of prisons sufficient to cover the expected intake in each section. This huge program would have included closed prisons with different degrees of security, a youth prison, an internment prison, an institution for institutional care of probationers and a series of small open prisons in each section of the country. The construction of some of these prisons was immediately started, but due to the costs the plan was supposed to take at least ten years to carry out. This delay was fortunate. As earlier described, the courts were reluctant to use imprisonment and since the daily population of prisoners declined, there were no need for all the expected places. The new Minister of Justice, who was himself negative to the use of incarceration, abandoned the earlier plans and set down a committee with completely new directives. The result of its work was presented to the Parliament in 1973. A new Prison Law (P.L.) was enacted in 1974.

This reform, which is now being carried out, is built upon the idea that the prisoners should serve their term in an institution close to their homes, in order to keep frequent contacts with their relatives and to have access to the social services of their local communities while they are in prison.

3-2 Organization[9]

The National Prison and Probation Administration is the central administrative head of the correctional system including prison, parole and probation. It consists of a board with the director general as the chairman and 9 other members appointed by the government. In addition representatives from the prison officers, representatives from the probation officers and members of labor unions are always present. In 1978 the 9 members of the board were: the vice-director of the administration, a representative from the National Welfare Board, a representative from the Central Labor Unions, 3 members of the Parliament (all women), one director from a private industry, and a

representative from the National Labor Administration.

The daily work is carried out by an administrative staff of 390 members. The organization is mainly an administrative authority, but has in certain matters even the duty to make decision directly connected with the single inmate (e.g. to order certain punishments for misbehavior). Most decisions of the latter type are the duty of the different boards, namely The Central Correctional Board, The Internment Board and the local supervision boards. The director general is a member of the Central Correctional Board, but the head of the board is a supreme court judge. This board decides in matters concerning parole, etc. for persons sentenced to more than one year imprisonment. It is also an instance of appeal for decisions made by the local supervision boards. The Internment Board has similar duties concerning persons sentenced to internment.

The local supervision boards, of which there are 50, are responsible for parole and probation within their respective regions. Each board has five members and the chairman must be a lawyer, usually a judge, while the rest are laymen. The duty of the board is to decide in matters concerning parole for prisoners and arrangements for probations, including special provisions and restrictions for such decisions. If conditions set up for the parolees and probationers are broken, the board may order the police to apprehend the offender and he may be placed in prison for up to a week while the board decides in the matter. In 1978, 557 such incarcerations took place. The board may even decide that the parole should be revoked and send him back to prison for the rest of his term (or part of it), or institute proceedings against him in a criminal court. Neither is very common, in 1978 these measures were taken only in 32 and 16 cases respectively.

The work of the supervision board is considered very stimulating by most members. Especially many judges have found that the work gives them insight into the difficulties many ex-prisoners and probationers have, which the judges find most useful when they sit on the bench doing their daily work in the criminal courts.

3-3 The prison system and allocation of inmates

Since 1974 there are no more any special institution for internment, imprisonment or other types of sentences. The allocation of the inmates is arranged according to the following principles. The institutions are divided into *national and local prisons* of which there are both *closed and open institutions.* In 1978 there were 15 national closed institutions with a capacity of 1,312 places—the largest being Kumla with 213 places (administratively divided into 2 institutions with 70 and 143 places). Furthermore, there were 10 national open institutions with 603 places. In addition, the womens prison (the only one in the country) had 48 closed and 34 open places. In the same year the number of local institutions were 51, of which 21 were closed (with a total capacity of 729 places), and 30 open (with 1,210 places). As can be understood, each of these institutions are very small, most of them accepting 20-60 inmates.

In the Act on Correctional Treatment in Institutions (The Prison Law) is described how the allocation shall be to the different types of institutions: If an inmate has a sentence of one year or more, he shall be placed in a *national institution,* but may be transferred to a local prison if this is necessary in order to prepare him for release. Prisoners with a sentence of less than 12 months shall, in principle, be placed in a *local institution.*

Concerning the use of open or closed institutions, the main rule is that a prisoner should be placed in an open institution unless there is risk that he will abscond or that he represents a "security risk." But a prisoner who is in need of services which can only be given in a closed institution, may be placed there if such an institution can better manage his needs. For those who are serving more than two years the general principle is opposite: They shall be placed in a closed institution unless there is reason to believe that they will not abscond

and continue their criminal activity. However, even these inmates may be transferred to open institutions in order to arrange for their release or for other reasons.

As can be understood, these prescriptions aim at greatest possible flexibility within the system. It should also be noticed, that the inmate himself shall be given opportunity to express his own views concerning his placement—as in all other matters which particularly affects him (P.L. Section 5).

In 1978 there was no overcrowding in the institutions. The average daily population was 85 percent of the capacity in the closed national institutions and 82 percent in the open institutions. The equivalent figure for the local institutions were 77 percent.

3-4 Treatment in institutions

When entering the institution the prisoner shall together with the institutions' *treatment board* make up a treatment plan for his training during his stay. This plan shall take into consideration his special skills, his need for education and vocational training, his physical and mental health and his need for medical and dental treatment.

It is the duty of an inmate to do the work prescribed for him or to study, if he so wishes. For his work as well as his study, he receives a remuneration, which approximately is about $1 per hour. Some prisoners working on special types of jobs may, however, earn much more and on the other side, even those who are unable to work for medical reasons are given a certain remuneration in order to meet their daily need for tobacco, newspapers, etc.

Since 1972 an "experiment" has been undertaken to introduce competitive wages for the inmates in an open institution (Tillberga). This institution, which has a capacity of 118 places, has a modern factory for producing prefabricated houses. The wages paid is "competitive" of those which are paid for similar work in the open society—in 1978 approximately $3.25 per hour after taxes. The aim of the experiment is to straighten out some of the economic difficulties the inmates are known to have, and especially to secure that they have a fair amount of money to start with when they leave the prison. Together with the inmate, the economic advisor of the institution makes a budget for his income and expenses (including unpaid debts etc.) and 75 percent of his income is used for taking care of these problems. Whatever is left is kept for his release. In 1975 a similar experiment was started at a closed institution, Skogome, which has a capacity of 88 places and a large laundry doing washing for the hospitals in the area.

The effects of these experiments have been evaluated by the research division of the Prison and Probation Administration.[10] The reports showed that the inmates were positive to the treatment they had received and that their economic situation had been improved. However, due to the difficulties on the labor market, they had 12 months after leaving the institution worse economic conditions than before entering the institution. Obviously, work training and competitive wages are no solution to the problems of readjustment, these problems are of a different kind, depending upon conditions in the society itself with which the parole service cannot cope.

Education on the second level (but sometimes even at university level) is arranged in many institutions by arrangements with the ordinary schools for adults in the local community—or in some institutions by their own teachers employed by the prison (at the moment there are 16 such employees).

Most closed institutions have facilities for sport (indoor and outdoor) and there is a library service attached to all institutions. Unless there are special security problems involved, the inmates are free to purchase any types of books, magazines and newspapers they want (there are no restrictions on pornography or any type of political literature). The institutions are ordered to keep necessary number of copies of the most common newspapers available for the inmates. For the benefit of foreigners

staying in prison, the library service has 70 foreign papers and journals in different languages. Furthermore, a copy of the Criminal Code and about 25 other laws and ordinances shall be kept available for those inmates who want to study them.

According to Section 17 of the Prison Law, inmates shall work and spend their leisure time together unless special circumstances make it necessary to stipulate otherwise. An inmate who wants to work and spend his leisure time alone, shall be allowed to do this, but under a doctor's supervision. The general rule that prisoners shall be together, has both advantageous and disadvantageous consequences—it makes the time in prison more tolerable, but it also gives an opportunity for strengthening the in-feelings of the habitual criminals and for plotting new crimes. Special groupings of inmates, headed by a "King", may also sometimes rule the prison by means of threats and harassment.

A special problem in Swedish prisons is the high number of drug-addicts. Approximately one third of the daily population is addicted to stimulant drugs or opiates. In 1979 heroin was, for the first time, estimated to be more common than any other type of drugs. Unfortunately, drugs are found in many prisons and are sold and distributed by the aforementioned groups. It seems to be difficult to stop this trafficking without enforcing such restrictions that the whole idea of humane treatment and "open door" policy will be ruined. Recently two attempts to cope with the drug problem have been made, in both cases depending on the addicts' own wish to get away from the drug. In 1977 two prisons outside of Stockholm was set aside for such prisoners; starting in fact with one remand jail in the center of Stockholm. Remand prisoners who want to stop using drugs may apply for placement in this jail, signing a contract that they will undergo a certain treatment and leave urine test whenever it is demanded. They can then, after sentence, be placed first in a closed prison, and later in an open one. Similar attempts for drug-free institutions—or parts of institutions—are made even in some other places, among these in the women's prison. No evaluation of these undertakings has so far been done. The other attempt is tried out at one hospital in Uppsala, and involves a different approach which made it necessary to make a special law for this experiment only. This law states that under certain conditions a criminal court may decide not to pronounce sentence, but suspend the case while an offender is undergoing treatment in the hospital. The conditions are that the court is convinced that the suspect is guilty of the crime in question and that he agrees to undergo the treatment ("civil commitment").[11] The treatment starts with six to eight weeks in the hospital, and continues with curative work in the community. Urine tests shall be taken twice a week and analyzed at the hospital.

A special feature of the Swedish prison system is the extensive use of *furloughs*. These are of different kinds, but they all serve the aim of making the distance between life in prison and life in the society less striking. The most important types are the following:

a) *Short-term furlough* (P.L. Section 32 as amended in 1978) may be given to all prisoners except when "there is a substantial danger of continued criminal activity or a considerable danger of some other forms of abuse" or for a particular group of long-termers (Section 7, 2). The furlough from some hours to some days, depends on the circumstances and the distance from the prison to the place he wants to visit. If necessary, he may be followed by a prison officer although this usually only is the case when the prisoner is an earlier escapee. In 1978 such furloughs were granted in 40,385 cases, of which 9 percent were abused mostly by the inmates not returning to the prison within the stipulated time.

b) *Release-furlough* (P.L. Section 33). As a preparation for release or parole a prisoner may be given the opportunity to live outside the prison although he technically is a prisoner under the prison's supervision. This type of furlough can be given from the date he is eligible for parole

(which usually means after having served 2/3 of the sentence) and is often used as a transmission between prison and parole. In 1978 release-furloughs were granted in 1,589 cases.

c) *Sojourn* (P.L. Section 34) for seeking special assistance, e.g. in treatment clinics, etc. may be granted and are often successful. In 1978 the number was 627.

d) *Medical treatment* (P.L. Section 37–39). If better care can be given in a hospital than in the prison, the prisoner shall be transferred to a hospital.

e) *Partaking in leisure time activities* outside the prison (P.L. Section 14). The prisoner may be allowed—alone or in groups—to leave the institution in order to take part in club activities, studies, sports or to go to the theater, cinema or similar entertainments. If necessary, it can be ordered that they are under surveillance.

f) *Daytime work leave* (P.L. Section 11). In local institutions the prisoners are encouraged to find work or studies outside the institutions and may be granted permission to spend their daytime in such activities. In 1979, 15 percent of the clients had this type of arrangements and efforts are made to increase this figure to 25 percent. Even prisoners in national institutions may be granted such permissions under certain conditions.

Another characteristics of the prisons in Sweden is the system for *punishment for abuse of the prison rules*. In the Prison Law there are only three measures which can be taken by the prison authorities, namely *warning* (in 1978 given in 2,120 cases), *increase of the length of imprisonment with up to 10 days* (in 1978 decided in 1,638 cases) and *transportation* to another institution (in 1978 used in 1,876 cases). Furthermore, abuse will certainly make it more difficult for the prisoner to get furlough. Of these sanctions, transportation to a more strict institution is considered to be the severe punishment by the inmates themselves. The following table gives the reason for the use of transportation in 1978.[12]

Escape or attempt to escape	818
Abuse of furlough	401
Refusal to work	69
Intoxication	206
Violence or threat against a prison officer	73
Violence or threat against another inmate	31
Posession of contraband	105
Other reasons	173
Total	1,876

Contrary to what is the case in most prison systems, solitary confinement and deprivation of good time, etc. is not allowed to be used as punishment. Solitary confinement may only be used in accordance with P.L. Section 20 to 23; Section 23 regulates the case of a violent inmate who may be placed in solitary confinement or in a straight-jacket if this is absolutely necessary. These restrictions must, however, cease as soon as possible and never be used as punishment. A study in 1978 shows that straight-jackets were used only in a handful of cases and never for more than two hours. Solitary confinement were used mostly in cases of drunkenness (returning from furloughs) or in order to safeguard the security of staff and other inmates. The length in such cases were usually less than two days (until the necessary investigation had been carried out, and eventual arrangements for transportation to another prison made). Sections 20 to 23 regulate those cases in which maximum security is considered necessary. As stated in Section 20, such prisoners may be kept separate from other inmates. This was earlier done by means of solitary confinement, but due to the negative psychological effects of such treatment special arrangements are now made for such prisoners. In three closed institutions a special part of a wing has been rebuilt and furnished with separate rooms for about 5 prisoners. The rooms form an apartment with drawing-room, kitchen, etc. and are more spacious than otherwise is the case, and the equipment is more "luxurious" (TV, etc.). The number of prison officers are higher than ordinary cases, and the security

measures are very strict. In this manner the handful of dangerous offenders are kept under strict control, but under such circumstances that the negative effect of the loneliness of solitary confinement is avoided.

4. The Probation and Parole System

Since parole is an integrated part of the treatment of the prisoners, it is necessary to give some information about its organization and work. The main idea of the reform in 1974 was to integrate treatment in institutions with treatment outside of institutions. This is the main reason for the use of furloughs and it also is the basis for the parole system.

The organizational structure is so made that the parole system is a part of the same organization as the prison system. The country is divided into 13 regions, each headed by a director who is both responsible for the work of the local prisons within his region and for the probation and parole services. Parole and probation are combined and each region has a number of districts headed in its turn by a chief probation officer. The actual work are carried out partly by probation officers themselves or by supervisors appointed by the courts or the supervision boards under the guidance of a probation officer.

A prisoner shall have an appointed supervisor latest at the time when he is eligible for parole. The supervisor will visit him in prison, make contact with his family, arrange for living-quarters, work, etc. However, such efforts are often met with great difficulties, and studies have shown that the ex-prisoners often express the view that the supervisors and probation officers have been of little help to them.

Last year a report was presented concerning a long-term experiment of the work of a parole and probation district, the *Sundsvall experiment.*[13] The idea was to study the effects upon the clients of an increase in resources in the district of Sundsvall (in the north of Sweden). The experiment was started in 1972 and was finished for evaluation in 1978. It included the following extra resources for the aftercare of ex-prisoners (in comparison with other districts): A trebling of the full time staff, a half-way house with 20 places, a hostel with 20 places, a socio-medical clinic and the availability of a full time public servant attached to the labor exchange with the sole task to secure jobs for the clients. The result of the evaluation is negative. Measured in terms of recidivism, use of alcohol and work adjustment, the Sundsvall clientele did not significantly improve in comparison to any other district in the country. The reason for this was that the resources was not channelled into such activities which directly had any impact upon the clients, e.g. the level of contacts between the supervisor and his client was the same as before the experiment started (approximately 14 hours per year). This is quite obviously not a type of contact which in any way can influence the client's behavior.

5. Evaluation of the Reform of 1974

Recently the National Prison and Probation Administration published a report concerning the application of the Prison Law of 1974.[14] A representative sample of 15 percent of those 2,586 prisoners who were paroled in 1977 were studied. The picture which appears from the study is quite disorderly and difficult to grasp. It shows that as many as 23 percent of those sentenced to less than 1 year imprisonment —who in accordance with the intentions of the law should have been placed in a local institution close to their homes—were in fact placed in national institutions. Furthermore, no less than 22 percent of those placed in local institutions asked to be transferred to another institution. Obviously, these facts concerning placements and dissatisfaction expressed in the wish to be transferred, indicate that there are problems to be solved. Another disturbing fact was that misbehavior, considered to be so serious that transports to other prisons were made, was very common. No less than 76 percent of the ex-prisoners had been transferred to another prison at least once during their terms. The report points out that according to the instructions given

in 1974, transport was such a serious measure that it should be used restrictively. This is, as the figure shows, not the case. Lastly, the report points out that one of the main ideas of the reform was that those prisoners who were placed in national (closed) institutions should be transferred to local institutions for adjustment in good time before their release. But no less than 34 percent had in fact not been given this opportunity, something which necessarily must have led to difficulties for their adjustment in the local community, since their possibilities to visit employers, family, etc. and to be in contact with their parole officer were hindered.

The reform of 1974 was not built upon any deeper analysis of the clientele in the Swedish prisons and the difficulties of prison life, and probably it did underestimate both the number of psychologically unstable prisoners and the problems of adjustments in prisons with few rules and little restraint. However, the basic idea of the reform seems to be good, although good intentions are not a guarantee for good results.

If the plans for future crime policy will be passed, this will make another prison reform necessary, because the prisoners will then probably mostly be those who today are in closed institutions.

6. Reform Plans

Those decisions concerning policy questions, which really have any impact upon correctional work, are seldom made within the correctional system itself but by other governmental bodies, especially the Ministry of Justice and the Parliament. In order to be meaningful a discussion of reforms must therefore include crime policy in general.

As presented earlier in this paper, the Swedish Parliament accepted in 1979 the proposals from the government that youth prison and the sanction called "probation with institutional treatment" should be abandoned. The reason for this was mainly that both sanctions contained relatively indeterminate length of incarceration, which is a type of sanction built upon a rehabilitation model. The Parliament's acceptance signifies a change in attitude which has been under way since the last 15 years, and is a result of the critical views described earlier in this paper. This critic was concerning the criminal justice system summed up in a report from a working party within the Swedish National Council for Crime Prevention in 1977, called "A New Penal System."[15] This report played an important role as guideline for the discussions on reforms. However, it is by no means the only document pointing out new directions. When the 1974-year Committee Concerning Youth Prison presented its proposal in 1978, it contained similar ideas as those of the working party of the Council for Crime Prevention.[16] And a *pro memoria* from the Ministry of Justice concerning the future of internment accepted a similar position.[17] Discussing these matters in a general way, the Parliament gave its general approval in 1979.

Even other proposals have been in the focus for the discussions. A committee concerning the treatment of mentally disturbed criminals suggested restrictions in the use of incarcerations in mental hospital,[18] and a committee instructed to review the whole social welfare system proposed in 1977 that the power to incarcerate alcoholics and drug addicts should be restricted, which would eventually lead to abolishment of the provision in the Criminal Code (Chapter 31, Section 2) that criminal courts can refer cases to the Alcohol Temperance Boards for treatment in clinics for alcoholics whenever this is a more suitable measure than a prison sentence.[19]

The common basic philosophy of all these proposals is to make away with rehabilitation by force, by means of state power. Historically, Sweden like most European states has in the last hundred years built up systems of social welfare which do not only contain "rights" for the citizens, but also has kept many ideas from the time where "the supremacy of the state" was the main ideological concept regulating the relationship between the state and its citizens. In many laws from

the first half of the century, it can be found that the state believes that it can rehabilitate offenders, mentally disturbed, alcoholics, vagrants and other deviant groups by means of force and without consideration for the individuals' own wishes. Ideologically, the proposed changes in the laws described above is a change away from this policy towards a greater emphasis upon the individual and his own responsibility.

The report "A New Penal System" from the working group of the Swedish National Council for Crime Prevention has tried to sum up the critic in the following manner: The existing system has been based on the idea that the measures taken against the deviants are beneficial for them, which the result of systematic research has shown usually to be untrue. Furthermore, the rehabilitative principle leads to results which are contrary to the idea of equality before the law. A person of high social standing will never be incarcerated in a dreary institution for alcoholics, that is to be reserved for those on the bottom of the society. And within the criminal justice system, the treatment ideology may lead to long term treatment of an offender, while another, committing the same offense, may get away with a short term treatment—all depending upon whether the offender in question may be in "need of treatment" or not.[20]

However, this does not mean that assistance, help, service and treatment shall have no place in the future system. The report says, "The critic is characterized by the view that the type and severity of the measures taken against an offender is *not* to be decided upon the needs for treatment a certain offender is supposed to have. These proclaimed needs shall not be considered an independent and autonomous reason for the kind of measures to be used. However, the critic does *not* imply any dejection against giving individual offenders service and treatment. Although it is not justified to use an offender's supposed need for treatment as the reason why we choose a certain type of measure, it is on the other hand allowed or even necessary to offer him the service and treatment which may be needed. Certain rehabilitating effects may perhaps be had by this, especially if the treatment work is done in consultation with the client. It may even happen that new research results may lead to a reversal of the standpoint we are today forced to take. However, this argument is not necessary in order to motivate the offering of services to the clients. Those persons, who today are the objects of the service measures within the criminal justice system, are often unfortunate in many respects. This is in itself a sufficient reason for offering them social service. Both humanitarian and equity reasons request that such services shall be given to all citizens who need them, regardless whether they have committed crimes or not."[21]

The report points out that treatment philosophy leads to injustice, to concealment of the conflicts between the lawbreaker and the society, to a false understanding of the causes of crime and to ineffective treatment results. It expresses the view that the level of criminality probably is less influenced by the criminal justice system and its measures than usually is believed to be the case. However, it is necessary to draw up a code of conduct for the citizens, and to use measures against the lawbreaker in order to strengthen the moral message in the rules. These measures should, then, be graded according to the moral stress given to the particular rule and the interest it protects. In principle, there should be equal punishments meted out for the same type of forbidden behavior. Having said this, the report adds that as far as this principle leads to unfair decisions, considerations must be made for the offender's personal and social background.[22]

Although the report from the working party in the Council for Crime Prevention has not the status of a document from the Ministry of Justice or one of the Royal Commissions, it has—perhaps due to the standing of the members of the working party—become something of a guidebook for the policy-makers.[23] In 1979 the

Cabinet approved a proposal from the Minister of Justice to set up two committees with directives to make plans for the future crime policy.[24] In these directives the Minister of Justice accepts in principle the views led down by the working party, and is speaking with unusual clarity about his views on these matters. Since there is no better way to express the official views on future Swedish policy, I will summarize the main points of the directives.

First, the Minister points out that crimino'ogical research, undertaken both in Sweden and elsewhere has shown "that imprisonment quite generally has negative consequences for those who are incarcerated. Clear evidence exists that imprisonment leads to bad rehabilitation and high recidivism, and that it often has a harmful effect upon the prisoners' personality. In this connection it does not seem to have any influence, what type of treatment or what type of institutions are used."—"An increased use of incarceration is therefore generally spoken not an effective means to conquer an increasing criminality, but can probably lead to the opposite result."[25]

Second, he says quite bluntly, "In my opinion, it is important to go further in the direction within our crime policy which aims at reducing the use of measures involving incarceration and to shorten the length of such incarceration where it is for general preventive reasons necessary to use it."[26]

With these general views in mind, the Committee is given the following tasks:

1) The Committee shall study the possibility of reducing the minimum term of imprisonment from one month to one or two weeks.[27] The committee has, in fact, just presented a proposal for a decrease in the minimum to 14 days.

2) The Committee shall make suggestions concerning parole in order to find out whether shortening of the sentences by means of parole should still exist or not. Moreover, if the Committee comes to the conclusion that parole should be abolished, it shall suggest how to avoid that this leads to an increase in the length of the prison terms.[28]

3) The Committee shall study to what extent the range of punishments in the criminal laws is "in accordance with the values of today's society."[29]

4) The Committee shall further study and make suggestions for general rules concerning what circumstances the courts shall take into account when they decide on the punishments to be meted out.[30]

5) Lastly, the Committee shall suggest how to strengthen the citizens' knowledge of and participation in the work of the criminal justice system.[31]

The other Committee, which shall concentrate upon probation and similar matters, it told that probation today both has a control function and a service function. The last part, however, should be the duty of the social welfare agencies, and the control function should be placed in the foreground. The Committee is instructed to present proposals for such changes in the probation system which can follow from this changed philosophy.[32]

Furthermore, it shall make an inventory of alternatives to imprisonment and other measures involving incarceration with the aim to suggest such changes which can lead to less use of imprisonment and other measures involving incarceration.[33]

Lastly, I would like to point out that the discussions concerning these basic problems of penal philosophy by no means is restricted to Sweden. All the Scandinavian countries have this debate and there are generally agreement in most quarters of the basic critique of the existing philosophy.[34] However, in criminological circles—among those who through research and arguments have won the first stage of the battle—there is differences of opinions whether the policy-makers are going in the right direction.[35] The debate is not finished, and it never will.

NOTES

1. Förslag till Skyddslag (SOU 1956:55). An English translation (by Thorsten Sellin) is available.

2. In 1960–64 the number of crimes against the Criminal Code reported to the police were approximately 300,000 per year, and in 1974–78 approximately 660,000. The number of persons sentenced for "serious" crimes (to be registered in the criminal register) increased from 20,000 per year to 30,000 in the same period.
3. *The Prison and Probation System 1978.* Official Statistics of Sweden, National Prison and Probation Administration, Norrköping 1979, pp. 80–81.
4. Summaries of the studies with evaluations are found in the following publications: Clarke, R.V.G. and Sinclair, I., 'Towards more effective treatment evaluation' in European Committee on Crime Problems, *Collected Studies in Criminological Research*, Vol. XII, Council of Europe, Strasbourg, 1974. Lipton, D., Martinson, R. and Wilks, J., *Effectiveness of Correctional Treatment: A Survey of Evaluation Studies,* Praeger, N.Y., 1975. Brody, S.R., *The Effectiveness of Sentencing,* Home Office Research Unit, London 1976.
5. The proposal was prepared by a committee which presented its suggestions in a report in 1978 (tillsynsdom, SOU 1977: 83).
6. The Cabinet's proposals in these matters were presented to the Parliament in the spring 1979 (Regeringens proposition 1978/79: 212 om ändring i brottsbalken, m.m.; beslutad den 5 April 1979).
7. Ibid., p. 48.
8. Justitiedepartementet, PM om internering, Ds. Ju. 1979: 5.
9. The information concerning the organization is from the publication mentioned in note 3.
10. KVS/U rapport 14/1975 and 29/1978. (Reports from the Research Unit of the National Prison and Probation Administration.)
11. Regeringens proposition 1978/79: 182 om försöksverksamhet med s.k. kontraktsvård av narkotikamissbrukare som har begått brott.
12. Ibid., note 3, p. 41.
13. Kühlhorn, Eckhart, *Non-Institutional Treatment and Rehabilitation.* An evaluation of a Swedish correctional experiment. The National Swedish Council for Crime Prevention, report no. 7 (in English), Stockholm 1979.
14. KVS/U 33/1980 Lagen om kriminalvård i anstalt – en undersökning om tillämpning.
15. The National Swedish Council for Crime Prevention, *A New Penal System: Ideas and Proposals. Stockholm 1977.* (In English.)
16. Ibid., note 5.
17. Ibid., note 8.
18. Psykiskt störda lagöverträdare (SOU 1977: 23).
19. Socialtjänst (SOU 1977: 40).
20. Ibid., p. 181 (Swedish version).
21. Ibid., p. 185.
22. Ibid., p. 405.
23. The committee consisted of the secretary to the minister of justice (chairman) the director of public prosecution, the director-general of the prison and probation administration, three judges, a legal advisor to the labor unions, a criminal law professor and a professor of criminology.
24. Fängelse och kriminalvård i anstalt. Dir 1979: 34; Kriminalvård i frihet m.m.; Dir 1979: 35. The decision was taken in a cabinet-meeting March 15, 1979.
25. Ibid., p. 5 (dir 1979: 34).
26. Ibid., p. 6.
27. Ibid., p. 8.
28. Ibid., pp. 9–13.
29. Ibid., pp. 13–15. As can be understood, this will be the most difficult task for the committee, since it involves the political-ideological question of what kind of behavior which ought to be punished in a modern, industrialized society, and furthermore to decide the priorities within these types of behavior.
30. Ibid., p. 14.
31. Ibid., p. 15–19.
32. Dir. 1979: 35, p. 7.
33. Ibid., p. 13–18.
34. The official documents are the following. From Finland: Straffrättskommittens betänkande (1976: 72), Helsinki 1976. From Denmark: Alternativer till frihetsstraf – et debatoplaeg (Betaenkning nr. 806/1977), Copenhagen 1977. From Norway: Stortingsmelding nr 104 (1977–78) Om kriminalpolitikken, Oslo 1978. (Contrary to what has happened in the other Scandinavian countries, the Norwegian proposal was met by a negative attitude from the members of the parliament when it was discussed there in April 1980.)
35. *Straff och rättfärdighet – ny nordisk debatt* (ed. Sten Heckscher, Annika Snare, Hannu Takala and Jørn Vestergaard), Stockholm 1980. Since the official standpoint upgrades the idea of general prevention in place of rehabilitation, some intellectuals point out that the abolishment of the rehabilitation idea doesn't logically lead to an acceptance of the general preventive idea. Other possibilities (e.g. A more complete abolishment of punishments in general) must also be discussed as alternatives.

SECTION 2: PARTICIPANTS' PAPERS

Institutional Treatment of Adult Offenders in India

*by Barindra Nath Chattaraj**

Prison as the oldest and universal form of penal institution was primarily used for detention of socially maladjusted persons. Later it was meant for the punishment for the lawbreakers and in modern times, it provides a secure place for confinement and correction of such law-violaters whose dissociation from the society has been considered to be inevitable. This institution has undergone momentous changes from time to time in keeping with the growth of human civilisation, social values and knowledge of criminal behaviour.

Objectives

The modern prison administration in India like other progressive countries aims at ensuring the return of an offender to society as a well-adjusted and self-supporting individual. Reformation and rehabilitation of offenders have been accepted as the ultimate objective of imprisonment. It is now widely appreciated that protection of society can not be achieved merely by detention unless the offender is corrected and reformed while in prison by individualised treatment so that he may not have any difficulty in assimilating himself with the main stream of life outside prison. Prevention, control of crime and delinquency and treatment of offenders are considered as inseparable ingredients of the social defence approach adopted in this field. An efficient and disciplined prison administration, diversified resources and facilities for training and treatment programme and properly trained personnel are considered to be the main components of the institutional organization. The primary aim of institutional treatment being the social reeducation of the offender for the purpose of smooth resettlement in society, proper classification on the basis of individual correctional requirement and induction of appropriate training and treatment programmes have been felt to be necessary. With the acceptance of these principles, prison administration in India is faced with tremendous responsibilities and problems.

Historical Perspective

The prison administration in India is governed by the old central legislation like the Prisons Act, 1894, the Prisoners Act, 1900, the Indian Lunacy Act, 1912 and the Transfer of Prisoners Act, 1950. The maintenance and development of prisons is a state subject under the Constitution of India and the state governments have their own Prison Manuals. The Indian Jails Committee 1919-20 was a landmark in the field of correctional services in India, as for the first time it declared that the ultimate object of imprisonment is the reformation and rehabilitation of offenders. One of the main recommendations of this committee was that juvenile offenders should be separated from the adult offenders. Several important recommendations of this Committee could not be implemented even after independence.

Some major and significant events took place in the field of prison development after independence. In 1952 Dr. W.C. Reckless visited India under the United Nations Technical Assistance Programme and submitted a review of the prison administration in India suggesting to the Government of India, a number of modifications in the techniques of handling the offenders. In 1957, the Government of India appointed the All India Jail Manual Committee to prepare the Model Prison Manual and to examine prison legislations

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and correctional programmes. Meanwhile, the Standard Minimum Rules for the Treatment of Prisoners were passed by the U.N. in 1955. This Committee got the benefit of the guidelines provided therein in preparing a draft model prison manual. The All India Jail Manual Committee submitted its report in 1959 making a number of far-reaching recommendations and a blue print for the reorganization and development of prisons in this country. As a result, the Model Prison Manual came out in 1960 to provide broad guidelines for the state governments to revise their respective Jail Manuals. In 1961, the Central Bureau of Correctional Services came into existence under the Ministry of Home Affairs to serve as the Central Technical Advisory Body with the broad objective of evolving modern policies and programmes in social defence field. Later on, the objective of this organization was further broadened to cover the entire gamut of Social Defence and was reconstituted and renamed as the National Institute of Social Defence under the Ministry of Social Welfare on 1 January 1975 with the following functions:

1. Undertakes research on social defence.
2. Compiles, processes, and analyses statistics on social defence.
3. Develops, promotes, sponsors and undertakes training/orientation in the field of social defence.
4. Drafts model legislation and rules in the field of social defence.
5. Advises the Central and State Governments/Union Territory Administrations on social defence problems and provides technical services facilities for preparation of schemes, formulation of projects, drafting of legislation etc.
6. Provides a forum for the exchange of information on social defence among States/Union Territories and voluntary organizations and thus serves as a clearing house for information in the field of social defence.
7. Creates public awareness on social defence problems especially with regard to preventive and rehabilitative role of the community.
8. Assists the Government of India for the exchange of information on social defence with other countries and with the United Nations or other specialised agencies.
9. Establishes liaison with universities' research institutes and voluntary organizations for appropriate attention to social defence.
10. Organises conferences/seminars/workshops on social defence.
11. Brings out publications in the field of social defence, both popular and scientific.

In 1972, the Ministry of Home Affairs, Government of India appointed a Working Group on Prisons to examine measures for streamlining and improving the jail administration and living conditions of prison inmates. The Working Group in its report submitted in 1973 made a number of valuable recommendations regarding overcrowding in prisons, prison buildings, vocational training for prisoners, staff structure, training of prison personnel to mention a few and made an appeal to treat prison development as a part of national development plan and to extend financial assistance to state governments to improve facilities in jails. The most remarkable event in the field of prison development took place on 9 April, 1979 when the Conference of Chief Secretaries of all the States of Indian Territories was convened to have a detailed discussion on various problems relating to prison development and to find out concrete remedial measures. Overcrowding and living conditions in jails, revision of prison manuals, improving jail administration and states and national boards of visitors were the main items for discussions. This conference recommended a number of solutions for each item and the Ministry of Home Affairs is at present engaged in taking necessary steps for implementing those recommendations.

Prison Population

Continuous increase in prison population has posed a serious challenge before

the correctional administrators and jail authorities. During the period 1972-76, jail population has increased by over nine percent. Almost all of the major states have shown an increasing trend. The annexure depicts the exact position. According to the latest figure, there are 71 central jails, 225 district jails, 693 sub-jails and 24 open jails, and 14 juvenile jails in the country. The total capacity in all the institutions is 179,567 prisoners as against which there were 211,963 prisoners in Indian jails on 1 January, 1978.

Classification

Classification of prisoners based on a scientific understanding of their personality traits and behaviour patterns is an essential feature of a progressive correctional system. Classification is a continuous process, which does not end with the initial study and diagnosis of the offender or planning of the correctional programme. Classification system is still functioning at a rudimentary stage in India due to various reasons. Classification in Indian jails is generally based on age, sex, tenure of sentence and number of offences committed. Long termers are incarcerated in central jails, short termers are generally lodged in district jails. Inmates showing tendencies towards violence and difficult discipine cases of professional and organised offenders are institutionalised in special jails. Some selected well-behaved, long term prisoners are placed in open prisons. Young adolescent offenders are generally kept in borstal schools and in juvenile jails. Women prisoners are lodged in a separate enclosures in district and central jails. There is only one prison at Vellore which is exclusively meant for women offenders. Lunatics and undertrials are also kept in separate enclosures.

Besides, most of the jail manuals contain provisions for three types of physical facilities to be offered to inmates. They are known as A-Class, B-Class and C-Class. Usually A and B-Class facilities are given to non-habitual, non-heinous and political prisoners or detenus who are used to a superior mode of life. The facilities of A and B are given on the recommendation of the sentencing court or by the state government. In most of the states, a system of convict officers is in existence. They are those inmates who have served a sizable part of their sentence in the institution and during this period, their conduct and work were satisfactory and praiseworthy. Such inmates are to shoulder some minor responsibilities and enjoy certain privileges. In some states, there is parallel system called 'Star Class Prisoners'.

Although it has been reiterated by several jail reforms commissions that behaviour patterns and correctional requirements of the prisoners are to be scientifically studied and analysed for an effective institutional treatment and diversification of institutional resources are imperative for meeting the specific requirements of different homogeneous groups, yet in India diversification of institutional resources has not been achieved satisfactorily so far, due to inadequate buildings, overcrowding, influx of short-term prisoners, lack of segregation facilities, insufficient staff and prevalent public apathy towards the improvement of prisons.

Education

Education of prisoners is an important ingredient of the institutional treatment in prisons. It provides an important avenue for reformation of their character and behaviour and preparing them for better adjustment in society after release. The Indian Jails Committee 1919-20 recommended for educational facilities for the inmates especially for those who are below 25 years of age. The All India Jail Manual Committee 1957-59 also looked into the educational programmes run by the jails in the country and urged for a diversified programme of education for inmates. Similar views have also been expressed by the Working Group on Prisons. Giving due consideration to these recommendations, jails in the country pay special attention for providing general education to the inmates. Almost all district jails and the

central jails offer this facility. Certain institutions also provide facilities for attending schools and colleges outside. Likewise, many institutions conduct formal examinations leading to award of certificates. Inmates are also permitted to sit for examinations outside. Juvenile jails at Bareilly, Udaipur, Faridkot and Junagarh run regular classes up to a high school level. Inmates are given special remission if they are able to put up worthy performance such as being successful in a formal examination. Apart from formal classroom teaching by the paid education teachers, inmates are also provided with library facility. Most of the district and central jails have separate budget allocation for this purpose. But still education system needs much improvement in terms of developing present system to be adequately diversified so as to meet the varied educational needs of various groups of prisoners. The concept of functional literacy through which the instructions are related to the real life situation is being tried to be introduced in some jails.

Work Programmes and Vocational Training

All inmates in prison for rigorous imprisonment are required to work subject to their physical and mental fitness as determined by the medical authority. Work in Indian prisons are not considered as an additional punishment but a means of forming better work habit and of preventing idleness and thereby furthering the rehabilitation of the prisoners after release. Section 53 of the Indian Penal Code prescribes two types of imprisonment; i.e. (i) simple imprisonment which entails no obligation on the part of inmates to work, (ii) rigorous imprisonment in which work is compulsory.

At present there are mainly three types of work programmes available to inmates; i.e. (i) inmate service, (ii) maintenance work and (iii) vocational programmes. As a rule, inmates sentenced to imprisonment for short period are allotted to service of maintenance units and rest of them are assigned to vocational programme. Vocational programmes are mostly available in central, special and district jails. On an average 70 to 80 percent of the convict population in an institution is engaged in vocational programmes. The nature of work programmes varies from state to state subject to variation in local conditions and resources. Traditional trades like blacksmithy, carpentry, durie making, newar weaving and furniture making are popular in jails. Besides, trades like paper, pencil, soap and tag making are also prevalent. Of late, a number of new trades like printing, tailoring, tractor repairing have also been taken up. Recently, an emphasis has been laid on mechanisation in prison trades. As India is predominantly an agrarian society, much emphasis has been laid on agricultural work. All central and district jails are having agricultural land. Under proper supervision, inmates work in these lands and grow vegetables, cereals and food grains for themselves.

Bottlenecks in achieving desired results in work and vocational training programmes may be grouped under two broad categories viz. (i) structural problems such as inadequacies in classification and lack of proper understanding between staff-inmate relationship and (ii) functional problems like insufficiency of man power, constraints in production facilities, etc. In recent years, several steps have been taken to overcome these difficulties and a considerable improvement in work programmes has been achieved. Still it is felt that the programmes need further nationalization to meet the varied correctional requirements of different categories of prisoners.

Remission and Paroles

Remission is the concession granted to prisoners as a reward for the good behaviour in prisons. It is not a right. The State Government reserves the right to debar/withdraw any prisoner from the concession of remission. Remission of sentences is provided under the Section 59(5) of the Prisoners Act. Remission is

generally of three types, a) ordinary remission, b) special remission and c) state government remission. Ordinary remission is granted to well-behaved prisoners on a monthly basis, special remission is accorded for a special achievement of the prisoners and state government remission is generally granted to eligible prisoners in block on occasions of national importance. Rules regarding eligibility, sanctioning authority and scale vary from state to state. But total remission of a prisoner does not exceed the half of his total sentence.

Parole, being synonymous with furlough, ticket of leave, home leave, emergency leave, is generally used in India for the award of temporary release for a short duration for providing an opportunity for some selected prisoners to be with their relatives. Prisoners who have already served 5 years or more and have completed one third or one half of their sentences satisfactorily, become eligible for parole. A board consisting of district magistrate, sessions judge, jail superintendent and two nonofficial members is constituted in each central and district jail for the purpose. This board holds meeting twice a year when all the eligible cases are considered. Amount of remission earned, conduct, educational attainment, family ties, etc., are some of the considerations for parole. The board looks into each case and send recommendation to the State Government where the cases are further scrutinised and final orders are issued. There is also a wide disparity in the conditions governing prisoners' eligibility for premature release in various states. The procedures regarding premature release need to be simplified and standardised on a uniform pattern. Due to lack of effective supervision and aftercare facilities the system of conditional release is liable to be misused. Aftercare services for ex-prisoners may be closely integrated with prison programmes so as to effect a smooth transition from institutional custody to free life.

Prison Buildings

Prison buildings in some states are generally in a dilapidated condition. Two thirds of prison buildings in this country are 75 to 100 years old and they are ill furnished and without proper ventilation. The traditional architecture of prison buildings cater mainly to custodial and security requirements. It is difficult to conceive in such institutions the requisite standard of proper living, sanitary conditions, proper classification, education, training and other aspects of progressive treatment. All types of prisoners are generally lodged within same institution leaving little scope for a specialised handling for custody and correction. Therefore, prison buildings need to be reconstructed in keeping with the changing security and correctional requirement for different categories of prisoners.

Security Measures

Most of the central and district jails are provided with adequate security measures in terms of having secure walls, well protected gates, dormitories, cells, lighting system inside and around the institution, a central part for the control of movement of prisoners and a thorough system of counting prisoners twice in a day. A system of custody and control and inspection of locks and keys, handcuffs and other security measures are also prevalent.

Prison Offences and Punishment

Sections 45 and 46 of the Prisons Act, 1894 provide for 16 types of acts as prison offences, committed by a prisoner. The superintendent takes decision after proper examination of case to determine punishment to be given to the concerned prisoner. Prison offences range from warning to criminal prosecution. Previously unruly prisoners were also subjected to whipping, which has now been abolished.

Prison Panchayat

With a view to encouraging inmate participation in jail administration, to inculcate self-discipline among them and to enable them to sort out their problems in a democratic way, panchayet system has been introduced in many jails. The prison panchayat is constituted by the elected prison inmates who are elected by their fellow prisoners. The panchayat supervises cooking and distribution of food and looks after sanitation and other recreational facilities. Periodical meetings with the superintendent are held in which problems concerning jail administration and inmate welfare are discussed and resolved to the best possible advantage of the inmates and administration.

Living Condition

The jail manuals of various states contain the detailed procedure for dealing with a prisoner and provide him with minimum facilities to which he has a right as a human being. Once a convict is admitted to jail, his well-being becomes the responsibility of the state and hence of the institution. Jail manuals are very specific in prescribing scale of diets for different categories of prisoner which ranges from 1,500 to 3,000 calories. Minimum facilities like bedding, necessary clothes, oil and barbering, and soap are provided to prisoners. Every jail has a whole-time or part-time medical officer and all the central and district jails have hospitals. Medical officers are assisted by the qualified compounders. Ailing prisoners are attended to by the medical unit and get the facility of being hospitalised if necessary.

Besides these facilities, the prisoner is allowed to observe his own religious practices in the jail. Relatives and friends of the prisoner may also occasionally pay visit to the institution and correspond with him at regular intervals. In fact, the prisoner has the opportunity to keep in touch with the family and the community. This aspect helps him in smooth rehabilitation back into society after release.

Standard Minimum Rules for the Treatment of Prisoners

As stated earlier, the All India Jail Manual Committee 1957-1959 prepared a Model Prison Manual and submitted the same to the Government of India along with its recommendations. The Standard Minimum Rules for the Treatment of Prisoners as an important document was passed by the U.N., in 1955. The All India Jail Manual Committee, therefore, incorporated the main principles enshrined therein for treatment of prisoners on progressive lines. The state governments have already taken necessary action to revise their existing jail manuals in accordance with the guidelines provided in the Model Prison Manual. Some states have completed the work of revision of their respective manuals while in others the work is in progress.

Recruitment and Training of Correctional Officials

The efficacy and success of correctional operation depend largely on the quality, competence and calibre of the prison staff. Prison personnel are not only engaged in arduous, hazardous and exacting task but also they are often required to work for 10 to 14 hours a day. Therefore, special care and attention need to be bestowed on the selection and training of the prison staff. At present prison staff are recruited both by open selection and by promotion. Prison Warders i.e., guarding staff are directly recruited. From Assistant Jailors to District Jail Superintendents are recruited both by promotion and by direct recruitment. Central Jail Superintendents and Deputy Inspector Generals are appointed on the basis of seniority-cum-merit from the lower posts. In some prisons Inspector General of Prisons are departmental and in some states they are from Indian Administrative Service Cadre. Each state has got its own arrangements for giving inservice training to warders. Assistant Jailors, Deputy Jailors, Jailors and Superintendents of District Jails are sent to Jail Officers' Training Schools at Lucknow,

Pune, Hisar and Vellore. For the senior level officers above the rank of District Jail Superintendents, the National Institute of Social Defence, New Delhi organises short term orientation courses and seminars from time to time.

Conclusion

Inspite of continuous efforts made by the Government of India, the guidelines contained in the Model Prison Manual has not been adopted by most of the states. The paucity of funds has been identified as the main hurdle in this respect. Although the role of the central government is mainly confined to provide states with technical assistance and advice, yet the Ministry of Home Affairs of the Government of India has made a symbolic provision of Rs. 2 crores in the year 1977-78 followed by Rs. 4 crores during 1978-79 for financial incentives to the state governments in the areas of improvement of prison structure, modernisation of industry and agriculture, construction of residence of the staff and development of scientific and technological facilities in prisons like security, fire lighting, alarm and communication arrangements. Simultaneously, the question of making larger allocation for prison development in the states was taken up by the Seventh Finance Commission. On the basis of detailed note prepared by the National Institute of Social Defence, the Finance Commission recommended a provision of Rs. 4831 lakhs to 11 states for the development of prison buildings and for raising the level of basic facilities and amenities by the prisoners. The commission did not cover the modernization of jails and development of correctional services. However, the provision made by the Finance Commission would surely provide a starting point for the desired improvements.

In view of the need for an effective strategy for prison reform, the formulation of a national policy on prison administration is felt to be necessary. This may lead to a reconsideration of the status of prisons as a state subject and the possibility of bringing within the concurrent list. The lack of uniform legislation on prisons has perhaps been one of the main reasons for delay in the adoptation of guidelines contained in the Model Prison Manual. The Ministry of Home Affairs is already considering a draft on Model Prison Legislation in consultation with the National Institute of Social Defence and state governments. The issues in this regard naturally involve a national consensus on the possible modalities and priorities of action. The investment on prisons may have to be considered as a human resource development as it aims to raise the quality of human life besides protecting society from criminogenic forces. At the present stage of development, it may also be necessary to consider the inclusion of prison development in the national plan.

Annexure: Jail Population (1972–76)

as of 1 January

State/Union Territories	1972	1973	1974	1975	1976	Percentage 5 Year Change over 1972
Andhra Pradesh	9,052	8,988	9,694	8,437	7,316	– 19.178
Assam	6,299	6,261	6,917	8,263	6,249	– 0.794
Bihar	33,422	40,091	35,425	36,225	34,737	+ 3.717
Gujarat	4,075	3,112	3,775	4,025	5,141	+ 26.159
Haryana	3,303	2,664	2,872	2,872	2,992	– 9.157
Himachal Pradesh	291	263	543	272	366	+ 25.773
Jammu & Kashmir	–	–	–	723	–	–
Karnataka	6,966	7,198	5,965	6,095	6,065	– 12.934
Kerala	3,167	3,920	3,830	3,669	4,807	+ 51.784
Madhya Pradesh	15,461	17,165	16,665	16,643	19,240	+ 24.442
Maharashtra	17,669	18,498	19,816	19,100	23,970	+ 35.661
Manipur	–	–	–	325	–	–
Meghalaya	562	471	669	612	411	– 26.868
Nagaland	–	–	–	499	–	–
Orissa	8,289	8,789	8,652	9,165	11,184	+ 34.926
Punjab	7,100	6,623	7,344	8,531	8,696	+ 22.479
Rajasthan	5,602	5,311	5,566	5,903	7,688	+ 37.237
Sikkim	55	69	80	110	97	+ 76.364
Tamil Nadu	–	–	–	24,709	–	–
Tripura	1,539	460	542	598	651	– 57.700
Uttar Pradesh	40,131	35,346	34,861	35,432	40,438	+ 0.765
West Bengal	25,893	21,895	23,084	24,702	24,397	– 0.004
Andaman & Nicobar Island	81	90	69	128	174	+ 114.815
Chandigarh	–	57	76	104	118	+ 104.175 (over '73)
Dadra & Nagar Haveli	15	23	6	10	10	– 56.522
Delhi	1,962	1,539	1,892	2,358	3,355	+ 70.999
Goa, Daman & Diu	206	165	193	180	286	+ 38.835
Mizoram	–	–	–	314	–	–
Pondicherry	98	123	95	151	174	+ 77.551
Total	191,211	189,122	188,771	220,146	208,562	+ 9.017

Corrections in Iraq

*by Nabil Shawkat Al-Khalessi**

Introduction

Iraq has, since the 17th July 1968 Revolution by the Arab Baath Socialist Party (A.B.S.P.), been planning and striving for the transformation of the main bricks of society in all aspects, bearing in mind that the human being is a basis and a means to bring about that transformation.

Since this revolutionary transformation has affected all political, economic, social and educational spheres, prison organizations have acquired a great deal of interest and enhancement with a view to developing it as near as possible to the ideal state in such a way as to secure its discharge of its humanitarian obligation as to be in harmony with the enormous cultural progress achieved by the government. Therefore the leadership undertook to issue certain regulations. Most important among them were:

1) The Law of Prisons Department No. 151 (1968). This was an advanced law bearing upon correction of criminals.

2) Modifications to this law through the change of the general organization of the Ministry of Labour and Social Affairs according to Law No.195 (1978) which converted the Prisons Department into the State Organization for Social Reform which is subdivided into (a) General Office for Adult Correction and (b) General Office for Juvenile Correction.

3) Regulations bearing upon rehabilitation and pardon.

Organization

Since the subject bears upon the treatment of adult offenders, I shall review the structure of organization responsible for the treatment of prisoners.

In General Office for Adult Correction there is an Expert Committee consisting of specialists in psychology and sociology, psychiatrists, specialists in vocational training, and social researchers. The Committee is in charge of the planning of correction procedures and dealing with obstacles which emerge during the operation.

General Office for Adult Correction is divided into eight offices. They are: (a) Department of Legal Affairs which is concerned with the rights of prisoners and the fair application of correction laws to them. (b) Department of Prisoner's Affairs which is concerned with the records and files of prisoners relating to home-leave, parole and pardon. (c) Department of Vocational Training and its ramification which is charged with supervising the planning and administration of training programmes. (d) Department of Social Research and Post-parole Care which is concerned with the classification work and nomination for parole and home-leave. It observes the daily life of prisoners and presents reports and recommendations to the Committee and also to related prisons. (e) Department of Factories which is concerned with services commonly coming from industrial bodies. (f) Department of Planning and Follow-up. (g) Agricultural Activity Office. (h) Administrative Service and Accountancy Department.

Under the supervision of General Office for Adult Correction, there are four prisons. Two of them are in Baghdad, namely, Abu-Ghraib Central Prison for men and the other for women. The third prison is in north of Iraq (Ninevah). The fourth is in south of Iraq (Basrah).

In each prison, there is sub-committee of experts headed by the chief of the prison. Sub-committee is similar in composition and function to the main Expert Committee and technically connected to it. Prisons also have branches such as social research section and vocational training section.

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Procedure of Work

Sentences passed on adult offenders are divided into two types. One is unimplemented sentences and the other is sentences served in the prison. In the latter case the prisoner is accommodated in a social reform department (prison) situated near his family. Then the prisoner is produced to the records section where a file is opened for him. Later on he is led to the reception section where social researchers study different aspects of the prisoner, e.g. personality, family background, mental and physical capabilities. And a doctor examines his physical condition. After that the social research section will classify him and assign the suitable work. All these pieces of information will be passed to the Expert Committee for the purpose of review and recommendation for suitable treatment.

As for buildings, prisons located in Baghdad and Abu-Ghraib are considered advanced and modern. They comply with all requirements for correctional facilities such as good accommodation, individual beds with sponge mattress, blankets, and sheets. Rooms are also appropriate from the hygienic point of view. There are electric lighting, heating, ventilation and running water. Bathrooms are attached to the rooms. There are gardens and open grounds.

Services

They are adequately provided. They include hairdressing saloons and self-service laundries. A number of prisoners are assigned to bakery and cooking in return of wages.

All sections in the prison cooperate for proper performance of their responsibilities under the supervision of the chief of the prison. He is empowered to give necessary disciplinary sanction to the prisoners accommodated in his institution.

Among these authorised penalties are: (a) deprivation of athletic or recreation activities for period of not more than three months, (b) deprivation of correspondence for a period not exceeding three months, (c) deprivation of visits for not more than three months, and (d) solitary detention for a period not exceeding three months. Prisoners may be deprived of private food and their food shall be provided by the prison, which remains adequately nourishing. The law strictly prohibits the use of compulsion and such punishments as iron fetters and beating.

Aforementioned are about prisons located in Baghdad and Abu-Ghraib. As for the rest of two prisons in Basrah and Ninevah, they are not fit for the implementation of correction programmes due to the improper structure of the buildings. They do not have ample halls, workshops and grounds and there are many other things which are insufficient. Therefore the central planning for the improvement of correction department have started in 1978. The construction of an ideal prison with highly developed requirements is planned. It is expected that the new building in Ninevah is completed in 1981. In this very year, the construction of a similar prison can be started also in Basrah.

General Trend in Prison Population

The prisoners now accommodated in prisons are totaling 3,500 to 4,000 in number since a lot of factors contributed to the reduction of the number of prisoners. These factors involve: (a) economic growth with no unemployed labour and still numerous vacancies among every kind of job which necessitated the employment of many non-Iraqis from Arab and other foreign countries; (b) development of culture and education which led to a decrease in certain types of crime; (c) introduction of general pardon and alleviation of sentences; (d) abolishing detention of dangerous offenders and of those who have returned to crime; and (e) release of those convicted by the Revolution Court or the Civil Courts. This resolution was passed in celebration of the 10th Anniversary of the Revolution.

However, there is an increase in the number of certain offenders. The increase of such offences are supposedly the result of the rapid cultural evolution in urban areas. They are mostly larceny, embezzlement and associated offences.

Correctional Programmes

A. Classification

The task of classification formerly took into consideration the kind of crime and the length of sentence. But since the establishment of the Expert Committee and its branches, a radical change has been enforced in the classification process. The experience and information of Japanese prisoners classification system have contributed to the emergence of new classification process. The present categories are as follows:

1) Classification according to nationality.

2) Classification according to potentiality to commit crimes. This category is subdivided into (a) a group with much propensity towards crime and (b) a group with less propensity towards crime.

3) Classification according to health conditions. The sick are subdivided into (a) the mentally retarded and (b) those in need of health care for long periods and those with various physical disabilities, or aged prisoners.

4) Classification according to sentence. Sentences are (a) light sentence of less than one year, (b) medium sentence ranging around 3 years, (c) sentence ranging from 3 to 5 years, (d) long sentence from 5 to 7 years, (e) long sentence from 7 to 10 years, (f) long sentence from 10 to 15 years, (g) long sentence from 15 to 20 years, and (h) long sentence over 20 years.

5) Classification according to age. Offenders are classified into (a) those between 18 to 26 years old and (b) those over 26 years old.

In addition there are programmes for individuals who need special treatment. They can get a daily interview if required to do so by the social researcher.

B. Education, Work and Vocational Training

1) Education

Primary, intermediate and secondary schools are facilitated in the prison. Education is not compulsory. However, in view of the fact that Iraq is suffering from cultural backwardness, the central office of A.B.S.P. and the government issued the effective law of the comprehensive campaign for illiteracy eradication and adult education. The law binds every illiterate citizen. All potential resources, both in official and private levels, have been applied in its service. For the past two years the campaign has been quite successful. All correctional institutions have now adult education centres. These have drawn 100 percent of the illiterate prisoners.

To complete this illiteracy eradication, education has been regarded as one of the conditions for parole. At the end of 1979 new regulations for the public school have been issued. These schools are additional stage to the illiteracy eradication schools. At the opening of 1980, several of these schools have been inaugurated in the correctional institutions. Learners are provided with all their requirements gratuitously. The prison offers incentive prizes to the proficient at the end of each stage. Technical and administrative supervision of these schools is undertaken by the Ministry of Education in coordination with the Administrative Board of the Institute.

2) Work

In the prison there are production factories of such trades as carpentry, blacksmithing, sewing, shoe making, texture, carpet making, book binding in addition to the manual work done by the prisoners individually. The prisoners work for six hours a day in return of small amount of wages. Supervision of these factories is carried out by a specialized officer, yet there is the problem of inability to employ capable officers in work. Only 40 percent of the prisoners have been employed in the prison. Furthermore the obligatory campaign for eradication of illiteracy force

those who are under 45 years to go to school in the morning.

The central planning drawn by the General Office for Adult Correction aims at employing 80 percent of the prisoners during the five-year plan 1980–84. The new buildings which are under construction will enable, if completed, the goal of the five-year plan to become possible.

3) Vocational training

There is the Institute for Vocational and Cultural Training in the General Office for Adult Correction which is supervised by a specialized officer. The prisoners are nominated as trainees by the Expert Committee in collaboration with the social researchers. The wishes of the prisoners have to be taken into consideration in this procedure.

The Institute is operating vocational training programmes at prisons both in Basrah and Ninevah in such fields as (a) typing (Arabic and English), (b) carpentry, (c) electricity, (d) sewing (e) hairdressing, (f) agriculture, (g) financial sciences, (h) engraving, (i) welding, (j) penmanship, and (k) mechanics. Those who successfully complete the study are given a certificate qualifying them to work in their fields on their release.

C. External Treatment (Open Institutions, Work Release, Home-Leave and Parole)

1) Open institutions

This kind of prison is not available in Iraq and numerous factors including social conditions do not allow us at present to adopt this system.

2) Work release

Outside work is not hitherto legislated in the correctional institutions. But the State Organization for Social Reform, which is supervisory body of both adult and juvenile correction, allowed the prison in Ninevah to attempt a small-scale experiment so as to observe its effectiveness. In practice the prisoners participated in the paving work and in the preparation for festivals according to their wishes. There are regulations similar to those for granting home-leaves. The prisoners worked without any supervision except for visits by the social researchers during work hours with a view to studying the experiment. The experiment proved successful and the arrangement may be adopted after being endorsed by the Ministry of Labour and Social Affairs.

3) Home-leave

All the prisoners are entitled to home-leave with the exception of those convicted of sodomy or jeopardising the state-security. The home-leave is granted once every three months and lasts for five days. The prisoners are nominated for leave by the Expert Committee in coordination with the physician. The nomination process is headed by the head of the prison. The prisoners' attitude in the prison is to be considered in granting home-leave. To be granted home-leave, the prisoner must serve one-third of his sentence which should not be less than one year.

4) Parole

The Parole Law No. 34 (1974) is an amendment of the Penal Trial Law No. 23 (1971) which allows parole when the prisoner served 75 percent of his term of imprisonment. This Penal Trial Law excludes the dangerous offenders and recidivists sentenced for such offences as sodomy, rape, criminal assault on persons below 18, forced assault, penal servitude, embezzlement of public funds, "provided that they have been convicted of a similar offence." Those are also not eligible for parole who are convicted for two or more successive embezzlement offences, those convicted for an embezzlement offence constituted of two or more successive deeds or those convicted for a number of thefts provided that they have already been convicted for one or more thefts even if they have passed the term of imprisonment for any reason.

The court issues a resolution to release the prisoner and place him under control while he is out in society until term of sentence expires. If he commits another

crime and is sentenced to more than thirty days, he should be returned to prison and stay for the rest of the prison sentence in addition to the new sentence. It is evident that this Law contains way of rehabilitating adult offenders and is at the same time not lenient to the repetitive criminals or those convicted of crimes considered serious. The purpose is to reduce incidents of crime to a minimum.

Security and Control

1) Prison structure and security facilities

Prisons in Iraq adopt traditional measures for security and maintenance of the prison facilities. This is effected through double fences and watch towers. Security inside the prison and discipline of prisoners are effected through social controllers who are not armed but trained to deal with prisoners. No electronic security system is introduced at present. But new prisons under construction will have such equipments.

2) Human relations in prison

Since enactment of the Law of Prisons Department (1968) and the formation of the Expert Committee, relations among prisoners as well as relations between prisoners and officials have been carefully defined. In the Law the use of physical compulsion is strictly prohibited, except in the case of self-defence or in preventing prisoners from committing offences directly against the security of the prison. It can be noticed that the relations have acquired a human and correctional character.

3) Inspection and search

There is a routine inspection of prisoners with a view to preventing them from the use of banned material. There is an inspection of inmates who received visitors for there is no fence between visitors and the prisoners.

4) Disciplinary measures

As is described before, directors of prisons are authorized to impose penalties on prisoners who break prison rules but this can only take place after submitting the cases to the social research section and when punishment is indispensable for the security of the prison. The punishments are recorded and referred to when granting of home-leave and parole.

5) Use of firearms and restraining devices

Firearms are used only for guarding the surrounding walls of the prison. Nobody can be allowed to enter the prison with a firearm no matter what his rank is. As for the restraining devices, they are banned in the prison with exception of those fetters binding the prisoner during his transfer to or out of the prison. He is released from such devices immediately after his arrival.

6) Emergency planning

Plans especially related to breaking-out of fire are laid down in coordination with civil defence organization. A prison is required to have its own plan in case of any threat to the peace of the institution.

Prisoner's Rights and Living Conditions

1) Visits and correspondence

Prisoners are allowed to communicate by letter with their families and friends. Letters are received in their rooms or in halls. Visits are allowed four times a month as well as on religious occasions and national festivals.

2) Religious activities

Religious activities are one of the effective factors in the correction work. Hence prisons encourage such activities and provide places for religious practice. Stipends are paid to religious preachers of all sects who give religious service and lectures. Foods are provided in a specific way during the period of religious fast.

3) Access to information

Prisons are equipped with radios which enable prisoners to listen to amusement and news programmes. Daily newspapers are available free to prisoners. Prison libraries provide prisoners with magazines

and periodicals in addition to cultural and religious books. In 1979 the President presented a number of colour T.V. sets to prisons. In the near future an educational T.V. station will be established and special educational programmes will be televised for prisoners.

4) Personal freedom and privacy

Prisoners are free to move inside the specific area of the prison and are allowed to smoke and purchase things at canteen in the prison. They are allowed to see the social researcher or the director of the prison if necessary. They are allowed to visit each other at any time without restriction. The only restriction is to cause no disturbance to others.

5) Procedure of redress for grievances

Prisoners have several ways for redress for their complaints. They are allowed to complain through the social research section. Complaints are then examined by the administration. They are allowed to send complaint-statements to the administration or to any outside body. Our law bans the obstruction of any complaint addressed to anybody. They are allowed to summon their lawyers while the sentence is still subject to appeal.

Furthermore the senior inspectors and the officials of the head office occasionally visit prisoners and this will allow the prisoners to express their complaints directly to them. A locked box is installed in the prison so that prisoners put letters of complaints in it.

6) Medical care and living conditions

Prisons daily provide fresh foods to ensure health. A prisoners committee supervises quality of foods and services. Prisoners refuse foods if they are below the standard. Prisoners are allowed to buy tin foods and take foods brought by their visitors after inspection. As for the medical care physicians and other medical officers in addition to part time specialists are working in the prison to care for prisoners. Each prison administration is responsible for conveying a sick prisoner to the city hospital whenever it is impracticable to treat him inside the prison. Rooms and utilities are built in compliance with hygienic principles. There are ample yards for practicing exercise and sports.

Recruitment and Training of Correctional Officials

The rotten heritage of ancient regime has prompted the revolution to take measures for radical changes everywhere including correctional institutions. It goes without saying that this requires a long time and painstaking efforts. And administration still suffers from a shortage of skilled personnel in the spheres of correction, social research and vocational training. As there are numerous chances for workers to get a job in business and education, industrial and educational recruitment of competent officers is a difficult problem to solve. On submitting this problem to the Revolutionary Command Council last year, there appeared new rulings facilitating the acquisition of such personnel and training of them. The General Office for Adult Correction in collaboration with the National Centre for Criminology has been organizing in-service training courses as well as courses for guards and social controllers lasting not less than 6 months.

Institutional Treatment of Adult Offenders

*by Peter Rogers**

Roles and Functions of the Correctional Institution

The Malaysian Prisons Service comprises Prisons Department of Peninsular Malaysia, Prisons Department of Sarawak and Prisons Department of Sabah. The administration of the Prisons Department is vested in the Director-General of Prisons, subject to the directives, approval and policy of the Ministry of Home Affairs. At the Prisons Headquarters, the Director-General is assisted by two Deputy Director-Generals of Prisons, the Director of Industries, Senior Superintendent of Welfare and Aftercare, Administrative Officer, Research and Planning Officer and the Organiser of Schools, each of whom heading their own division. At the regional level, each penal institution is under the responsibility of a Director or a Senior Superintendent, or a Superintendent or an Officer-In-Charge. They are responsible to the Director-General of Prisons with regard to the administration, security of institution as well as the rehabilitation programmes of the inmates.

In contrast to the practice in the past, the work of the Prisons Department today is mainly of a rehabilitative rather than punitive in nature. The role and functions of the Prisons Department is threefold:

i) to segregate offenders from society as ordered by the law courts;
ii) to ensure safe custody of inmates;
iii) to rehabilitate them so that they can regain their self-respect and identity and eventually return to the community as law-abiding citizens and socially productive persons.

The essentials of penal administration are provided for in the followings: (a) Prisons Ordinance, 1952. (b) Prisons Rules, 1953, (c) Juvenile Courts Ordinance, 1947, (d) Internal Security Act, 1960, and (e) Emergency Ordinance, 1969. The general principles of penal administration can be summarised as follows:

a) Discipline and order shall be maintained with fairness but firmness and with no more restriction than is required for safe custody and to ensure a well-ordered community life.
b) In the control of inmates, prison officers should seek to influence them through their own example and leadership, so as to enlist their willing cooperation.
c) At all times, the treatment of inmates shall be such as to encourage their self-respect and a sense of personal responsibility, so as to rebuild their morale, to inculcate in them habits of good citizenship and hard work, to encourage them to lead a good and useful life on discharge and to fit them to do so,

General Trends in Prison Population

The Prisons Department of Malaysia is under the Ministry of Home Affairs and administers 26 Institutions.

Prisons	18
Borstal Schools	5
Rehabilitation Centres	2
Prison Officers Training School	1
Total	26

The current total population in the following correctional institutions all over the country as of 31 December 1979 is as follows:

Penal Institutions	Male	Female	Total
Prisons	8,156	158	8,314
Borstal Schools	844	21	865
Rehabilitation Centres	678	9	687
Total	9,678	188	9,866

* Deputy Superintendent of Prisons, Malaysia

With a population of about 13.5 million, the Malaysian imprisonment rate is 70 prisoners per 100,000 of the population. In respect of remandees and those awaiting trial, the following may be observed:

Total Prisoners	8,314
Prisoners under Remand and Awaiting Trials	2,136
Percentage of Remandees and Awaiting Trials	25.7
Remandees/Awaiting Trials per 100,000 of General Population	15.8

The years following 1975 saw a dramatic rise in the prison population:

Prison Population
(As of 31st December)

Year	Prisons	Borstals	Rehabilitation Centres	Total
1970	3,097	606	866	4,569
1971	2,978	558	537	4,073
1972	3,030	466	242	3,728
1973	3,177	448	148	3,773
1974	3,334	496	186	4,016
1975	4,320	566	417	5,285
1976	5,150	734	906	6,790
1977	5,799	847	1,004	7,650
1978	7.220	913	814	8,947
1979	8,314	865	687	9,866

The rise in prison population may be attributed to:

i) Intensified efforts on the part of the police directed towards criminals and Secret Societies.
ii) Greater number of arrests of drug abusers and traffickers.
iii) Introduction of stiffer penalties by the Courts.

As a result of the increases in prison population, the Department has been beset with the problem of overcrowdings. The problem can be summarized as follows:

i) Prisons which used to accommodate 600 inmates in the early 1970s now have to accommodate as many as 1,400 to 2,000 inmates.
ii) Now it is common for 2 or 3 prisoners to be accommodated to a cell which was originally designed for one.
iii) The high number of inmates has also disrupted the prison classification system.
iv) It has brought about strains and pressures to the social and physical facilities of the prisons e.g. recreational facilities, kitchens, toilets, workshops, visiting rooms.
v) The high number of inmates is also unconducive from the medical and security points of view.

The problem of overcrowding in prisons is compounded by the fact that most of the penal institutions are old, built in the mid 19th century or at the turn of the century. To aggravate matters, over the passage of time, these prisons have become located in the heart of the city or main town amidst heavy flow traffic and high rise development. In view of this, apart from minor renovations, the prospects of future expansion and extension of the said existing institutions are extremely poor.

With a view to overcoming the overcrowding problem and to replace existing old, ill-adapted prisons, the Department has proposals to build a number of new, modern penal institutions under the Fourth Malaysia Plan (1981-85).

Correctional Programmes

1. Classification, Allocation and Progressive Treatment

With a view to facilitating the rehabilitation of offenders and minimising the danger of contamination, prisoners are classified having regard to their age, character and previous history, as follows:

Young Class Prisoners, consisting of convicted prisoners under the age of 21 years.

Star Class Prisoners, consisting of first offenders and well-behaved prisoners who have no vicious tendencies or habits.

Ordinary Class Prisoners, consisting of recidivists and all other convicted prisoners.

Unconvicted Class Prisoners, consisting of persons on remand, awaiting trial, debtors, vagrants or persons detained for safe custody or for want of sureties.

Juveniles, consisting of young offenders between the ages of 14–21 under the Juvenile Court Ordinance, 1947.

At every prison in Malaysia, there is a Reception Board who shall interview every prisoner after being medically examined and consider what arrangements are to be made for his training. All convicted prisoners are classified according to their age, character and previous history. The director or his deputy will himself allot to each prisoner the labour for which he is best suited, the first consideration being to give each prisoner the best industrial training which his sentence, his capacity and the resources of the prison will allow. Rules relating to the treatment and conduct of the prisoners in the national language with translation into English, Chinese and Tamil are kept posted in places accessible to the prisoners.

At every institution there is a system of progressive stages with increasing privileges attached to the higher stages. Termed as the "Progressive Stage System," promotions from one stage onwards will depend upon good conduct, industry and length of service in each stage. Where a prisoner has served 3 years of his sentence, he is eligible for promotion to the Special Stage provided his conduct and the maintenance of his standard of skill at his trade has been continuously excellent. A prisoner in this stage is known as an Honour Prisoner and he is eligible to be discharged seven days earlier. As a result of a disciplinary charge or for continued slackness at labour, a prisoner may be demoted in stage or have his promotion to another stage postponed by the director for a period exceeding three months.

2. Education, Living Guidance, Work, Vocational Training and Therapeutic Treatment

The majority of the inmates, prior to their admission, are either illiterate or had received basic primary education only. Education is an integral part of the rehabilitation programme. The philosophy underlying the educational programme is to eliminate illiteracy, to help the offenders overcome his antisocial attitude and to develop a wholesome attitude and self-redirection. Language classes in the national medium and English are conducted by professional full-time teachers and inmates are encouraged to sit for secondary examinations.

Since Malaysia is made up of three main races, namely, Malays, Chinese and Indians, they are taught to respect each other's culture and religion and to develop personal relationships among themselves, in the daily activities by officers, instructors and teachers. In the process of training, every prisoner is required to engage in useful work. He shall be given industrial training and experience that will fit him to get and keep jobs on discharge.

The majority of the offenders have no vocational skills and were leading wayward life. Providing them with vocational training is of utmost importance, as without gainful employment, they are much more prone to temptations and eventual relapse to crime. Inmates are therefore taught in carpentry, tailoring, laundry, sock-making, shoe repairing, rattan work, printing, book binding, brass-ware, gardening and farming.

Individual and group counselling is provided. The counselling sessions are useful in that they provide the opportunities for prisoners to air their feelings, reflect the past and be guided. With tactful handling, the prisoners become less inhibited, thus counselling encourages them to discuss their problems more freely. It helps to create an atmosphere of trust and confidence between staff and prisoners.

3. Extramural Treatment (Open Institution, Work Release, Furlough, Remission and Parole)

A shift from closed urban penal institutions to open borstal farms is also evident. A good example is the Henry Gurney School and the Dusun Dato Murad in the state of Malacca for young offenders. This is the first of its kind in this country and

is in accord with the premise that since Malaysia is basically an agricultural country, therefore, training in agriculture is more likely to encourage youths to work instead of seeking employment in towns. In the future, it is intended to extend this agriculture scheme to adult prisoners.

Work release and furlough has not been introduced in Malaysian penal institutions, except that work release is currently implemented for young offenders who are committed to the borstals or approved schools. In any event, work release is considered a useful technique for helping the offender to strengthen his ties with the community and to ensure his eventual rehabilitation.

With a view to encouraging good conduct and industry and to facilitating reformative treatment, a convicted prisoner (male or female) sentenced to a term of imprisonment exceeding one month is granted one-third remission of sentence. According to the Prisons Ordinance, 1952, where a prisoner is sentenced to several terms of imprisonment on several warrants at the same time, or is sentenced to a further term or terms of imprisonment before the expiration of his original sentence, his several sentences on all the warrants shall be consecutive, unless otherwise ordered by the court and the aggregate term shall run from the date of the first warrant. An offender transferred to a mental institution is allowed full remission. A prisoner undergoing confinement in a punishment cell is not entitled to earn remission in respect of the period during which he is undergoing such punishment.

In Malaysia, there is no general system of parole for convicted adult prisoners. Parole is given for young offenders who are committed to the approved schools.

Security and Control

1. Prison Structure and Security Facilities.

Under the Five-Year Development Plans, efforts are being taken to replace or renovate old prison buildings which have become ill-adapted to the aims and purpose of modern correctional practice. In the planning of future institutions, an effort is made to avoid an unsightly, grim drab and forbidding appearance. The layout of the buildings is designed not only to take account of the security aspects but also to give them an attractive appearance.

Besides the traditional walls, some maximum security prisons have additional innner fences to strengthen the perimeter security. Selected armed prison guards are on 24 hours shift duty at all post towers. Each post tower and workshop is equipped with an alarm system which is used in case of emergency.

Everyday, surprise checks are made in cells, to check the bars, walls and doors. High powered lights are used at strategic points in the night. All ladders, ropes and planks that would facilitate escapes are kept locked in a secured area. Male prisoners, who during a previous detention in lawful custody have escaped or attempted to escape, will be considered and treated as potential prison breakers. A special watch will be kept over them.

2. Human Relations in Prison

There are many opportunities for offenders to develop personal relationships of various kinds with members of the staff within the prison society. Human relations is maintained with officers in the daily activities of the prison, in personal interviews and recreation, with instructors in workshops, teachers in classes and the prison welfare officer. All these situations provide the staff with opportunities that can be used to demonstrate that good relationships have been attained with Malay, Chinese and Indian prisoners.

3. Inspection and Search

Daily inspection of prison officers is carried out by a senior officer. All lower rank officers are made to assemble for inspection. A senior officer is detailed to check the appearance and smartness of prison officers. Attention is drawn to cleanliness of uniform, shoes, buttons and reasonable short hair. Similarly, the inspection officer ensures that every prison officer is searched. Officers reporting for

duty in the morning, afternoon and night are picked at random and taken to a search room and strictly searched. While he is in uniform, no prison officer is supposed to keep in possession any objectionable items, except his baton, a whistle and his authority card.

4. Disciplinary Measures

There is a fairly high standard of discipline among prison officers. In all penal institutions, prison officers are strictly confirmed to all written laws, rules, standing orders and regulations. All written or verbal orders are explained to uniform staff during monthly meetings. However, disciplinary action is taken against any prison officer who contravenes the above conditions. He is lieable to dismissal, reduction in rank, extra weekend duties or extra drill.

5. Use of Firearms and Restraining Devices

Firearms are only used by prison officers at post towers, or officers proceeding on escort duties to courts and hospitals. Generally, a prison officer is taught to use of any such weapon against any prisoner escaping or attempting to escape, provided that resort shall not be had to the use of any weapon, unless such officer has reasonable ground to believe that he cannot otherwise prevent the escape. Firearms can also be used on any prisoner engaged in any combined outbreak, in any attempt to force or break open the outside door or gate, or in using violence to any prison officer. Before using firearms against a prisoner, the officer shall give a warning to the prisoner that he is about to fire on him. The use of firearms shall be as far as possible to disable and not to kill.

6. Emergency Planning

The director of each prison has drawn up emergency plans to improve prison security and defences. In the event of any prison disturbance, several prison guards have been trained in unarmed combat to control any physical violence without using arms. If the situation gets out of control and if prison staff are overpowered, an alarm system and a "hot line" is immediately relayed to the Police Riot Squad Division. So far in the history of Malaysian Prisons, there has been no such incidents. In borstals and rehabilitation centres, where the compound is wide, wireless sets are used by staff to communicate with each other. At every prison, there is also a fire service to prevent any fire outbreak. Similarly, each prison is equipped with a generator to supply electricity if the mains are temporarily disrupted.

Prisoners' Rights and Living Conditions

1. Visits and Correspondence

In all prisons, priority has been given to visits to those who are convicted and on remand according to the stage in which a prisoner is serving. The time allowed for each visit in all stages is 30 minutes. Those serving less than 6 months are allowed every 28 days and prisoners serving above 6 months are permitted between every 3 weeks to weekly visit. Visits are also accorded to the legal adviser of a prisoner who is conducting any legal proceedings, civil or ciminal. The privilege of writing and receiving letters is allowed every week. Prisoners can write to their families, relatives and friends but all correspondence has to be censored. In addition, a prisoner is allowed to write a special letter or to receive a special visit in any of the following circumstances:

i) the death or serious illness of a near relative;
ii) business or family affairs of an urgent nature; or
iii) arrangement for obtaining employment or assistance from friends on release.

2. Religious Activities

Malaysia is a multiracial society and prisoners of different races and religions are committed to custody. Freedom of religious worship is allowed for all prisoners. Religious instructors and ministers from various faiths provide religious guidance in all penal institutions. On festive occasions, religious organisations provide food parcels to all prisoners.

3. Access to Information (Books, Radio, Television and Newspaper)

All penal institutions are provided with library facilities and prisoners are encouraged to make the best use of them. In addition, newspapers and periodicals are made available. Regular cinema shows, radio, cassette and television facilities are made available throughout the year. Besides the provision of extramural activities in the form of indoor and outdoor games, annual sports for prisoners are organised by prisoners themselves under the supervision of staff.

4. Personal Freedom and Privacy

In all prisons and other correctional institutions, personal freedom and privacy are given to prisoners. They can either be by themselves or associate freely with other fellow offenders during working hours and during recreational period. To overcome monotony, adequate communication of offenders with family members and friends through letters and visits and through counselling have played an important role in strengthening their community ties. Extramural activities has also provided constructive means of spending their leisure time and helped them to reduce the monotony of prison routine.

5. Procedure for Redress of Grievances

It is the duty of all prison officers to listen patiently to prisoners' complaints and to report their grievances and all such other matters as are necessary to enable them to understand both their rights and obligations and to adapt them to institutional life. Every prisoner is given the opportunity to make requests or complaints to the director of the institution once in every week. The prisoner is given the opportunity to talk to the director and should any action is to be taken, the director will take steps to investigate and take immediate action. The usual complaints received are petty quarrels between prisoners themselves.

6. Medical Care and Living Conditions

In all penal institutions, every prisoner after his admission is separately examined by the medical officer. If a prisoner is found to be suffering from any infectious disease, he is at once taken to be treated and to prevent it from spreading to other prisoners. Prisoners who fall ill are given daily medical treatment. In addition, the medical officer regularly inspects and advises the director upon the hygiene and cleanliness of the institution, preparation and service of food, sanitation, lighting, ventilation and living conditions of the prisoner.

7. Implementation of the Standard Minimum Rules for the Treatment of Prisoners

It can be proudly said that in the treatment of offenders, the Rules covers the general management of institutions to all categories of prisoners for corrective measures ordered by the courts in almost nearly every aspect with those in the United Nations Standard Minimum Rules.

Recruitment and Training of Correctional Officials

In the recruitment of uniformed staff, the prison administration selects persons having the requisite qualities of integrity, humanitarian approach, competence, physical fitness and having completed secondary schools. To equip prison officers with the heavy and increasing responsibilities, the Prison Officers' Training School provides in-service training courses between 3 to 6 months. During their probationary period, officers are given theoretical and practical training in respect to the Prison Ordinance, Prison Rules and Standing Orders. Special attention is paid to the technique of relations with prisoners, based on the elementary principles of psychology and criminology. Prison officers are also given special physical training to enable them to restrain aggressive prisoners and instructions in the use of firearms.

Training courses for higher grades officers are offered in penal laws, penology, group discussions, visits to different types of institutions, including those outside the

penal system. Selected senior officers are often sent overseas for specialised courses at the United Nations Asia and Far East Institute for the Prevention of Crime and Treatment of Offenders at Fuchu, Japan, the Staff College, Wakefield, England and Australian Institute of Criminology. In this era of development, the Malaysian Prisons Department realises the fact that it cannot remain complacent with its present achievements, but continuously seeks to be on the move, probing new innovations that will bring about greater efficiency in penal administration as well as keeps it abreast with modern trends in criminology, penology and social defence as a whole.

The Principles and Methods of the Probation System as Practiced in Western Samoa

*by Nofoatolu Poumau Papalii**

Introduction

The Samoan Islands lie in the Central Pacific about 1,000 miles south of the equator, within an area bounded by latitude 13° and 15° south and longitude 168° and 173° west. The group consists of nine main islands which were inhabited by Samoans at the time of their discovery by Europeans in 1722 and which have remained under continuous habitation ever since. Samoans belong to the ethnic race of peoples known as "Polynesians." The Polynesians settled the islands within a vast triangle in the Pacific Ocean stretching from Hawaii in the north to New Zealand in the southwest and across to Easter Island in the east. Physically, the Polynesians are a brown skinned people, with straight or wavy hair, generally tall and solidly built; and similarities of material culture, of language, of tradition, and of social structure help to assess their common origin. The theory most widely accepted by anthropologists believes that the Polynesians came from Southeast Asia under progressive migrations. It has been firmly established that Samoa was one of the earliest regions of settlement and has been continuously inhabited for at least two thousand years.

The Independent State of Western Samoa, which was the first fully independent state in the South Pacific to emerge in the 20th centry, achieved this status on 1 January 1962.

The people of Western Samoa are almost wholly (98%) literate, however, over 50% being literate in the Samoan language only. Almost without exception every Samoan professes to belong to one established church or another of the Christian Faith. Of the economically active population, 65% are engaged in village agriculture (and fishing) and the next employment class in size is the civil service which is almost entirely Samoan. Most Samoans live within the traditional social system based on the extended family group. The part-Europeans number approximately 10,000, and in their way of life range between the completely Samoan and the completely European.

Samoan society had no central political authority or government exercising control over all its members. Rather, political organization rested largely upon the ramified lineage and the local extended family, and also upon the village, in which members of several families joined in dealing with common local problems. These traditional institutions are still as effective today as in the past and they help in lessening domestic crisis in Western Samoa.

The Probation Service

The probation service in Western Samoa is a division of the Justice Department, and it is headed by the Chief Probation Officer whose administrative head is the Secretary for Justice, the political head of the Department being the Minister for Justice.

Probation officers are statutory officers and derive their authority from the Offenders Probation Act of 1971. This enactment provides the legal and administrative framework under which the service may operate.

1. The Judicial System of Western Samoa

The judicial system of Western Samoa operates at three distinct levels: The Supreme Court which is presided over by the Chief Justice, the Magistrates Court presided over by two magistrates and the Lower Magistrates Court which is managed by specially appointed lay judges who are Samoans. The Lower Magistrates Court has only minor jurisdiction and only deals with

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the smaller offences carrying penalties of six months imprisonment or less. It may also handle a limited number of civil cases involving minor traffic offences, domestic proceedings, and civil claims.

Courts of all jurisdictions are mainly conducted at Apia, the capital of Western Samoa, situated on Upolu, the smaller but the more developed of the two main islands. Regular courts are convened at the smaller township of Tuasivi on the larger but less developed island called Savaii.

The Samoan criminal justice system which functions on the above judicial pattern was adopted from the New Zealand system which in turn was moulded after the British judicial organization. The Samoan system, however, has been extensively modified to suit the particular needs of the community. For example the jury system is not used in Western Samoa and in the Supreme Court trials the Chief Justice is assisted by a panel of five assessors, all of whom must be holders of Matai Titles (chiefs) and thoroughly conversant with Samoan customs, Samoan attitudes and practices. Like a jury, the assessors determine the facts of the case and reach a verdict. If they convict the defendant the Chief Justice has the power of veto, but if they acquit then the decision must stand.

The basis of statute laws in Western Samoa stems from English common law and this system is common with those practised in other former British colonies such as New Zealand, Australia and the rest of the Commonwealth nations.

2. Definition of Probation

Probation may be defined in Western Samoa as a method of dealing with an offender convicted of an offence punishable by imprisonment whereby the imposition of a final sentence is suspended. Instead of being sentenced to imprisonment the offender is released on probation under the supervision of a probation officer. Subject to certain restrictions laid down and with the help, guidance and advice of the probation officer, the offender is given the opportunity to prove himself within society. He is given the chance to regain a place he may have lost through his offences and to become re-established as a law-abiding citizen within his own community. Should he fail by his own choosing the law can still deal with him for his original offences.

The aim to release young and first offenders on probation is to rehabilitate and encourage them to resume a useful place in the community. Probation enables the court effectively to protect young and first offenders from meeting and associating with habitual criminals, as such would be the case if they were sentenced to imprisonment.

3. Power of Court to Impose Probation

Where any person is convicted of any offence punishable by imprisonment the court may in its discretion, instead of sentencing him to imprisonment, release him on probation for a specified period of not less than one year nor more than three years. In addition to this, provision is made for the court to sentence an offender to imprisonment for up to 12 months followed by a period of probation of not more than one year.

4. Court Reports (Investigation)

Probation officers are required to make enquiries and prepare written reports on offenders at the request of magistrates. They submit similar reports on the majority of criminal cases for sentence in the Supreme Court. Reports are required to be complete, accurate accounts covering the criminality, employment and social history of offenders. They may recommend probation or some other forms of treatment as a result of his conclusions about the offender and his crime.

Usually an offender is remanded for a week to enable the probation officer to write a full and checked social history. Only when this has been obtained can a proper recommendation be made to the presiding judicial authority. At the point of being found guilty the judge or magistrate knows only the facts surrounding the offence, he knows nothing of the personal history of the offender, nor does he know

the reason why the person concerned committed an offence. Only with this knowledge can the appropriate sentence be given.

A probation officer may be required to write several reports for the court in any given week. The report is perhaps the most important and valuable thing a probation officer does. It directly assists the magistrate in the disposition of the case and he will ask for a specific recommendation at the end of the report.

Probation officers may recommend one of the following means of disposing with a case:

1) Discharge without conviction
2) Deferred sentence
3) Convicted and fined with costs and restitution
4) Convicted and discharged
5) Deportation (in the case of foreigners convicted of criminal offences)
6) Psychiatric investigation (not a sentence)
7) Probation supervision—minimum 1 year, maximum 3 years.

At the time of sentencing the probation officer must appear in court and ensure that the offender had read and fully understands the nature and contents of the report which has been prepared on him. He must also be prepared to assist the court as required by acting as interpreter and answer questions relating to any information contained in the pre-sentence report.

The preparation of the pre-sentence report represent the first of two main functions and duties required of the probation service. The second and probably the most difficult of the two from the probation officer's point of view, as well as being the most important from the correctional standpoint is supervision.

5. Supervision on Probationer

1) The probation order

When an offender after being convicted for his offence is released on probation by the court he must immediately report to the chief probation officer and undergo formal induction. The normal practice is for the probation officer who prepared the offender's court report, to undertake his supervision and the chief probation officer will delegate most casework to his officers on this basis.

The first duty of the supervising officer is to arrange an interview with his new client (offender) as soon as possible and the importance of this interview cannot be overstressed as it allows the probation officer and his client to get to know one another and establish the tone of their relationship for future casework. It must be remembered that supervision will last from 1 year to 3 years and in order to ensure a smooth relationship the probation officer must be honest but firm with his client during the initial stages of supervision. At this first interview the supervising officer will issue the client with his probation order, sometimes called a probationary licence in other countries, and explain to him in clear and simple terms the conditions under which he is being released. The standard probation order issued to the client will contain the following conditions which he must abide by:

a) Within 24 hours after his release on probation he shall report in person to a probation officer.
b) He shall report to the probation officer under whose supervision he is as and when required to do so by the probation officer.
c) He shall give the probation officer reasonable notice of his intention to change his address, and if he moves to any other address, he shall within 48 hours notify the chief probation officer of his arrival, his new address, and the nature and place of his employment.
d) He shall not reside at any address that is not approved of by the probation officer.
e) He shall not continue in any employment or continue to engage in any occupation, that is not approved by the probation officer.
f) He shall not associate with any specified person, or persons of any specified class, with whom the proba-

tion officer has, in writing, warned him not to associate.

g) He shall be of good behaviour and commit no further offences against the law.

(2) Breach of probation order

If a probationer fails to comply with one or more of the conditions of his probation order he is liable to be brought before the sentencing court and dealt with by way of imprisonment for a period not exceeding 3 months or a fine not exceeding $100. It may also impose additional conditions and extend the term of probation up to the maximum of 3 years for those serving less.

To institute such proceedings the probation officer will lay a written information on oath, before the registrar of the court requesting that a warrant be issued to arrest the probationer and that he be charged for breach of his probation order. The probation officer must prepare documents of prosecution and personally deal with the case in court. When the matter is brought up before the court the alleged breach of the probation order must be clearly put to the probationer and if he does not admit it, the probation officer must prove it to the satisfaction of the court, giving evidence on oath and being open to cross-examination. There is a right of appeal against the court's decision.

(3) Further offence while on probation

If a probationer is convicted for committing a further offence while serving probation, his supervising officer after discussion with the chief probation officer may formally apply to the sentencing court to have the probationer dealt with on the original charge for which he was released on probation. This procedure has the effect of revoking the probation order and terminating probation as in nearly all cases the probationer will be sentenced to a term of imprisonment.

(4) Power of arrest

In accordance with the Offenders Probation Act of 1971 every probation officer in the exercise of his powers and duties is given the powers, protection and privileges of a police constable and may arrest without warrant. I would hasten to add that such powers should not be used by any probation officer unless the situation is unavoidable and that he must always seek a warrant from the court.

(5) Variation of conditions and discharge from probation

From time to time it may become necessary for the probation officer to apply to the court to vary certain conditions of the probation order or add special conditions in order to effect better supervision methods to benefit both the probationer and his own status as supervisor.

In the matter of a discharge from probation the supervising officer may apply at any time to the court to have the probationer discharged however, the probationer himself may make application to the court but only after he has served half of his term. For the court to approve such a discharge usually it requires a major change in the probationer's attitude and general circumstances and even then the court is very reluctant to grant such a discharge.

(6) Termination

Probation is deemed terminated when the prescribed term ordered by the court has expired. With this the person is no longer under legal obligation to the probation service or the court and his supervision is formally ended.

6. Objectives of Probation

The professional practice of probation in Western Samoa is directed towards the achievement of more permanent goals than just prevention of criminal or otherwise antisocial behaviour during the offender's period on supervision. The technique of intensive casework counselling and use of general community resources are exploited to their fullest extent in an endeavour to develop within the probationer those qualities of character and personality necessary for him to lead a stable and more responsible life within his community. Such an undertaking requires the combination of full cooperation on the part of the probationer and the contribution of a probation officer, who is fully equipped both by requisite factors within his own personality and specialized training together with his status in the community, will be able to develop the situation to its fullest potential.

The value of probation in Western Samoan criminal justice system is firmly established. As is shown in the Table below the judiciary's willingness to use the service has shown marked increase over the past three years to an extent where it has now become difficult to keep up with the demands of the courts without further increase in staff. The quality of the service is dependent on those who administer it and at present, I am proud to admit the high standard of professionalism with the service. As more and more young Samoan men and women are being sent overseas to study in the field of human sciences, this high standard will be maintained in the future.

Offences Committed by Persons on Probation for 1979

	Male	Female
Assault	37	2
Bodily Harm	15	1
Theft	103	17
Insulting with Threat Words	–	–
Found by Night	8	–
Break/Enter	22	1
Driving without Licence	9	–
Negligent Driving Causing Bodily Injury	6	–
Negligent Driving Causing Death	2	–
Driving under Influence of Alcohol	–	–
Dangerous Driving	7	–
Armed with Dangerous Weapons	9	1
Forgery/False Presence	12	2
Wilful Damage	10	–
Throwing Stones	19	1
Unlawful Conversion	11	–
Indecent Assault	7	–
Unlawful Sexual Intercourse	2	–
Attempted Sexual Intercourse	1	–
Rape	–	–
Arson	1	–
Car Conversion	1	–
Wilful Trespass	8	–
Others	4	–
Total	294	25

SECTION 3: GROUP WORKSHOPS

WORKSHOP I: Some Important Aspects in Criminal Justice Administration

Summary Report of the Rapporteur

Chairman: *Mr. Leo Teng Jit*
Advisors: *Mr. Minoru Shikita, Mr. Makazu Ikeda and Mr. Susumu Umemura*
Rapporteur: *Mr. Tin Ching-Lung*

Titles of the Papers Presented

1. Prisons Social Service in Singapore
   by Mr. Leo Teng Jit (Singapore)
2. Kwun Tong Hostel—the First Probation Hostel and the Only of Its Kind in Hong Kong
   by Mr. Tin Ching-Lung (Hong Kong)
3. Criminal Justice System in Iran
   by Mr. Mostafa Zarin-Ghalam (Iran)
4. Stimulant Drug Offenders
   by Mr. Nobuyuki Hikita (Japan)
5. Suspension of Execution of Sentence in Japan (Especially Concerning Traffic Crimes)
   by Mr. Kiyomasa Yamagaki (Japan)
6. Juveniles Sniffing Thinner or Glue
   by Mr. Nobuo Kaneko (Japan)

Introduction

The group consisted of two judges, one public prosecutor, one family court probation officer, one probation officer and one rehabilitation officer. All of the group members directly or indirectly involved in one way or another in the criminal justice administration towards the common goal of prevention of crime and treatment of offenders. The group discussed various aspects related to the criminal justice administration such as criminal justice system, suspension of execution of sentence, stimulant drug offenders, examination and treatment of glue sniffing juveniles, probation hostel and prisons social service.

Prisons Social Service in Singapore

In Singapore, the release on licence is equivalent to the parole system of many other countries. Mr. Leo explained that this system could be administered from two angles; one is operated as a segment of criminal justice system and the other, as part of an integrated system of treatment for the prisoners. In the former case, it involves the introduction of a separate agency, which is disengaged from prison administration. In the latter case, parole administration is vested in the penal authorities.

Mr. Leo introduced the prisons social service in Singapore. Formerly, a branch of the Probation and Aftercare Service provided casework services to the offenders detained in the prisons. As this branch was detached from the Prisons Department and unable to provide adequate assistance to the prisoners, the Prisons Social Service Division was thus established as an integral part of the Prisons Department on 1st November, 1972. Mr. Leo himself was then one of the five probation officers transferred to the Prisons Social Service Division. This Division has two roles: 1) Essential roles—to provide various social services to prisoners and their families and to act as a channel of communication between prisoners, the penal authorities and community; 2) Supportive roles—to enhance the effectiveness of treatment programme, to reinforce the security and control. These roles were achieved by conducting social investigation in relation to inmates' training and domestic problem, preparing social enquiry reports for the Prisons Classification Board, providing individual and group counselling to inmates and their families and carrying out surveys and research regarding inmates' training and problems.

The functions of Prisons Social Service officers can be broken down to three distinct but interrelated stages: 1) Upon admission—the Social Service Officers help the newly admitted prisoners, in the process of classification interviews understand their situation in order to let them have better adjustment to the institutional life, and provide assistance to them and their families if necessary; 2) During rehabilitation process—many complicated problems, including financial, marital and adjustment problems, require long term intervention from the Social Service Officers who are all the time available to assist the prisoners; 3) Prior to release—the Social Service Officers on the one hand assess the prisoners' suitability for home leave and, if favourable on the other hand prepare both prisoners and their families for the prisoners' release from prison. Cases requiring follow-up intervention after release are to be referred to the Singapore Aftercare Association which is a voluntary social agency, assisting the released prisoners on voluntary basis, or to the Probation and Aftercare Service if the prisoners are to be released on licence, as the service, a government establishment, is carrying out statutory supervision of licencees.

The present practice of the release on licence in Singapore was considered by Mr. Leo to be a segment of the criminal justice system. After emphasizing the importance of release on licence and pointing out the disadvantages of the existing practice, Mr. Leo opined that the prisoner would be helped more adequately and effectively if the release on licence was administered as an integrated part of the prisoner's treatment in and outside the prison, with the same Prisons Social Service Officer handling his case throughout the process.

Regarding the importance of the release on licence, Mr. Leo stressed the fact that many ex-prisoners who had gone through a period of stay in prison would lose all sense of direction to live a normal life on their release unless they were given guidance during the initial period of integration. It was unnecessary to emphasize, Mr. Leo added, how all the efforts of the rehabilitative staff would be wasted if an ex-prisoner relapsed into committing crime again mainly due to his failure in adjusting to the living of the open society upon his release. The group members unanimously agreed that effective rehabilitation depends on effective release on licence system.

The present practice, i.e. the Probation and Aftercare Service being responsible for the statutory supervision on the release on licence cases, was not considered by Mr. Leo to be an ideal approach because a long-standing rapport between the Prisons Social Service Officer and the supervisee ended abruptly due to the change of supervising officer. Mr. Leo added that the Probation and Aftercare Officer not only had to establish a new working relationship, but also had to repeat many efforts previously made by the Prisons Social Service Officer. In his opinion, if release on licence case was to be supervised continuously by the Prisons Social Service Officer, the advantages would go to both the worker and the client, and the practice would become a part of an integrated system of treatment for the prisoners. In Japan, parolees have to be transferred to the probation officers because of the comparatively large community area, whereas Singapore is a small country, geographical factor is not a problem. The communication with the open community made by the Probation and Aftercare Officers and Prisons Social Service Officer was discussed, and it was found that two kinds of officers were the same while comparing with their abilities and experiences. Again the subject of professional and personal relationship was mentioned; the possibility of supervisee's wish to have a change of supervising officer was raised; the smooth transfer system in Japan was elaborated; and the physical setting of Prisons Social Service was enquired. In Singapore, the discharged prisoners maintain very close relationship with the Prisons Social Service Officers; all the work performed by those officers are under the close attention and supervision from senior officer and a change of supervising officer will be taken if necessary; and the Prisons Social Service Office is situated at the

prison staff training school, therefore the discharged prisoners will have no hesitation to contact the officers there. The group members were of the opinion that the Prisons Social Service in Singapore had been established and appeared to be an effective one; if the release on licence was taken-over by the Prisons Social Service Officers, the whole system might be improved. In fact, we have to consider carefully the advantages and disadvantages of any proposal before any decision for a change is to be made.

Kwun Tong Hostel—The First Probation Hostel and the Only of Its Kind in Hong Kong

The general picture of probation service in Hong Kong was given by Mr. Tin. Probation is used by the courts to place an offender at liberty under the supervision of a probation officer for a period of 1 to 3 years. Probation order is usually issued after the court has considered carefully the circumstances leading to an offence, the nature of the offence and the character of the offender. There are altogether 13 probation offices serving magistracies, district courts and the Supreme Court. To facilitate the successful rehabilitation of offenders into the community, the probation officer guides the behaviour of probationers during the probation period, makes regular contact with them through home visits and interviews and exercises his professional skills and knowledge of local resources to meet the needs of probationers, and, where necessary, that of their family members for financial assistance, employment, schooling, etc. The Kwun Tong Hostel, with a capacity of 60, is the first probation hostel and the only of its kind in Hong Kong for the male probationers aged 16 to 21 who are required to reside there as a residential condition of their probation orders. It is an open institution and the majority of the residents take up outside employment during the day. The emphasis of training is on career guidance, budgeting, the proper use of leisure and social responsibility. After the brief description of the probation work and the Kwun Tong Hostel, Mr. Tin took up the following difficulties for discussion:

1) The maximum period of residence: According to the Probation of Offenders Ordinance, the maximum period of residence in the Kwun Tong Hostel is one year, but some probationers, especially those having poor relationship with their parents and those having immature personality and antisocial behaviour, may need longer period of training in the hostel. Under the present practice, they have to be discharged after the completion of 12 months residential training.

2) Employers' attitude towards probationers: Some employers have prejudice against probationers, the former do not employ the latter if they know those applicants are probationers. Bearing in mind that full cooperation from the employer is vital factor in the rehabilitation process, we have to seek for the possible solution to this problem.

3) Lack of social worker in the probation hostel: If the probationer has any problem requiring professional assistance, he has to seek assistance from the Superintendent, or he has to wait until the visit paid by his supervising probation officer. In the interest of the probationer, we should try to tackle this problem.

After the presentation, the group members firstly discussed the period of residence. In Japan, the rehabilitation aid hostels, private organizations, perform rehabilitation services under the authorization and supervision of the Minister of Justice, and the State reimburses the expenses for such services. There is no limitation for a probationer or parolee to stay at the rehabilitation aid hostel and the residential period for a discharged offender is 6 months but he can be allowed to stay there continuously at his own expenses. In Singapore, the discharged Criminal Law detainees can stay at the Ahmad Ibrahim Camp for a period of 6 to 12 months, but the Camp Commandant can, with the consent of the Minister for Home Affairs authorize a resident to stay there at a longer period whenever necessary. The

group was of the opinion that in order to facilitate the rehabilitation of offenders, the residential period at an institution should be more flexible, and it was more desirable if the residential period could be extended.

Secondly, the group members exchanged ideas about the public opinions towards offenders and the cooperation from the employers. In many countries, the probation officers have certain connection with factories and companies, but some employers may still have prejudices against offenders. The group felt that the government should enlighten the society about the importance of gainful employment to the offenders' future rehabilitation. The Singapore government invites the prominent businessmen to be members of the Aftercare Subcommittee; as a result the committee members try their best to offer job opportunities and work cooperatively with the government officials towards the rehabilitation of offenders, and the success of the subcommittee is highly recognized by the government. It was concluded that the general public should be encouraged and educated while the cooperation from employers should be sought in order to achieve the goal of successful treatment for the offenders.

Finally, the group took up the subject of the availability of a social worker in probation hostel for discussion. The expansion of service to justify the establishment of a social worker, the provision of training to the staff, the negotiation with trade union, and the roles of a superintendent were thoroughly discussed. It was agreed that at least one social worker attached to the hostel was necessary because this being the functional post in the institution.

Criminal Justice System in Iran

Mr. Zarin-Ghalam introduced the criminal justice system in Iran. When a report is made to the police, the police investigates both the complainant and the accused, and gathers evidence including statements from witnesses, medical certificates, etc. After completion of the investigation, the police sends a file to the examining judge or interrogator who again makes enquiry into complainant, accused, witness, and other evidences. Having taken all of the information into consideration, the examining judge issues the edict and then he makes further enquiries and issues the final edict, the case is then sent to the public prosecutor for an indictment. If the public prosecutor agrees with the final edict he will issue the indictment; if the public prosecutor notices some shortages in the final edict and deems it necessary that some enquiries must be done, he can refer the case back to the examining judge for further investigation. The examining judge is obliged to complete the edict and to carry out re-investigation as required by the public prosecutor. As a principle the public prosecutor is empowered to control over the investigations of an examining judge. Upon the completion of investigation, the case is referred to the court with an indictment endorsed by the public prosecutor. The accused has the right to request the presiding judge to offer him a defence counsel provided by the government. During court session, the judge(s) will hear the evidences, and the defence, and will then dispose the case. The sentence must include the reasonable and rational judgement on the evidences of a crime, and the relevant article must be stated in the verdict.

According to Mr. Zarin-Ghalam, the service of subpoena to the accused is sometimes delayed by the police or military police; that is to say, the police or military police responsible to serve the subpoena to the accused at rural area may not accomplish his duty in due time before the appointment for trial. As a result, the court has to postpone the hearing even for several times, for some extreme cases the postponement may last for two to three years. This defect may not only affect the efficiency of the criminal procedure but also induce the objections and protests by the correspondent party. This situation does not exist in Hong Kong because the police usually cooperates with the court,

and the latter will not be satisfied if no concrete explanation about the delay is given. In Japan, if a copy of the formal prosecution sheet cannot be served two months after the date of issue, the case has to be dismissed; some gangsters may influence the medical doctors in order to get a false medical certificate and yet the court can solicit the help from police to investigate the actual situation. The group members were of the opinion that cooperation and assistance from police would likely do things better, and it was hoped that this problem would be solved eventually.

Regarding the protests against sentences given by courts on the cases of traffic negligence causing death, the group members exchanged information about sentences given by the courts from different countries. In Iran, the offender is likely sentenced to 6 months imprisonment, fine or even suspended sentence, due to mitigating circumstances, although the statutory penalty ranges from 2 to 3 years imprisonment, and the amount of compensation is very small. The Japanese laws do not consider this as a serious offence, the usual practice is 6 to 10 months imprisonment without forced labour, among the total number of these who received imprisonment sentences, majority of them are granted suspension of execution; the compensations are mandatory and are to be paid by the insurance companies, although the amount of compensations may not always satisfy some victims. The Singapore situation is more or less the same as Japan, and the compensation is decided by the court and paid by the insurance company. The majority opinion was that the court should be empowered to give sentence on any individual case and the compensation should better be paid by the insurance company.

The criminal justice system in Iran is undergoing an overall change due to the Islamic Revolution. During the transitional period, there are some differences in the judicial practice between revolutionary and ordinary courts. The group recognized the existence of the difficulties and understood the strenuous efforts made by the revolutionary government of Iran to solve this problem.

Stimulant Drug Offenders

At the outset, Mr. Hikita invited the group's attention to the serious problem of stimulant drug offenders. The number of stimulant drugs cases including the smuggling of stimulant drugs, has been continuously increasing, and the original causations for the use of stimulant drugs are out of curiosity, sexual stimulation and unscrupulousness, etc. The use of stimulant drugs is not only harmful to the individuals but also to the society as a whole; even worse some drug abusers may commit criminal offences because of stimulant drugs.

With regard to the possible measures to cope with an increase of stimulant drug offences, the group members exchanged their experience and opinions. Singapore exercises the severe punishment towards drug offenders; the mandatory death penalty applies to anyone who is convicted for trafficking morphine in the quantity of more than 30 grammes or heroin of any amount exceeding 15 grammes; as to the drug abusers, the first known offenders are sent to drug rehabilitation centres, and the relapsed offenders are sent to prisons. Even though Hong Kong does not have death penalty for drug traffickers and yet they will never be let off by the courts; the courts are empowered to order a drug offender convicted of an offence punishable with imprisonment to be sent to an addiction treatment centre, if it is satisfied that, in the circumstances of the case and having regard to his character and previous conduct, it is in his interest as well as in the public to do so. Before a detention order to a treatment centre is made, the court is required to remand the offender into a drug addiction treatment centre for a suitability report by the prisons authorities. Since the majority of stimulant drug offences in Japan, especially the smuggling cases, are committed by the gangsters, the group members stressed that it was necessary to tackle the problem of gangster

groups. It was felt that the public in general, and the youth in particular, should be educated on the harmful consequences of drug problem. The Singapore Anti-Narcotics Association (SANA), is responsible to carry out the programmes through mass media to educate the general public. The Japanese government has already paid attention to this problem and some activities have been organized to achieve this objective. It was generally agreed that severe punishment should be given to the drug traffickers whereas the drug abusers should be given special treatment for the cure of drug abuse, and the public should be informed of its serious consequences.

As to the institutional treatment for drug offenders, both Hong Kong and Singapore have compulsory treatment. In Hong Kong, an inmate, immediately following admission, will receive treatment for withdrawal symptoms if necessary. He is also enrolled in an induction course to assist him in adjusting to the demands of the treatment programme. An inmate is assigned to an aftercare officer who will establish rapport, give him individual counselling, seek on the inmate's behalf reconciliation with his family, plan arrangements for post-release employment and accommodation, and give such other help as is necessary. At the completion of the induction course, an inmate is directed and encouraged to undertake a particular work task based on his previous experience, skill if any, and aptitude for the job. Work in a treatment centre serves a twofold purpose: firstly, it provides the inmate with a source of self-dignity based on gainful employment, and secondly, it instills into the inmate a good work habit. An inmate's physical progress and attitudinal changes are observed closely by the staff, and his case is brought up at monthly intervals before a board of review chaired by a senior member of the staff who is in charge of all treatment centres. Suitability for release from a treatment centre is decided by members of this board. Before release from a drug addiction treatment centre, an inmate is served with a supervision order which is effective for one year. The requirements of the supervision order can be varied at the discretion of the board of review for the benefit of individual inmates. On leaving the treatment centre, every person who will be subject to the 3-year follow-up programme is so informed and his cooperation requested. During the one year statutory supervision, noncompliance with the conditions of superjvision may result in recall to a treatment centre for further treatment. However, during the second and third years, such statutory restrictions are not enforced, and the aftercare officer fills the role of an observer-adviser and not a supervisor. Besides the compulsory treatment, the Society for the Aid and Rehabilitation of Drug Abusers offers voluntary institutional treatment to drug abusers who are released by courts and voluntarily want to receive treatment for drug abuse.

In Singapore, all drug abusers are subjected to a five-stage treatment programme. The first stage consists of detoxification (one week) whereby each inmate (except those above 55 years of age or medically unfit) undergoes self-withdrawal (i.e. 'cold turkey' method) without replacement therapy followed by one week of recuperation and induction in the second stage. Following this stage is one week of intensive indoctrination to drive home to the inmate the serious consequences of drug abuse. The fourth stage which stretches from the fourth week to the end of the third month comprises military form of drill and physical exercises to inculcate discipline and for the promotion of good health. Assignments are also given to carry out maintenance and domestic chores. During the final stage, the emphasis is on inculcation of work discipline whereby inmates are assigned to work in the various industrial workshops on a 44 hours per week basis. Apart from this they are required to participate in daily flag-raising ceremonies, singing of National Anthem, pledge taking and physical exercises before the commencement of labour. The evenings are set aside for recreational activities. Then, they are sent to the Day Release Camp where they can go out to

work in the open community. Of course, all dischargees have to undergo the compulsory supervision under the supervision officers, and the supervision period is 2 years.

It was suggested by the group that institutional treatment for drug offenders operated by Hong Kong and Singapore might be referred to if consideration for the establishment of this kind of service was necessary.

Then the group discussed the international cooperation for the prevention of smuggling stimulant drugs. The group members strongly believed that a single country alone could not win the battle against dangerous drugs. All Asian countries have to play an active part in international anti-drug action; i.e. to keep close links with the United Nations, with the inter-governmental agencies such as the Colombo Plan Bureau and Interpol, and with the individual government, with Europe, North and South America, etc. Furthermore, it is very useful and important to conduct comparative studies and to exchange information on the prevention of smuggling dangerous drugs in order to utilize the knowledge and experience in other countries. Through the international cooperation, we can work together in the prevention of drug abuse and thus suppression of illicit trafficking in dangerous drugs.

Finally, the group discussed the ways to cope with offenders who committed other crime under the influence of stimulant drugs. In Japan, the public prosecutors have to decide whether the offender is to be prosecuted for the use of stimulant drugs or, in addition, he is to be prosecuted for the crime he has committed; actually, the public prosecutor may seek compulsory hospitalization for the dangerous drug addicts. As to the practice of Hong Kong, the court may likely study the medical report and psychiatric report before passing the sentence which may, in most cases, act according to the recommendations submitted by the experts. This type of offenders in Singapore will be sent to the drug rehabilitation centre. Members of the group were of the opinion that the offender should be punished if he was found to have taken drug intentionally in order to commit the alleged particular offence.

Suspension of Execution of Sentence in Japan (Especially Concerning Traffic Crimes)

Mr. Yamagaki explained the system of suspension of the execution of sentence in Japan. Punishment is sometimes unsuitable for some persons, especially those who are convicted and sentenced to short-term imprisonment. Thus Japan has this kind of system. The requirements for suspension of the execution of sentence were explained clearly. As for a person who falls into the requirements may be suspended for a period of not less than one year nor more than five years. When the period of suspension elapses without revocation of the pronouncement of the suspension of execution, the original sentence loses its legal effect. The suspended sentence is to be given or not is the most concerned matter to the accused, and consequently it is likely to become the most controversial and important problem for the judges.

Concerning the violation of the Road Traffic Law, most cases brought to the court as violation of the Road Traffic Law are those of driving without licence and drunken driving. The offender committed the aforementioned offence for the first and second time is usually dealt with according to the summary procedures; cases of traffic crimes disposed of through the formal procedures are those of rather malignant ones. The main factor to decide whether suspended sentence is to be granted lies in the offender's criminal record in traffic violations. According to the Osaka District Court's research, the total number of 7 past malignant traffic offences is the borderline to distinguish suspension and non-suspension sentence for non-licence driving cases; as to the non-licenced and drunken driving cases, the marginal number of past malignant traffic offences is 5.

Members were invited to comment on

the Japanese court's assessment standard on the violation of the Road Traffic Law. All group members involved themselves in the discussion. It was felt that the attention had to be paid to the type of offence, i.e. whether the offender committed the same offence repeatedly, and the interval between the past and the fresh offence. As to the juvenile offenders, the court should give different consideration, while comparing with the adult offenders, though there might not have an agreed standard of sentencing. Since the present practice would let the court and the offender have the same expectation towards sentencing, it might thus be considered as an appropriate assessment.

With regard to the serious traffic accident cases, the suspension rate of the death cases without malignant violation against the Road Traffic Law is higher than that of the bodily injury cases with malignant violation against the Road Traffic Law. This means that much more emphasis is given on the malignancy of criminal conduct, or the gravity of negligence overrules the gravity of result. While the court is going to decide the term of imprisonment, the degree of the accident's result becomes a more influential factor than the degree of negligence; other factors taken into consideration are (1) the nature of previous traffic offences, (2) the degree of negligence on the part of the injured person and (3) the compromise between offender and victim; besides, factors including age of the injured person and degree of offender's injury are also considered by the courts.

The group realized the need to consider both the gravity of the accident's result and the degree of negligence. In Japan, the public prosecutors do make recommendation to the court after having considered these two factors carefully. However, the group's opinion was that more emphasis should be given to the degree of negligence, and yet all other relevant factors should also be duly taken into consideration.

Juveniles Sniffing Thinner or Glue

Mr. Kaneko explained the procedures of the Family Court and the work of the Family Court Probation Officers. As revealed, there are many thinner or glue sniffing cases required assistance from the family court probation officers. The teenagers resort to the abuse of thinner and glue as a 'play' to satisfy their wants. The trouble with these juveniles is that they do not have the sense of guilt as other offender because they think that they do not do harm to others. But the abuse of thinner and glue is found by scientists to have ill effect, both physical and psychological, on the abusers.

In order to have a clear picture about thinner or glue sniffing juveniles, Mr. Kaneko classifed them into three types:

1) *Simple type*: Those sniffing thinner or glue just for a 'play', or just out of curiosity, and having the tendency to get rid of it or change to another kind of play later.

2) *Delinquent type*: Those having the tendency of sniffing thinner or glue habitually, loosing interest in school work, and sniffing thinner or glue with other abusers.

3) *Habitual type*: Those with strong psychological and physical dependence on thinner or glue and with the difficulty to build up relationship with others.

Majority of the thinner or glue sniffing juveniles are the simple and delinquent type, whereas the habitual type juveniles are the minorities. According to Mr. Kaneko, counselling guidance and group discussion can be used to help the simple type abusers; in addition to the aforementioned methods, finding out the basic causes of the problems and helping them solve their problems by probation supervision are necessary to the delinquent type of abusers; as to the habitual type of abusers, treatment in the juvenile training school may be the only way, and it should be followed continuously by aftercare service.

To close his presentation, Mr. Kaneko introduced the programme of group guid-

ance for the thinner and glue sniffing juveniles at the Fukui Family Court. This programme aims at helping those juveniles, except the habitual abusers, who are brought to court for the violation of the Poisonous and Hazardous Substances Control Law or are proved to be thinner or glue abusers. The juvenile abusers should participate with parents or employers; group discussions are held separately for juveniles and the adults, i.e. their parents and employers. During the selection of group members, care has to be taken so that the proper juveniles will participate in the proper group. Sometimes, individual interviews have to be given to those members who do not verbalize their feelings in group discussions. Although there is no follow-up study on the effectiveness of this programme yet it seems to be a successful one.

In the discussion period, the group firstly discussed how to prevent the juveniles from sniffing thinner or glue. In Japan, most juveniles sniffing thinner or glue are those graduated from junior high schools or dropped out from senior high schools, therefore, it is badly necessary to enlighten the younger generation and the parents about the sniffing problem; perhaps, the schools can be chosen as the target groups, meetings and discussions should be arranged for the teachers, students and parents so that all of them are aware of the seriousness of the problem. In Singapore, intellectual, recreational, social, cultural and training activities are provided by the community centres to meet the interests and needs of different people and to occupy the citizens' leisure time; through these community centres, the prevention of thinner and glue activities can be carried out.

The group was of the opinion, that in order to avoid duplication of service and to coordinate different kinds of service, it was necessary to have a centralized body to make policy, to give advice and to coordinate activities against the use of thinner and glue; the work of the different organizations, either governmental or voluntary, might be focused on fostering public awareness of the dangers of thinner and glue abuse, promoting community involvement to deal with the problem and persuading young people not to experiment with thinner or glue.

Finally, the group discussed the workability of the present treatment given by court for those thinner and glue abuse juveniles. All group members were eager to find the best treatment for this type of juvenile offenders. However, the members divided into groups of opinion; 1) juvenile training school being a must to stop juveniles from sniffing thinner and glue, 2) educational and counselling being the alternative because juvenile training school being too harsh to them. After thorough discussion, the group unanimously agreed that chance should be given to the first or second known juvenile offenders; in order to avoid the social stigma of institutionalization, institutional treatment should be used as the last resort to treat those habitual offenders; the group also recognized that institutional treatment might be an effective way to stop certain type of juveniles from sniffing thinner and glue.

WORKSHOP II: Administration of Penal Institution

Summary Report of the Rapporteur

Chairman: *Mr. Nabil Hanna Shammo Kirma*
Advisors: *Mr. J.P. Delgoda, Mr. Akio Yamaguchi and Mr. Tōichi Fujiwara*
Rapporteur: *Mr. Barindra Nath Chattaraj*

Titles of the Papers Presented

1. Institutional Treatment of Offenders in Thailand
   by Mr. Nutchai Rasisuddhi (Thailand)
2. The Need for Correctional Programmes
   by Mr. Francis Xavier Thurairetnam Philips (Sri Lanka)
3. Administration Council and Technical Committee in the State Organization of Social Reform
   by Mr. Nabil Hanna Shammo Kirma (Iraq)
4. Recruitment and Training of Correctional Officers
   by Mr. Siddiqur Rahman (Bangladesh)
5. Training Needs of Prison Personnel in India
   by Mr. Barindra Nath Chattaraj (India)
6. Substituted Prison System in Japan
   by Mr. Takashi Mori (Japan)
7. Problem in the Treatment of Unconvicted Prisoners
   by Mr. Suekichi Ushijima (Japan)

Introduction

The group was mainly composed of prison officers except one who belonged to the National Police Agency, Japan. Each member of the group presented his own paper according to order, as mentioned above. The titles of the papers although, were different, the main emphasis of most of the papers was laid on correctional function of the penal institutions. However, there were some papers which were devoted to the administrative function of some penal institutions.

All the papers were discussed in the group and deliberations were based on the personal and professional experiences of the participants in the light of existing conditions of their respective countries.

Institutional Treatment of Offenders in Thailand

The first paper was presented by Mr. Rasisuddhi on the Institutional Treatment of Offenders in Thailand. The paper was mainly devoted to describing as to how the Thai Correctional Administration is engaged in developing treatment programmes for the prisoners. At present, Thai correctional ststem, as mentioned by him, is busily engaged in making necessary preconditions in which prisoners are properly studied, classified and treated to make them fit for living in the community as law-abiding citizens. With a view to accomplishing the desired result, the individual case history of the prisoners are carefully studied and examined. Medical and psychological services are also provided to the prisoners. Parole and remission as parts of treatment programmes are liberally granted.

As an important component of correctional programme, vocational training on some suitable trades are given to the prisoners which serves mainly two useful purposes. Firstly, it has a treatment value and secondly, prisoners learn some skills by which they may earn money when they are released. He reported that there are more than 20 kinds of trades on which vocational training is given to the inmates of Thailand prisons out of which, craftmanship, industrial work and agriculture are very important.

He also pointed out that the prison administration of Thailand is trying best to achieve community involvement in prisoners' treatment programmes. Prison authority has opened some shops in the local

market where prison products are sold for public consumption. Moreover, prison products are exhibited in local festivals annually since 1971.

Mr. Rasisuddhi felt that for the smooth functioning of the penal institution on the line of modern correctional philosophy, remodeling of prison buildings, development of staff training, proper classification of prisoners and upgradation of treatment programmes are indispensable.

The main hindrance in the way of improving the existing correctional programmes, according to Mr. Rasisuddhi, is the lack of adequate financial resources. During discussion, it was generally agreed that paucity of funds is a real problem for the upliftment of prison programmes. The group suggested that prison authority while making efforts for obtaining greater allocation for the prison development should also engage themselves in exploring ways and means by which some improvement could be made without any financial obligation. The group pointed out that the cultivation of good human relations among staff and prisoners does not require any money yet can go a long way in making the treatment programme a success.

Mr. Rasisuddhi while discussing the penal administration of his country, mentioned about two major problem areas besides the problem of nonavailability of adequate funds and old prison buildings. Regarding his first problem, he stated that the Penitentiary Act of 1936 which is the main source of formulation of prison rules and regulations does not meet the present requirements for the modern treatment needs of the prisoners. He desired for its replacement. After discussing the problem from all angles, the group suggested that it is better not to use some sections of the enactment which go contradictory to the modern objective rather than replacing the enactment altogether. However, the group did not deny the necessity of revising the old enactment in the light of modern objectives of punishment.

His second problem was related to the nonavailability of services of professional staff like doctors and psychiatrists. The main reason, he mentioned, is the poor remuneration given to the specialists. The group could not find any way out as its solution lies in the availability of funds.

The Need for Correctional Programmes

The next paper was presented by Mr. Philips. Mr. Philips's paper explained elaborately the purpose of punishment and different objectives of imprisonment. Punishment, according to him, is expected to serve the purpose of correcting and reforming the offenders. He discussed about two main limitations of punishment. The first of these two is that it exerts certain adverse effect on the offender's personality which in turn works against the goal of reforming him as a law-abiding citizen. The second disadvantage comes from the brand it imprints on the offender's personality. This branding makes the offender feel rejected in the society and tends to be driven to the company of other criminals.

Regarding goals of imprisonment he has commented that goals assigned to a prison are sometimes contradictory with each other. Society expects the prisoners to be punished and at the same time wants that the prisoners are to be reformed also in the prisons. In order to satisfy the society's expectation relating to punishment it becomes necessary for the prison authorities to lay emphasis on coercion and regimentation which again operates against the other expectation concerning reformation. Therefore, it is a very difficult task for the prison staff to maintain a balance between these two conflicting expectations and to achieve the ultimate goal of the protection of society in terms of adopting necessary measures for helping offenders to be properly rehabilitated in the society.

Mr. Philips placed a great importance on the human relationship between prison staff and prisoners. The recent trend in correctional work embodies new kind of relation, between inmates and prison officers. In modern prisons, prison officers have to play the role of guide, philosopher and friend as well as custodians to the prisoners. This requires, according to him,

an ability on the part of the prison officers to adjust themselves to fulfil the needs of the new circumstances.

The group discussed the points raised by Mr. Philips from various perspectives and wanted to know from him regarding the position of Sri Lanka in respect of implementation of treatment programmes in prison.

Mr. Philips stated that in Sri Lanka, prisoners are given different types of vocational training on trades which are popular in the community with a view to enabling them to earn their livelihood after being released from the jails. He told that prisoners of Sri Lanka are also given formal education for which fulltime educational teachers are appointed. He maintained that education sharpens the mind of the inmates and widens their outlook.

Besides vocational training and educational programme, inmates of Sri Lanka prisons are offered with liberal opportunity to pursue their respective religion. Mr. Philips asserted by saying that religion has a strong impact on the prisoners' mind. He cited some of his valuable experiences concerning the usefulness and effectivity of religion in creating favourable attitudes in prisoners' mind toward society.

Mr. Philips mentioned about two main problems in conducting prison programmes on the progressive line. His first problem was related to shortage of staff. He stated that in order to implement individualized treatment programmes, adequate number of staff is necessary to take individual care of the prisoners. His second problem was concerned with inadequate training of staff. Although a training institute is set up in Sri Lanka in 1975, yet it has not been possible to impart training to all the prison staff.

The group after examining the pros and cons of the problems expressed the necessity for convincing the government to understand the real nature of the problems and consequences. Regarding the staff training the group felt that by opening one more training institute, this problem may be solved to a great extent.

Administration Council and Technical (Expert) Committee

The paper presented by Mr. Kirma was mainly devoted to describe the composition, functions, role and importance of Administration Council and Technical (Expert) Committee in the State Organization for Social Reform. The Administration Council which is the policy-making body in the sphere of criminal justice system in Iraq consists of eleven members from the Ministries of Justice, Interior, Finance, Education, Health, Industry, Agriculture, Prison Affairs and Professional experts with the Chairman of the Council of Management as the Chairman and the Director-General of Prisons as the Vice-Chairman.

The competence of the Council includes mainly the issuance of instructions relating to adminstrative, technical and financial affairs, approval of and making necessary amendments to the Administration's annual budget, appointment of officials, submission of annual report and laying down the general industrial and agricultural policy regarding prisons. The Administration Council is empowered by the Minsiter of Justice to impose five types of disciplinary punishments on any prisoner violating the regulations and instructions, issued under the law.

The Technical (Expert) Committee, as he mentioned, is the responsible body for operating classification system and formulating individualized treatment programmes for the prisoners. This Committee consists of seven members with the President of the State Organization as Chairman and the Councillor as Vice-Chairman, one medical doctor, one specialist in criminology, one specialist in sociology, one psychiatrist, one specialist in social service, one specialist in vocational training and the Director of the Prison. The main office of the Committee functions at Bagdad, the capital of Iraq.

The functions of the Committee is threefold: firstly to make proper classification of offenders after a thorough study of their personality, and to prepare plans for their

vocational and cultural rehabilitation, secondly to organize and supervise the work inside the prison, and thirdly to carry out all the functions confided to it in accordance with laws and regulations.

Mr. Kirma after discussing different functions of the Committee discribed the detailed procedure adopted by the Committee in classifying the prisoners.

Mr. Kirma mentioned about one problem relating to functioning of the Technical (Expert) Committee. He stated that the experts coming from the universities are generally very reluctant in attending meetings regularly. This creates a lot of difficulties in smooth functioning of the Committee. The main reason of their reluctance is the low remuneration given to them by the government. The group after deliberating upon the problem, suggested that it is better if the prison department can make fulltime appointment of these experts in the prison service. Mr. Kirma mentioned that at present, this problem has been partially solved by issuance of a government order directing the members to attend the meetings regularly. He also stated that some social researchers of prison department have been sent abroad for specialized training. On their return back, this problem may not exist in Iraqi jails.

Recruitment and Training of Correctional Officers

Mr. Rahman discussed a recruitment procedure and need for training of prison staff of Bangladesh. He stated in the beginning that the Prisons Act, by which prison administration is guided and controlled today was formulated by the then British rulers long back. The Act has lost its validity on today's prison administration whose primary aim is to resocialize the offenders to rehabilitate them in the community. He said that prison administration can not undertake any progressive programme for prisoners' treatment due to the absolute prison rules. He felt an urgent need of replacement of the old rules by new rules which would be framed in keeping with the modern objectives of punishment. The group unanimously agreed with him and felt that same immediate measures should be taken in respect of revising the outmoded prison ordinances. Mr. Rahman mentioned that Bangladesh Government has already set up a commission for the same purpose.

Mr. Rahman pointed out that the prison staff of his country is appointed and confirmed without any possibility of getting good and efficient workers in the department. Another fact which restricts the change of getting efficient workers, he mentioned, is low status and poor pay scale of the prison staff. Following an elaborate discussion, the group came into conclusion that in order to get good and capable staff, pay and status of the prison staff have got to be enhanced. In this respect again government's interest is to be aroused. In respect of the recruitment of the guarding staff, the group felt that there should be open competition on the basis of written and oral test to select candidates. Candidates are required to possess good health and should be educated up to high school standard.

Mr. Rahman stated emphatically that proper training of the prison personnel is imperative in smooth functioning of the prison administration. Today's prison officers are not supposed to perform the custodial duty only but also they are expected to help the prisoners to improve their behaviour pattern. Untrained prison personnel instead of performing these tasks often create hindrances in the way of achieving modern objectives of prisons. At present, Mr. Rahman, pointed out that there is no formal arrangement for imparting training to prison staff in Bangladesh. He expressed an urgent need for establishing at least one Training Institute for this purpose. The group suggested that to begin with, arrangement for imparting training to guarding staff should be made in the existing four central jails. Initially one barrack of each central prison may be spared for this purpose, where newly recruited guarding staff may be given practical training by experienced prison officers. This arrangement may not need financial implication. The group also agreed to Mr. Rahman's proposal with regard to the establishment of a Central Training Institute for conducting regular training courses for the newly recruited prison officers and also to conduct refresher courses for those who have put considerable services in the prison department.

Training Needs of Prison Personnel in India

The main theme of paper presented by Mr. Chattaraj was related to training needs of prison personnel. Mr. Chattaraj's paper contained a historical review of the development of thought in evolving infrastructure for imparting training to different categories of prison staff.

At present in India, training is conducted at three levels for three categories of prison staff like lower ranking staff (prison guards), middle ranking officers (assistant jailors to district jail superintendents) and high ranking officers (central jail superintendents and above). The first level training is organized by the respective states. Many of the states have got their own Training Institutes for prison guards.

The second level of training which is meant for the middle ranking officers are generally organized at regional level. At present, there are four Training Institutes at Lucknow (Uttar Pradesh), Poona (Maharashtra), Hissar (Haryana) and Vellore (Tamil Nadu) which are engaged in imparting training for the middle ranking officers of the country. The training of high ranking officers are generally arranged by the National Institute of Social Defence, Ministry of Social Welfare in collaboration with the different state government in terms of organizing short term courses, seminar and workshops.

In spite of these arrangements Mr. Chattaraj mentioned that a vast majority of the staff of Indian prisons still remains without adequate training and proper orientation concerning the modern philosophy and methods of correction. The training which is given to the guarding staff is mostly in-service training. But before giving in-service training, Mr. Chattaraj felt that they should be given initial and basic training at the time of their recruitment. The facility is lacking at present.

The group assessed the training need on the basis of available statistics relating to the strength of prison staff working in Indian prisons and discussed on the various facets of the problem. The group felt that in view of changing pattern of criminality and change in the objectives of punishment from deterrance to reformation, refresher training for prison staff has become essential. Therefore, each state government in addition to giving initial training to guarding staff has to make arrangements for conducting refresher training courses for them at a regular interval. The four existing Regional Training Institutes have to organize the same for the middle ranking officers. The National Institute of Social Defence, the group felt, has to play a very significant role in this sphere by organizing more seminars and workshops for the high ranking officers, who are working at policy making level. The group also suggested that the National Institute of Social Defence may also hold some special courses of short duration on some selected topics for a cross section of top level officers engaged in different branches of correctional administration from various states and union territories.

Substituted Prison System in Japan

Mr. Mori who is a police officer of the National Police Agency, presented his paper on substituted prisons. The substituted prison being synonymously known as police jail is the place where persons who are arrested by the police according to the Code of Criminal Procedure of the country are detained not more than twenty three days. At present, there are about 1,200 police jails in Japan where about 5,000 persons are detained by the police.

Mr. Mori after giving a systematic historical outline of the substituted prison system, tried to bring about the major criticisms against the system. Mr. Mori, by

the virtue of being a senior and responsible police officer had also reproduced the summary of the official comments given by the police in December, 1977 against those criticisms.

The main criticisms, he listed are three fold. Firstly, the substituted prison system has always a possibility of the infringement of the human rights in course of investigating an accused while his detention. Secondly, the system has a contradiction to the Code of Criminal Procedure in respect of its principle or philosophy of "adversary system" and thirdly, the system suffers from insufficient facilities and lack of arrangement for treatment.

The official comment in respect of first and second criticisms is that the police pays respect to human rights and it is one of their major interests throughout the process of investigation. He added that the severe training and education are given to all police officers to carry out their duties and to observe the due process of law and every police officer recognizes the importance of the protection of human rights. The Constitution, the Code of Criminal Procedure and other laws guarantee the human rights of suspects and the police appreciates that the rights of the suspects should be respected as much as possible at every stage. In respect of the third criticism regarding insufficient facilities and treatment, he maintained that the criticism is not valid because 30 to 40 police station buildings are rebuilt newly or renovated every year and the police jails of these stations are provided with modern and up-to-date facilities. The other out-of-date police jails are given adjustment by providing new interview rooms, physical exercise ground, improved ventilation and lighting system.

Mr. Mori justified the importance of and necessity for the existence of the police jails in a very elaborate manner. The main point on which he emphasized is that the police jails provide an opportunity for the police officers to conduct proper and rapid investigation which ultimately lead to shortening of the period of detention of accused persons.

Mr. Mori concluded his paper by mentioning that, although substituted prison system is not suffering from any major drawback, yet police authorities are trying their best to modify the police jail system in order to bring further improvement in it. On first April, 1980, the management of the police jail has been transferred to the jurisdiction of general affairs secretariat section from the criminal investigation section. This arrangement will be helpful in reducing the misunderstanding that police infringes on the human rights of the subject.

Problems in the Treatment of Unconvicted Prisoners

The last paper was presented by Mr. Ushijima. His paper was related to problems in the treatment of unconvicted prisoners. In the beginning of his paper, he made it clear that the treatment of unconvicted prisoners does not intend for making efforts for their rehabilitation. He gave a detail account relating to legal provisions made by the Prison Law Enforcement Regulations in respect of accommodation, personal hygiene, clothing, bedding, exercise and sports, interview, correspondence, books and newspaper, writing materials and work.

He mentioned that he is to face some difficulties very often to carry out the rules strictly as enunciated by the Prison Law particularly in the areas relating to under trials' outside contact, work programmes and interview facilities. Mr. Ushijima stated that there is a proposal for amendment in Prison Law regarding remand prisoner's right of work and added that in case, the amendment comes in force and large number of under trials apt for work, there is a possibility of creating the problem of inadequacy of staff. He also mentioned about the problem arising out of the use of micro-tape recorders by the lawyers in interview with remand prisoners.

WORKSHOP III: Correctional Programmes in Prisons

Summary Report of the Rapporteur

Chairman: *Mr. Nabil Shawkat Al-Khalessi*
Advisors: *Mr. Knut Sveri, Mr. Keizō Hagihara and Mr. Masaru Matsumoto*
Rapporteur: *Mr. Ghulam Sarwar Lalwani*

Titles of the Papers Presented

1. Female Penal Institution in Hong Kong
   by Miss Chan Sim-Ying (Hong Kong)
2. Religious Activities in Tongan Prisons
   by Mr. Solomone Hivapea'ulu Tatila (Tonga)
3. Report on Classification in Ninevah
   by Mr. Nabil Shawkat Al-Khalessi (Iraq)
4. Over-population and Problem of Classification in the Prisons of Pakistan
   by Mr. Ghulam Sarwar Lalwani (Pakistan)
5. Treatment of Prisoners Associated with Organized Violent Groups
   by Mr. Tsumoru Tomonaga (Japan)
6. Criminal Case on the Maintenance of Security and Discipline in Institutions
   by Mr. Takumi Nakao (Japan)

Introduction

The group comprised five correction officers, one public prosecutor. These participants with different professions and coming from different countries contributed towards programming for the treatment of offenders, and their rehabilitation and streamlining their living condition. The papers focused mainly on the issues relating to the staff members' problems and their requirements, human relationship in the correctional institutions, better treatment and requirements of classification, and the activities of members of the gangster groups within the walls.

Female Penal Institution in Hong Kong

The first paper which came for discussion was the one presented by Miss Chan on the functioning of the female institution in Hong Kong and the various problems faced in the treatment process. Tai Lam Centre was established to cater for the young and adult prisoners, drug addicts, training centre inmates and remands who were awaiting trials and each of these groups was accommodated in separate sections of the centre.

Miss Chan explained briefly the treatment adopted in the different sections of prison. During work, recreation and accommodation, they were kept separately from each other and for that purpose different programmes were drawn.

Miss Chan added that for the drug addiction centre inmates a comprehensive treatment programme including medical and psychological treatment was conducted. They were mainly employed on tailoring, embroidery and domestic chores. While for the training centre inmates a comprehensive programme of group and individual counselling and education classes were conducted. They were engaged in half day education training and the other half in vocational training. The release of training centre inmates was based on their progress and they were required to undergo compulsory supervision for a period of 3 years after release. Miss Chan emphasized the importance of welfare and aftercare to look into the need of prisoners, to undertake individual and group counselling for inmates of the drug addiction centre and the training centre, and to coordinate with the Discharged Prisoners Aid Society in order to make pre-release arrangements for employment and accommodation.

Miss Chan put up the problem that with the enactment of new Law in 1975 the female employees could not get married during their service which resulted in the shortage of the skilled and experienced staff, since the employees had to leave the

job after marriage no one could adopt this job as a career and these jobs had become a passtime. The participants regarded it highly discriminating when in police and other departments the married women were on the job. There was a risk of physical violence from prisoners against the staff but the chances were very few. The group suggested that the department should convince the government to change the recruitment system and women be allowed to remain in their service after their marriage.

Miss Chan put up another problem which was the offshoot of the previous one, that the immature and inexperienced staff had to deal with mature and shrewd prisoners as the experienced staff had to leave the jobs. The participants opined that it was very necessary to allow the staff to carry on their jobs after marriage and it was also suggested that the staff should be given advanced training with which they would be able to fill up the gap with the skill and specialized knowledge. Few participants put up their opinions that both sexes be allowed to work in the institution to mete out the outflow of the staff.

Another problem which came under discussion was that there was a resentment amongst the junior staff against the attitude of the senior staff who often sent them to nasty jobs and to remote areas where there was a limited communication and that this attitude was always demanding and authoritative. The participant suggested that the new staff should be oriented with the specification and the nature of the job and, nevertheless, the senior staff should also undergo a change in their attitudes and behaviours.

Dr. Sveri looked into another facet of the problem and remarked that in Sweden they were also facing the difference of attitudes between young and old staff. He said that new staff was educated in prison schools and they had got particular ideas of humane treatment, but when they came to actual work and tried to implement their ideas they had to work with the old staff for whom the keys were important and from there arose the problem. It was difficult for the old to change their mind, so the emphasis was given upon the training of the young staff and they were often brought back to the refresher courses. But, in spite of all this, when study of their attitude was conducted, it was found that the new staff had adopted the attitude of the old ones.

The women jail was also facing the problem regarding the functioning of the clinical psychologist who had to face the indifferent attitude of the custodial staff. Mr. Tomonaga remarked that in Japan psychologists worked in the institution as a staff member not as a separate entity. The psychologists worked with the other staff keeping in view the entire functioning of the institution.

Religious Activities in Tongan Prisons

Mr. Tatila presented his paper on the impact of religion and its role in the rehabilitation process. He explained that religion had great influence upon the people of Tonga. With the advent of Christianity in Tonga, a new way of life came with the emphasis upon the reforms and the equality of mankind and it had done a lot to minimize the rate of crime in the society as the religion touched the inner heart and changed the mode of thinking and behaving. In Tonga, every staff member of the institution had belief in God and had the spirit to teach and treat the prisoner with kindness. He said most of the crimes occurred due to the lack of knowledge of the religious spirit. Hence, it was the foremost duty of the society to set the religious rules and try to have their prevalence so that the crime occurrence should be minimized. This was the work to be done simultaneously in the community and within the prisons.

Mr. Tatila maintained that the prison staff did not want to perform the duty of execution. The staff contended that it was easy to pass the order but to carry out was very difficult. But it was always the prison staff who had to pull the rope. In Iraq, Japan, Hong Kong, Tonga and Pakistan, according to the participants, the death

sentence still existed as it was an agreeable act in the society.

Dr. Sveri suggested that the best solution was to make away with the death sentence as it was strange to continue such things after so much advancement in the civilization. It was a matter of great concern that there was no regard for human life and that the feelings of revenge were being upheld by the society. Mr. Al-Khalessi of Iraq reacted that it was very difficult to finish the death penalty in the society where for the sake of honour and for small things murders were easily committed. Had the death penalty been stopped, there would have been a tremendous amount of crimes. Death penalty was a necessary step to minimize the rate of murder.

Mr. Tatila told that in Tonga the prison staff was trained in the Police Training School where the nature and purpose of training was quite different than that of the prison and that they had to face the outflow of the trained custodial staff towards Police Department. Dr. Sveri suggested that it would be beneficial as well as economical if it was managed to get prison staff to work as teachers in the police training centre as they had in Sweden. However, there was an advantage that the recruits from the prisons and police would by this kind of training get to know each other's job very well.

Report on Classification in Ninevah

Mr. Al-Khalessi in his paper referred to the classification process. He took up with the historical silouette and illustrated that the buildings of prisons in Iraq were built during the British occupation. Therefore, the classification process with the acknowledged scientific methods could not get due attention because of the retributive attitude as well as incapacity of the prison administration. The classification was firstly done by taking into consideration the kind of offence however, this classification had so many demerits. Convicted prisoners of the same offence were placed in the same ward regardless of their age and health condition. Owing to the diversity of offences several wards were needed when the buildings did not have the required accommodation. Due to over-population of the inmates and scarcity of the accommodation, the inmates were placed haphazardly with the result that contamination prevailed and the different social evils such as gambling, sodomy and the use of drugs erupted in the younger prisoners. Sometimes the sectarian conflicts arose resulting into group fights amongst the prisoners.

With the Revolution of 1968, prison reforms were introduced. Mr. Al-Khalessi explained the process of new reforms and stated that the main expert committee, established for the welfare of prisoners, managed to draw a uniform principle in order to be adopted by all the social researchers during the classification process. The expert committee was also of the opinion that the prison buildings were not adequate to meet the requirements of the classification policy to be implemented. The new pattern of classification was based upon nationality, potentiality to commit crimes, health conditions, period of sentence and age factor.

It was only in 1978 when the Pardon Law was enacted, there came a chance to experiment the new method of classification as the population of the Ninevah Prison decreased remarkably after the release of Kurds who were condemned on charges of armed rebellion in the past. According to Mr. Al-Khalessi when the new principle was translated into practice various kinds of problems were faced by the prison administration. In the first instance, it was found that the prisoners with different sectarian attitudes were not ready to tolerate each other in the same block of confinement. Secondly, the tribesmen who regarded themselves honorable refused to live with the prisoners of the moral offences. Thirdly, regarding murders and retaliatory murders there came up the difficulty of placing the prisoners of opposite parties in the same place of confinement. Then the administration faced resentment by the members of the same family when they were going to be

segregated on the basis of age and period of sentence. Mr. Al-Khalessi suggested that while finalizing the policy of classification various sectarian factors and offenders' background within villagers or tribesmen should be carefully observed.

The classification of prisoners in most of the participating countries was based upon the basis of advanced criminality and less advanced criminality categorized as A and B and they were confined in the prisons accordingly. The condition of the prisoners of Iraq was typical due to its traditional society where just for the sake of honour and small things murders were done and the line of revenge went down to the generations.

Over-population and Problem of Classification

Mr. Lalwani of Pakistan put up the problem of overcrowding and inadequacy of the prison buildings to accommodate the prisoners for better treatment. In the prisons of Pakistan mainly two main categories of prisoners, i.e., undertrial and convicted prisoners were confined. The existing arrangements for the confinement of convicted and unconvicted criminals were most unsatisfactory features of prison administration. Even amongst the undertrials, there was need for careful classification and separation of prisoners. However, at the moment most of the undertrials were locked up together at night in large association barracks, where the danger of association between previous convicts and casual prisoners seriously existed.

Mr. Lalwani opined that convicts who were tried and covicted by courts of law, were to be released on stipulated dates whether this term was short or long.

However, violators could not be kept out of circulation permanently. They might be kept behind walls for long duration but eventually they have to come back to society as a reformed individual or as a confirmed criminal. A person reformed was one who had developed a change in his mental outlook and developed a respect for the society. He had to be understood as a person and it should be found out what had gone wrong with him, his family or his environment. Mr. Lalwani said the process of the reformation of a prisoner was not a matter which could be affected overnight. It took time. Therefore, the reformation of short term prisoners was rather difficult. In cases of first offenders or petty offences, Mr. Lalwani opined that it was in the public interest to avoid imposition of short sentences and to either impose fines or to place the offenders on probation.

Realizing the necessity and importance of segregation, attempts were being made in most of the prisons in Pakistan to keep the different classes of prisoners in separate blocks and to segregate them so as to prevent the evils of contamination and molestation, but congestion in the prisons was so acute that all efforts at segregation had become futile. The necessity of protecting juveniles and young prisoners and the segregation of undertrials and casual convicts from confirmed convicts of the classification was most essential.

The participants were of the opinion that the main problem in the prisons was the overcrowding of the undertrials and lack of proper segregation. Most of the prison buildings were century old and inadequate to absorb the inflow. The prison population was increasing partly due to the lengthy procedure of the courts and undue delay in the disposal of the cases with the result that on one hand the prisoners were not provided required hygienic facilities, on the other hand, the overcrowding of the undertrials was indirectly disturbing the rehabilitation work for the convicts.

It was suggested by the group that the Ministries concerned should be approached to give priority to the correctional institution regarding the provision of new buildings, custodial staff and the specialist staff for better treatment. Moreover, the alternative methods for outflow such as parole and probation, remission and work camps should be encouraged.

Treatment of Prisoners Associated with Organized Violent Groups

Mr. Tomonaga of Japan presented that the number of prisoners associated with organized violent groups had shown increasing tendency, that tendency to increase would continue as they were already 50% of all prisoners in penal institutions for category B prisoners i.e., those who have an advanced criminal tendency, and that they were involved in most of the serious incidents in penal institutions.

Prisoners associated with organized violent groups organized informal groups within penal institutions, endeavoured to bully the weak, made a resistance to the prison authority and feigned illness in order to escape the forced labour and depart from ordinary institutional treatment. On the other hand they were so familiar with institutional treatment and so much shrewd that they acted as obedient prisoners to the prison officials. But these actions were usually to escape various restrictions in institutional treatment. It is obvious that in no case the administrative principles of the correctional institutions should be influenced by their illegal actions.

Mr. Tomonaga told that their tactics were becoming ingenious day by day and offenders who violated the Stimulant Drugs Control Laws had increased year by year. Mr. Tomonaga stressed the importance of a strict attitude on the part of prison officials toward them. In the treatment process staff should advise and counsel prisoners to leave organized violent groups, and separate work programmes should be adopted for members of organized violent groups to avoid constant contact between them. The treatment programmes should be chalked out to instil in them the importance of work within the community. Moreover, moral education such as religious instruction and living guidance, and groups physical training (disciplinary training) are most important in the treatment of those prisoners.

According to Mr. Tomonaga active guidance had so far a little impact upon them because most of them had no confidence in self-support and consequently, they returned again to their organization in order to ensure their means of living.

Mr. Tomonaga raised important questions of how the activities of the members of organized violent groups within the prison should be controlled and what kind of rehabilitation work was to be initiated in order to minimize the influence of the groups upon those prisoners. Mr. Tomonaga told the participants that in Japan the police, public prosecutors, the judiciary and the corrections as well as the citizens were doing their best with their coordinated efforts to minimize the activities of such groups. In the opinion of the group it was a serious problem as the gangster groups were gaining strength day by day and this problem, having so many facets was not restricted to the introduction of rehabilitation programme in correctional institutions only, rather, it needed various measures to be adopted by the different law-enforcing agencies to check their flourishing and minimize their activities.

Maintenance of Security and Discipline in the Institution

Mr. Nakao of Japan picked up the topic on the assault and bodily injury against the prison officials which had mostly decreased due to the improvement in classification and security methods. He told to the group that ordinary measures taken by the prison authorities in these cases were the disciplinary punishment, such as minor solitary confinement up to a period of two months and prohibition from reading books or magazines.

Generally the convicted prisoners having few chances of release on parole involved themselves in deviant behaviours and caused various troubles to the prison officials who in return had to resort to disciplinary action for maintenance of institutional security. In these cases, if the prisoners were not prosecuted on the attempts of assault and bodily injuries the morale of the prison officials would be weakened, on the other hand, if public

prosecutor wanted to prosecute in court he must have sufficient evidence.

Mr. Nakao put up a case for study. This was a case of 30 years old prisoner M in Shiga Prison who had 16 days as an unexpired portion of sentence out of one year and two months. When after the movie festival for inmates was over and he was coming back with his cellmates, Guard A checked him that he was out of step with the others and took him by his hand to security section. Guard B, who happened to pass by, rushed up for his help and escorted him together with Guard A. M became very angry and tried to free himself from the grip and gave a blow to Guard A who got a bruise on his face. There was alarm and he was taken to security section. There were two alternatives of dispositions before public prosecutor, i.e., M's violent behaviour against Guard A needed severe punishment in order to maintain discipline among others. It might be that Guard A's actions to take him by force had deviated from the normal use of security force. However, as M caused Guard A bodily injury by hitting him in the face, he should be prosecuted for assault against an official or on the charge of obstruction of official duty. Another alternative disposition was that because the public prosecutor had wide discretionary power to discharge the offender from prosecution, the case should be dropped.

In determining the disposition of this case, the factors regarding injuries sustained, medical treatment involved, motive and *modus operandi,* psychological reason, and difficulties in sustaining the prosecution at the court, must be taken into consideration. It was an incidental case of an assault that was provoked by Guard A's excessive force, and the injury Guard A received was not serious. In addition, M didn't use any cutlery. Therefore, the prosecutor who took charge of this case suspended the prosecution.

Mr. Nakao concluded that the prison officials better understood the importance of human relations, however, prison officials should always be aware that good and harmonious human relations should be maintained in the daily contact with inmates in the prison. In most of the countries disciplinary punishment was awarded by a prison committee. The investigation was made by the staff of the prison, sometimes working directly under the control of the inspectorate, and the punishment was given by the superintendent or the committee. The Group discussed the issue whether or not the disciplinary punishment might be awarded by the disciplinary committee. Dr. Sveri argued that it was not fair that the disciplinary committee could award punishment relying upon the statements of the guard. Even if the decision was judicious the prisoners would think justice had not been done to them because the committee belonged to the same hierarchy. It was necessary that police should step in and investigate the matter. Mr. Hagihara opined that cases of minor nature relating to discipline were investigated and decided by the disciplinary committee and there were a few complaints by the prisoners against those decisions, which was a clear proof of the confidence the prisoners had in these committee. The group members emphasized the need of training given to the staff and that the staff should be oriented with the importance of human relations and the limitations of the use of force.

WORKSHOP IV: Assistance in Smooth Resocialization

Summary Report of the Rapporteur

Chairman: *Mr. Peter Rogers*
Advisors: *Mr. Shinichi Tsuchiya, Mr. Teiichi Harada and Mr. Masakazu Nishikawa*
Rapporteur: *Mr. Poumau Nofoatolu Papalii*

Titles of the Papers Presented

1. Community Involvement in the Institutional Treatment of Adult Offenders in the Philippines
   by Mrs. Susana U. Sembrano (Philippines)
2. Discharged Prisoners Aid Society
   by Mr. Peter Rogers (Malaysia)
3. Corrections and Community Agencies
   by Mr. Jeong Dong Jin (Korea)
4. The Use of Community Volunteers in Probation Work
   by Mr. Poumau Nofoatolu Papalii (Western Samoa)
5. Some Aspects of Treatment of Residents in Halfway Houses
   by Mr. Norio Gōda (Japan)
6. Relations between the Correctional Institution and the Aftercare Agency—Especially on Environmental Adjustment
   by Mr. Hiroyuki Namiki (Japan)

Introduction

The group consisted of three correctional officers and three probation officers. Each of the group members presented papers dealing with their own specific sphere of correctional or rehabilitation experiences as represented by the organizations in their respective countries. In their presentations, group members put forward some of the major problems which they considered gave rise to difficulties in the proper treatment of many groups of offenders such as discharged prisoners, parolees and probationers. Most of the group's discussions centred around the problems presented, in an effort to find solutions for improving the existing methods of correctional rehabilitation both within the institutional setting and also through the use of community based organizations and programmes.

Community Involvement in the Institutional Treatment of Adult Offenders

In her paper Mrs. Sembrano of the Philippines dealt extensively with the various rehabilitation programmes conducted in their correctional institutions. Also presented in her paper were some of the problems and difficulties experienced as a result of the three independently administered prison systems; national prisons, provincial jails and city or municipal jails. Because of the separate administrations there is no uniformity of prison standards especially relating to treatment programmes and adequate training of staff in provincial and city or municipal jails. The group in discussion agreed that a more uniform system of penal administration would ensure standardized training for basic grade and lower ranking custodial staff and promote better treatment programmes for prisoners. Another important aspect of correctional programme utilized in the Philippines was the extensive use of prison labour. As explained by Mrs. Sembrano the overcrowding in the closed prisons led to a policy of separating the first-termers and model prisoners from the hardcore and recidivists. This led to the establishment of open prisons or penal farms under minimum security and engage in scientific horticulture and animal husbandry projects. They are given a certain amount of cash remuneration and encouraged to open savings accounts so that they may have money on their discharge. A special feature of the penal colony system is the allowance of the

inmate's family to join him in the colony and establish normal family relationship within the prison environment. Overall, prison labour is utilized to the fullest and inmates are assigned to work on government building construction and maintenance work, repairing government vehicles and electrical equipment. This kind of policy has contributed much to the people's understanding and the inmate's awareness that he is a member of the community, especially as he is contributing valuable service to his government and country.

Mrs. Sembrano then spoke on the importance of a comprehensive vocational training programme in the institutions in order to provide the inmate with adequate training which will make himself sufficiently productive and develop his working skills. Prison work should conform with the demand in the society and training must be provided through the use of qualified instructors. On completion of any course and its requirements the inmate is awarded a certificate of completion. The group agreed in principle with wider use of vocational training programmes in correctional institutions but efforts must be made to ensure that the inmate is given the opportunity to practice his skills once he is back in the society. A particular problem touched upon by Mrs. Sembrano was the lack of rehabilitation programmes geared towards the short-term inmates and for the most part they did not receive specialized training. For this reason an intergrated rehabilitation centre will be opened in 1981 situated in Manila. This centre will provide extensive rehabilitation treatment to those inmates sentenced to prison for 3 years or less.

Mrs. Sembrano spoke about the importance of community involvement to the extent that corrections cannot be accomplished properly without the active participation of the community. Public cooperation and active coordination with concerned agencies is needed to effect better treatment of offenders. Community participation should be a continuing process and in the Philippines public support is gained through such organizations as; Rotary Clubs, Lions Clubs, Kiwanis, Jaycees and also religious groups like the Catholic Women's League. The Integrated Bar Association, Women Lawyers Association and the Episcopal Commission on Prisoners' Welfare offer free legal assistance to inmates while the Ministry of Social Services and Development provides welfare assistance.

The group all agreed that programmes for rehabilitation and vocational training in the Philippines corrections were generally more advanced in the use of volunteer aftercare services than many other countries and the interest shown by community organizations was to be commended. There did however exist some problems within the general administration of corrections as expressed by Mrs. Sembrano and these were outlined as follows:

a) Lack of uniformity in policy governing the administration and treatment of offenders in national prisons, provincial jails and municipal jail systems.
b) Lack of suitably trained personnel especially custodial staff in the provincial, and city or municipal jail institutions resulting in congestion and poor conditions.

Through their discussions the group considered several alternatives in dealing with the problem and suggestions were put forward as follows:

a) A centralized authority be set up to administer all three prison systems at a national level in order to standardize penal policy and prison management.
b) Intensive training programmes be instituted for police and jail caretaker warden or penal management as conducted in the National Prisons Bureau Training Institute.

Discharged Prisoners' Aid Society

The second paper for discussion was presented by Mr. Rogers of Malaysia. Mr. Rogers presented an informative report on the work of the Selangor Prisoners' Aid Society of which he has been the secretary

for the past 14 years. He pointed out the various ways in which the Society has been able to assist with the rehabilitation and aftercare of discharged prisoners and made particular mention of some of the problems which the society faced in its efforts to provide a better service to inmates. The history of the Discharged Prisoners' Aid Societies in Malaysia extends back to pre-World War II years but after the Pacific War and liberation, the society began anew though its activities were restricted in the immediate post war years due to lack of funds and public support. A public meeting was convened in July 1954 in an effort to resuscitate the society and this culminated in the successful production of a stage show in January 1955 by inmates and prison staff of Pudo Prison which generated much good will and support for the Society from the public.

Today there are seven societies throughout Malaysia with the common aims and objectives as follows:

a) To promote the welfare of discharged prisoners especially first offenders and to enable them to become useful and self respecting members of the community.
b) To assist prisoners to find employment.
c) To give assistance in cash or kind to needy discharged prisoners.

Although it is primarily geared toward helping discharged prisoners financially the Society may also extend its assistance to those who may be in need of counselling guidance. Mr. Rogers explained further the membership qualifications and status within the Society especially the ex-officio members consisting of Directors of Social Welfare Departments, senior police officers and the Director of Prisons in Kuala Lumpur. The Society has four subcommittees. The main functions of this committee is centred on financial assistance and job placement for ex-prisoners. The committee will interview about 20 prisoners each month prior to their release and recommend assistance to them on a basis of between $20 to $100 depending on their individual requirements. Usually they require assistance for travel expenses to return home, to make new identity cards if their old ones have been lost and to make renewal of driver's licence. Prisoners having been promised of their job placements are usually given a sum of $50 to live on until they receive their first wages. Sometimes money will be issued to enable the prisoner to purchase necessary clothing and tools for a particular trade he will be employed in after discharge. In all, cash assistance and purchase of items amounting to over $6,500 was given to more than 200 prisoners in 1979. In order to continue to provide financial assistance to discharged offenders the Society relies heavily on subscriptions by members and public support from well-wishers in the community. However raising finance to cover its budget has always been a problem and this was offered to the group as a topic for discussion. One suggestion put forward was for the Society to conduct lotteries in order to raise funds. Mr. Rogers explained that a lottery was already being run by the social welfare agency but the Society was not given a high priority on the list of charitable organizations who received assistance from such a scheme. The group in consensus considered that the work of the society should be publicized more through mass media, interviews, meetings with the business community and even to the extent of holding such a "Campaign for Brighter Society" as held in July allover the country in Japan. Consideration could also be given to involving service organizations such as Rotary Clubs, Lions Clubs and such other community agencies.

Next Mr. Rogers spoke about the committee's work in the employment assistance field and quoted that the Society secured employment for 87 prisoners in 1979. Several of these prisoners with minor offences registered with the employment exchange. The distribution of job seekers by educational attainment indicated that the majority had a low educational standard and many could not fulfil the required qualification stipulated by the private sector. Most of the jobs found for discharged prisoners were; rubber tappers,

labourers, shop assistants, lorry drivers, fishermen, carpentry, tailoring and farming. The major problem faced by the Society is employment for ex-prisoners. Some employers are willing to accept and give them another chance, while the majority feel that ex-prisoners will prove to be a bad risk to his business and he may be a bad influence on the other workers. The group was of the opinion that the problem of unemployment amongst discharged prisoners was common throughout the Asian region and was associated to the overall unemployment figures for the whole society and where it was difficult for the ordinary non-offender to find work how much more difficult would it be for the ex-prisoner with low education and a criminal record. Here again the group could only suggest that increased liaison with voluntary organizations and private sector businessmen be utilized together with closer coordination of the government agencies such as the labour exchange, social welfare and correctional institutions. In order to make the ex-prisoner and asset rather than a liability to the community, there is much need to get influential men and women of goodwill involved in the activities of the Discharged Prisoners' Aid Society.

Correction and Community Agency

Mr. Jeong of Korea presented the third paper for discussion by the group which dealt with some of the major difficulties faced by correctional institutions in their efforts to promote closer liaison and communication with outside organizations in the community. Mr. Jeong pointed out that correctional agencies cannot be effective in their mission if other social agencies do not cooperate in an intergrated rehabilitation programmes extending beyond the prison walls and that the traditional institution based structure of the correctional system is, virtually by its nature as a closed system, reactive to changes in the community. Corrections must mobilize public support for rehabilitation programmes and stimulate the interest of wellknown citizens who can lend their personal prestige and community status for the benefit of correction. This requires recruitment of individuals who are respected and powerful members of the community. A technique used towards this end is to establish citizen advisory committee which may act as a liaisive body between correctional institutions and the community. Citizen groups have an opportunity to make alliances through which they benefit from corrections. For example, among those whom such a mutual relationship can benefit are the labour unions, which draw their strength from working groups. In Korea there are 27 prisons which conduct extensive vocational training programmes. Up to December 1978 over 100,000 prisoners had been given training and 25,377 of them in skilled work have passed national trade certificate examinations. From 1971 to 1978, 184 inmates won awards in national competitions. Under such a system the skilled inmates can usually expect to qualify for parole and this acts as an incentive for the scheme. Because the business community are actively involved in these training programmes and supply equipment and materials to the institution these supportive enterprises will also guarantee the prisoner an employment opportunity on his release. Mr. Jeong explained however that there is still a greater need for public participation in correctional programmes especially to deal with problems the prisoner is likely to face once he leaves the prison and reenters the community. Mr. Jeong explained that Korean correctional institutions also suffers from the problems of low qualified staff and find it difficult to attract suitably qualified personnel into prison work. There is one Central Training Institute for Correctional Officers and the normal training programme for new recruits consists of (1) 3 months theoretical training at the CTI, (2) 6 months practical field work in various correctional institutions, after which he will be posted for duty.

In discussion the group considered that the present term of 3 months could be extended and that refresher courses should be conducted at regular intervals after com-

pleting initial training. In order to attract better qualified people into the service the group felt that it may be possible to examine the present salary scale and the ranking and promotional system and make revisions where necessary. An added benefit could also be gained by encouraging university students studying related courses such as, sociology, psychology, education, etc. to take part in prison programmes.

The second topic given by Mr. Jeong was public participation in prison treatment programmes and prison work in general, and how this could be better effected in the future. This was discussed at length by the group and several suggestions were put forward such as wider use of service organizations like Rotary and Lions and inviting the mass media into the prisons to produce programmes for inmates. Also outside entertainment bodies could stage performances in the prisons.

Thirdly, Mr. Jeong spoke on the problems of extensions to the present correctional and penal system in Korea by explaining that at this moment there was no separate correctional institution for women prisoners in his country. The female prison is situated in the same compound as the male prison. He also felt that it was time that Korea considered implementing a probation system as it appeared from his observation that such a system would serve to alleviate many of the problems within the prisons relating to prisoners aftercare. The group agreed in principle on the merits of a probation system but suggested that it will require detailed study of the present criminal justice system and such a system should begin on a small scale aimed more at dealing with juveniles and then expanded later to include adult offenders.

The Use of Community Volunteers in Probation Work

The presentation by Mr. Papalii of Western Samoa outlined three programmes utilized by the probation service in Western Samoa to involve community cooperation and participation in the work of rehabilitation for the offenders and their resocialization into the community.

The first programme involved the use of volunteer foster homes which presently numbered 20. These foster homes provide suitable residences for young probationers for whom it is considered that his own home background and social environment may not be condusive to proper resocialization. The foster parents receive the offender into their home and treat him as a member of their family. Through this method the emotional and physical security of his new environment and the obligations placed upon him by being treated as an equal by his foster family will give him a sense of responsibility and selfworth.

Mr. Papalii commented that the system had only been in operation for the past 2 years and at this stage it was too early to make a sound evaluation of advantages or disadvantages of the scheme but he added that to date it was working very successfully with only two cases of where problems arose but the offenders were later placed in other foster homes and without further problems.

The second method for the use of community volunteers involved vocational training with the YMCA Trade Training School. Here the probation service found members of the business community who were prepared to sponsor a young offender to take up a course of trade training at the school and provide him with employment after graduation. This system was working successfully due mainly to the fact that the offender was grateful to his sponsor for being given the opportunity to learn a skilled trade, and the employer was happy to receive a worker who needed only the minimum of training on the job. Also on completion of the course the students were issued with tool kits for their respective trades e.g. carpentry, plumbing and motor mechanics. It has been found that once a young offender has learned a particular job well he is reluctant to do anything which may jeopardize future livelihood and so the system although used only on a small scale so far, is proving successful.

Lastly, there are also used within the

community, such volunteers whose functions are purely supervisory and they represented the largest body of volunteers. The use of these volunteers falls in line with the Volunteer Probation Officer (VPO) system employed in the Japanese probation system. These assistant probation officers as they are called are only involved as supervisors and counsellors for offenders who live some distance from the main centre of Apia where the probation office is located. They report once a month to the probation office and provide casework reports which are kept on file for periodical assessment of the probationers' progress. This system is also more practical in the case of married probationers who work for a living and cannot take time off from work to report on a weekly basis as is normally required.

Mr. Papalii concluded by remarking that the use of community volunteers has meant a marked improvement in methods of supervising and assisting young offenders acquire a better start to a new life. While there is interest shown by the community and willingness to assist those less fortunate in our society, it is possible to save many young people from a future life of crime by resocializing them and instilling in them a feeling of responsibility and selfworth which should assist in their social readjustment to the demands of their community.

Some Problems of Rehabilitation Aid Hostels in Japan

The paper presented by Mr. Gōda of Japan was both constructive and interesting to the point that it provided some very lively discussion from all group members, in dealing with the problems he raised with regard to the rehabilitation aid hostel scheme in Japanese correctional programmes for discharged prisoners, parolees and probationers.

The first problem summarized for the group's discussion was to define the role and function of hostels and what kind of treatment programmes are expected to provide by them. Mr. Gōda explained that there are some hostels that have special treatment programmes such as:

(i) "The Japan Psychiatric Treatment Centre" located in Machida city, Tokyo, which was founded to accommodate discharged offenders who needed psychiatric treatment.

(ii) "Risshōen" hostel located in Nagoya city, Aichi prefecture, which functions as vocational training institutes and also provides driving instruction.

(iii) "Senshūryō" hostel located in Izumisano city, Osaka prefecture, which has factory for automobile equipment and residents become students apprentices of the Kansai Automobile Equipment Factory attached to the hostel.

(iv) "Anryūen" hostel located in Fuchu city, Tokyo, which accommodates aged ex-offenders who cannot support themselves and have no family on which to rely for assistance.

In discussion the group was unanimous in the opinion that rehabilitation hostels should find ways and methods such as guidance and counselling to ex-offenders and that some hostels needed to specialize in accommodating those offenders with various needs such as medical treatment, job training, giving guidance and educational programmes for academic study.

Staffing for rehabilitation hostels was cited by Mr. Gōda as another major problem and he explained that in April 1979 there were a total number of 440 person working in hostels and apart from clerical staff and kitchen staff only 287 were in charge of treatment programmes with an average caseload of 10 persons per officer. This type of work does not seem to attract the qualified young people and reasons given were the long working hours, low wages and working conditions, and inadequate compensation for accidents. Each year some cases of staff having received injuries from residents are reported but where the staff member is not a VPO he cannot receive compensation from the national fund and will receive only small amount of money from the National Federation of VPO Association. According to a table given in Mr. Gōda's paper 41% of

guidance workers and 80% of the managing staff throughout the hostels were over 60 years old.

The group made the suggestion that it may be of benefit to use student volunteers especially those students studying human science courses, to help with the work in the hostel and give counselling to residents. It proved a difficult problem to solve in view of the present employment condition that other private and public sector employers could offer better salary and working conditions to qualified personnel.

The final issue for discussion was the question of finance and it was pointed out by Mr. Gōda that many hostels had great difficulty in meeting budget requirement on administration cost and could only rely on the government for nominal assistance. The budget estimates for an average hostel are: 53%: government assistance; 11%: donations from community organizations and the public; 8%: reimbursement from offenders; 18%: workshop income.

The question of financial assistance for the hostels was discussed at length by the group members and a suggestion was put forward as to whether the hostels could be administered completely by the government. It was explained by Mr. Gōda that it was unlikely that hostel management would agree to such a plan. However, fund raising could be made with the assistance of local groups such as Women's Associations for Rehabilitation Aid. Another suggestion was for the hostel to form committees which include prominent members of the community and these hostel committees or boards could raise funds by promoting hostel programmes in the community. The third suggestion put forward was for the hostels to accept lodgers from the community as well as offenders, and these lodgers who needed accommodation could pay rent on a fixed basis and this could provide extra income as it seemed that many hostels did not have full capacity for residents, but had to continue to pay staff and administration costs which created much of the financial burdens for them. Mr. Gōda expressed his ideas on certain measures which he felt the government could adopt such as (i) increasing the office expense subsidies for entrusting affairs, (ii) extending the period of aftercare from 6 to 12 months, (iii) adoption of the system of allocation of funds according to the authorized capacity. In this system the government provides standardized staff to meet the authorized capacity, and pays the personnel expenses regardless of the number of residents.

Relations between the Correctional Institution and the Aftercare Agency

The final presentation for the group workshop was the paper by Mr. Namiki of Japan, in which he stated that it was indispensable to keep good relations between the correctional institution and the aftercare agency for the transfer of offenders from the institution to the community. In Japan, in 1978, out of 14,782 inmates in the classification home, 5,207 inmates (35.2%) were disposed on probation. And out of 3,372 inmates released from training school, 3,066 inmates (90.9%) were released on parole. Also out of 29,164 inmates released from prison, 14,373 inmates (51.1%) were released on parole. The main topic for group discussion promoted by Mr. Namiki was the programme for environmental adjustment and its vital role in the preparation of prisoners for discharge and their smooth reintegration back into the community. He stressed that the environment has important significance for helping the rehabilitation of the inmate. The environment gives the inmate many influences which may lead him to become involved in crime or delinquency. The aim is therefore to arrange as much as possible a suitable environment to which the offender can return in order to minimize the risk of further offending. When investigation is conducted for the purpose of the environmental adjustment, the probation officer and VPO will pay particular attention to the following circumstances: 1) Offender's guardian and family situation; 2) The environment of the neighbourhood in which the family live; 3) Community attitude toward the inmate's

crime or delinquent behaviour; 4) The extent of any compensation made to the victim and his feelings toward the offender; 5) Life history and friends or associates before incarceration; 6) Offender's plans with regards to schooling, employment, etc.; and 7) Motives and causes for his offending or delinquent behaviour.

When a complete and comprehensive report of the environmental adjustment has been prepared it may then be possible to effect a suitable programme for supervision once the inmate is released from the institution. The value of such a report is also recognized by the parole board in considering the likely behaviour and response of the inmate to rehabilitation after he is released from the institution.

The group through discussion agreed with the aims and principles of environmental adjustment and suggested that: 1) Social guidance and education should begin in the prison at pre-release stage in order to acquaint the prisoner better with life outside the institution; 2) There should be a liaison between probation offices and correctional institutions even to the point of having probation officers working within the correctional institution as they do in the Philippines. If this proved difficult as it has in the past in Japan then perhaps it would be easier if correctional institutions used retired prison officers to act as social workers within the institutions to facilitate better communication between the institutions and the community agencies.

The other topic considered by the group were ways in which mutual understanding and cooperation could be best promoted between correctional institutions and other agencies within the community. Mr. Namiki explained that meetings did occur between the individual agencies but such meeting were not frequent and usually involved only the senior executive members of the agencies and matters discussed were not revealed to the staff of the institutions or agencies. The group agreed that any cooperation should first begin with the heads of the different agencies or bureaus and then communication may be engendered throughout the rest of the staff members. It was also suggested that as each agency published their own journals, articles representing the viewpoint of one agency might be printed in the other's journal thus promoting better understanding of their problems. In the matter of staff training it was also suggested that representatives of the correctional institutions could give lectures to staff of the rehabilitation bureau and *vice versa*.

The group considered that as the offenders were often clients of both agencies at some stage of his rehabilitation it was therefore most important that the separate organizations do all in their power to enhance and maintain mutual cooperation for the benefit of both the offender and the community at large.

SECTION 4: REPORT OF THE COURSE

Institutional Treatment of Adult Offenders

Summary Report of the Rapporteur

Session I: Correctional Programmes

Chairman: *Mr. Suekichi Ushijima*
Advisor: *Mr. Keizō Hagihara*
Rapporteur: *Mr. Peter Rogers*

Admission Programmes

It was agreed by the participants that admission and reception was a crucial moment when a prisoner was required to adapt to prison life. In view of this fact, participants suggested that a proper reception board/committee be established to look into the following factors:

i) To ease anxiety and mental stress of the newly admitted prisoners;
ii) To explain clearly the prison rules and regulations and information relating to his personal hygiene, work, exercise, sports and details of the prison diet; and
iii) To help the prisoner to overcome the future of his family and what available assistance could be given.

Some participants suggested a shorter period of orientation be given while another participant suggested a larger period is necessary in order that the prisoner could easily absorb most of the instructions. However it became apparent to the participants that every prisoner with a sentence of suitable length, as soon as possible after his admission, should possess a personal file which shall include a report by a medical officer on the physical and mental condition of the prisoner. The reports and other relevant documents should be placed in the prisoner's file. Some participants felt difficulties in providing short-termers with admission orientation, however, agreed that even in case of these prisoners utmost efforts should be made to give such opportunity as much as possible.

Classification and Progressive Treatment

It was unanimously agreed by the participants that the purpose of classification shall be:

i) To separate from others those prisoners who by reason of their criminal records or bad characters are likely to exercise an undesirable influence; and
ii) To divide the prisoners into classes in order to facilitate their treatment with a view to promoting their social rehabilitation.

As soon as possible after admission, a study of the personality of each prisoner should be conducted to ascertain the existence of any physical or mental sickness and to treat the offender if necessary. This process of study should be carried out by psychologists or psychiatrists or by a trained social worker. This test is essential to determine the type of training, education and treatment which the prisoner will undergo during his period of training. Suggestions were made pertaining that the prisoners should be classified and transferred to separate institutions or separate sections of an institution for the treatment in respect of their individual needs, capacities and dispositions.

In the course of discussion, some participants also suggested the importance of classification for discipline and security especially for hard-core criminals. Some participants indicated that they could not achieve satisfactory classification due to inadequate buildings, overcrowding, influx of short-term prisoners, lack of segregation facilities, insufficient staff and prevalent public apathy towards the improvement of prisons. In some countries due to the scarcity of prisons and facilities classification was limited and only done according to the degree of criminality and the number of previous convictions.

Prison Work

There were several reasons given regarding the importance of prison work for prisoners. Participants unanimously agreed that the ultimate aim of prison work was to ensure the rehabilitation of offenders. Work programmes for offenders must be organized to facilitate their employment in productive and gainful occupation and to lead a satisfactory vocational life so as to promote their reintegration into society. Work programmes as indicated by most participants should be planned, organized and performed not only to increase productivity but also to assist offenders by stimulating and cultivating industrious working habits and discipline, by providing, maintaining and upgrading vocational skills and enabling inmates to have wages or remunerations for their future independence. Thus, it was justifiable to require prisoners to engage in constructive labour or vocational training because of the wholesome effects on prisoners themselves and society at large.

All participants unanimously agreed that prisoners who had engaged in prison labour should be given a reasonable amount of payment for their work, and it was pointed out that the rate of such payment is relatively low in many countries. In most countries, a certain portion of prisoner's remunerations are reserved as compulsory savings to be paid upon their release or even to remit to family members and dependents. It was also noted that remunerations rates given to prisoners varied from country to country depending upon the social and economic conditions. However, the majority opinion was that prisoners had no rights to demand payment for their work. However, with regards to protective and safety measures, prisoners who met accidents resulting in physical injuries in a prison work were to be given suitable compensation.

The majority of participants pointed out a variety of problems faced in providing effective and meaningful work programmes for prisoners. The problems covered many areas including financial, social, economic and administrative factors. Participants also emphasized shortage of physical facilities and qualified personnel for work programmes together with overcrowdness in penal institutions. Some participants mentioned in particular that instructors were reluctant to join the prison service for personal reasons. Another participant mentioned that in order to overcome the shortage of instructors, some prison officers could be selected and trained by the existing insturctor in the workshop or sent to a trade school for further training. In this way, even if the instructor has retired or resign for better job prospects, the prison officer could take over the duties of an instructor.

Other Institutional Correctional Programmes

In the field of other institutional correctional programmes, the participants emphasized on imparting to the offenders vocational training, academic education, religious education and daily living guidance and therapeutic treatment. It was stated by the participants that vocational training was now most emphatically implemented in the institutions to give the inmates more skill and thereby facilitate their rehabilitation. Consideration was also favoured for the treatment of delinquent juveniles and younger offenders for vocational training. For the improvement of the programme, the participants stressed that the types of vocational training should be based on the needs of both inmates and society.

The participants talked on the importance of academic education which was provided in most institutions and there were some prisoners who sat for public examinations or followed university courses in some countries. Religious education was acknowledged by the participants as an effort to reform and rehabilitate offenders. In many of the participating countries religious instructors of different faiths were encouraged to come inside the prison to conduct services to the prisoners. Recreational and leisure time activities was also

mentioned as healthy activities as prat of the programme for rehabilitation. Contacts with friends and families through letters and regular visits was stressed to be an indispensable part of correctional programmes.

Extramural Treatment

Majority of the participants indicated that their countries had some form of community-based programmes for offenders such as open institutions, work release and furloughs. Some of these open institutions had minimum security and prisoners were engaged in the following work, such as farming, agriculture, animal husbandry and handicrafts. In some open penal institutions, prisoners with good conduct and who had to support their families were allowed to live with them in the penal reservations. A small portion of land for cultivation purpose was offered to the prisoners as a form of incentive. It was agreed by the participants that open institutions were more economical to construct and operate than the closed institution and also contributed much to the reduction of over-population in prisons.

Although not many countries had implemented fully the work release programmes, there were several countries in which work release programmes were currently introduced. The basic idea behind work release programmes is to require prisoners to go out into the free community for employment and return to the prison everyday and thus it can make the prisoners get along with workers in the factory or workshop. They are given wages as normal workers and the money could either be given to the families or kept and given to them until their date of discharge.

The purpose of furlough system was to promote the inmate to adapt to the free social life by giving home leave for a certain period of time. There are several countries in Asia which have adopted furlough system but it is mostly used for young offenders.

Conclusion

i) The initial period of admission orientation programme to a prisoner should provide him with proper guidance and instructions as this was a crucial period for the prisoner to adapt to prison life. Details regarding the procedure, routine and facilities must be made available so as to encourage the prisoner to follow a programme of rehabilitation.

ii) As soon as possible after a prisoner's admission and after a study of the personality of the prisoner, a programme of treatment shall be prepared for him in the light of the knowledge obtained of his individual needs, his capacities and dispositions. Therefore, the purpose of classification is to separate from others those prisoners by their reason of their criminal record or bad character who are likely to exercise an undersirable influence and to divide the prisoners into classes in order to facilitate their treatment with a view to their social rehabilitation.

iii) Prison work programmes for offenders must be organized to facilitate their employment in productive and gainful occupation and to lead a satisfactory vocational life so as to promote their reintegration into society.

iv) It was easy to identify the problems and difficulties in the work programmes but effective ways to cope up with the situation was difficult to find and implement under the current social and economic conditions in many countries. It was also observed in many countries that correction departments had been given least priority in the context of the social development planning. Hence, policy makers and administrators had a role to convince the government the importance of rising social problems, financial assistance was required to implement effective and productive programmes for correctional institutions.

v) Many obstacles existed in expanding and improving vocational training programmes for offenders in almost all participating countries. Among them is the lack of systematic planning for the programme owing to insufficient facilities and equip-

ments as well as shortage of qualified instructors. Therefore, active cooperation towards the efforts of correctional administration by legislators, public organizations and citizens were required for financial support.

vi) Greater need for some types of community-based programmes for offenders such as open institutions, work release, and furlough or home leave were unanimously felt by the participants in order to ease the difficulty of overcrowding in prisons as well as to facilitate resocialization of prisoners.

Session II: Security and Control

Chairman: *Mr. F.X.T. Philips*
Advisor: *Mr. Akio Yamaguchi*
Rapporteur: *Mr. Siddiqur Rahman*

Security Incidents

All the participants admitted in the discussion that escapes happen in prisons. One participant stated that in the prison of his country, there were 17 attempted cases of escape in 1979 out of which seven cases were successful. He stated that most of the escaped prisoners were long termers who perhaps could not adjust themselves with the environment of prison. Another participant expressed that most of the escaped prisoners of his country were members of gangsters. These inmates were perhaps refused by their colleagues and as such, they tried to escape from prisons. He added that riots and disturbances also occurred in the prisons of his country mainly because of the enforcement of strict discipline amongst the inmates. Another participant pointed out that the result of disturbances reached even to killing of a prisoner by another inmate due to homosexuality. Mr. Rahman of Bangladesh mentioned that escapes mainly happened in the prisons of his country from outside garden in course of employment in garden work. He also stated that the inmates usually remained calm and quiet inside the prison but the security incidents of the prisons were hampered when the political atmosphere of the country became cloudy. For instance, on such an occasion in 1971, about 2,100 inmates of a jail attempted to escape by breaking the main gate. They broke the doors of the office and about 400 to 500 inmates entered in the office as well as the main gate. The keeper of the gate was subdued and at one point a prisoner attempted to jump through the ventilator. The situation was brought under control by using firearms. One participant from Japan spoke of security incidents in the prisons of Japan. According to him, the average number of escapees from the prisons during the period from 1975 to 1979 was only 5.8, and there occurred no prison riot for nearly 30 years. However, gangsters or members of organized groups sometimes created problems in the smooth running of the administration of prison. Mr. Philips of Sri Lanka stated that food is one of the most important items that creates dissatisfaction amongst the inmates which ultimately turns to riot inside the prison.

All the participants agreed that one of the most important factors to be considered in the prevention of such security incidents is the maintenance of good human relationship between the staff and the inmates of a prison in their daily contact. As for the measures to prevent security incidents along with basic consideration on security, one participant suggested the following which could be applicable to many countries: 1) Fair administration with regard to the inmates' visits and correspondence; 2) Classification and allocation of inmates with a view to maintaining security of the prisons; 3) Regular and surprise inspection and search in the workshops, cells, stores and hospitals in the prisons to prevent the introduction of contraband or escape; 4) Furnishing necessary facilities for security, such as watch towers and electronic wires, TV cameras etc.; 5) Adequate lighting of the corners inside and outside of the prisons; 6) Safekeeping of equipments which could facilitate escape, such as ladders, ropes, planks, iron rods etc.

Inspection and Search

Mr. Lalwani of Pakistan stated that inmates are allowed cigarettes, fruits, etc. during the time of interview but the inmates are not allowed to take weapons and drugs and they are searched after interview. But normally these things such as, cigarettes, fruits and drugs are smuggled into inside the prisons beyond office hours. So, to prevent such smuggling thorough search is conducted daily before lock up and at the time of unlock of inmates. Mr. Rahman of Bangladesh expressed that body search of the inmates is conducted on admission to prison and whenever an inmate is taken out for any purpose i.e. to and from court, hospital or employment in extramural works. He stated that there is a small group of staff who conducts surprise search in almost every area of prison including cells, dormitories, workshops and hospital area. This search party also checks the body of the inmates in a private places on whom suspicion arises. The respectable inmates or the classified prisoners on whom suspicion arises are also searched by the senior executive officer in a private place to maintain privacy. Another participant stated that sometimes metal detector is applied to search the body of the inmate if there is doubt that any instrument or firearm is concealed in the body. The search party even use trained dogs to assist in finding out prohibited articles.

For safety and security of prison and to ensure strict discipline, thorough and surprise search should be conducted in every inside area of the prison and the time and date of such search should be kept confidential so that it may not be disclosed and the staff also be trained and they should devote their earnest zeal to see that no unauthorized articles pass inside the prison.

Disciplinary Sanctions

Mr. Chattaraj of India explained the procedure of disciplinary sanctions under the Prisons Acts in his country. If any inmate's *prima facie* case for violation of any prison rules is established, the Jailor or the Deputy Superintendent after thorough inquiry put up the case with all evidences before the Superintendent for decision. If the Superintendent after due hearing from both the prosecution and defence is satisfied that the grounds put forth by the prosecution are sufficient to warrant conviction, he awards punishment according to the provision of prison rules, otherwise dismisses the case. If the punishment to be awarded to the inmate is beyond the jurisdiction of the Superintendent, the briefs of the case together with the recommendation of the Superintendent are forwarded to the Inspector General of Prisons for approval of the punishment. If the offence committed by the inmate is so grave in nature and beyond the power of the prison authority to deal with the case, the Superintendent refers the case to the court of law for disposal.

Mr. Rahman of Bangladesh stated that in recognition of the principle of humanity as enshrined in the Constitution of his country and to ensure human dignity of the prisoners, such forms of punishments for violation of prison discipline as are in conflict with the generally accepted standard of behaviour and human relations and as may also cause both physical suffering and mental agony has been discarded in his country. It is really true that security and discipline cannot be maintained by force or by observance of rules and regulations alone. What is required for smooth running of prison administration is the good wishes of both the staff and the inmates. It has been stressed by participants that provisions of UN Standard Minimum Rules for the Treatment of Prisoners should be respected as far as possible in the prosess of imposing disciplinary punishment upon inmates.

Emergency Planning

As the inmates are put to prison against their will, it is quite natural that they may inevitably have complaints and problems which, if not duly solved, would cause disturbances. So, to cope with any event every prison should be equipped with modern firearms and staff trained accordingly. However, all the participants agreed that the use of firearms should be restricted and be applied only when all other methods fail, after due warning, in such serious cases as an outbreak of attempt to escape or loss of life, whereas in some countries, the use of firearm could be taken into consideration even when government properties are endangered or seriously damaged. In most of the countries all staff members are trained through in-service sessions in the technique of handling emergency incidents and their drills are put into practical exercise periodically. Written instructions of emergency plans are sealed in an envelop so that the officer on duty could have an easy access to them in time of emergency without being interfered with by civilians working inside the prison. Emergency plans to cope with any untoward event should be drawn up sufficient time ahead in the prison and that the procedures of the plan and the duty of each staff during emergency be communicated beforehand.

The necessity of communication between the prison and the police was emphasized in the discussion. In some countries if serious outbreak, mass hunger strike or disturbance is apprehended or if there is apprehension of attack of prison from outside, the message is immediately communicated to the Superintendent of Police and as soon as possible the Superintendent of Police sends police forces with tear gas or other necessary firearms to cope with the situation. When the prison authority with their limited resources cannot control the situation, the outside police should help the prison to bring the situation under control.

Session III: Recruitment and Training of Correctional Officials, Prisoners' Rights and Living Conditions, and Implementation of the UN Standard Minimum Rules for the Treatment of Prisoners

Chairman: *Mr. Leo Teng Jit*
Advisor: *Mr. Susumu Umemura*
Rapporteur: *Mr. N.S. Al-Khalessi*

Introduction

It was very clear during the discussion that there were many different practices/systems adopted by respective participating countries. However, it was generally agreed that in order to secure the competent correctional officials and to successfully implement the UN Standard Minimum Rules for the Treatment of Prisoners, the correctional policy should be geared towards improvement of the standard of correctional services and the interest of correctional personnel.

Recruitment and Training of Correctional Officials

There was almost a full agreement by the participants that most of the Asian countries faced a very serious problem on the matter of recruitment of correctional officials due to the circumstances explained as follows:

1) Low salary was the prime reason that the recruitment of sufficient qualified and specialized correctional officials could not be achieved. Most of the participants indicated this problem stating that it was mostly due to the increasing unemployment rate in the society that they could not get applicants for vacancies in a correctional institute.

2) The low social status of correctional official in most Asian countries also discouraged educated and qualified personnel to work in the correctional field and it was due to the rapid development of industries and other economical activities in the

society which offered these personnel sound salary, better condition in jobs and good positions, which resulted in their reluctancy of accepting correctional employment.

3) Failure of job satisfaction was pointed out by some participants. Especially those newly recruited personnel who were only assigned to perform purely custodial work such as locking and unlocking prison gates, were very disappointed at the work. This might be due to the lack of society education concerning correctional activities.

4) The limited scope of promotion was also expressed by some participants to be one of the reasons that the turnover rate of correctional officials was very high.

5) The difficulty in training of correctional officials was encountered by some countries for either the lack of training institute in case of Iraq and Bangladesh, or the low educational standard of personnel or both which made it difficult to conduct good training courses. Therefore the limited training programmes usually emphasize only the custodial and security knowledge in these countries.

As a result of the discussion about the above-mentioned problems, the following suggestions were agreed upon by almost all the participants.

1) Improvement of correctional officials' standard of living by increasing salaries, allowances and providing sufficient accommodation which would not only automatically lead them to a better social status, but also attract the qualified persons to join the correctional services.

2) Establishment of training institute and the improvement of training programmes as mentioned by Mr. Chattaraj of India who gave an example of programmes for various classes of correctional officials in his country.

a) Low ranking officers (guards)—security control, physical self-defence, emergency drills, social treatment (simple knowledge).
b) Middle ranking officers—management, corrections, psychology (general) as well as the programmes designed for the low ranking officers as mentioned above.
c) High ranking officers (e.g. superintendents and above) and specialist—they should have different types of courses like: i) Orientation training for direct entry superintendents. ii) Pre-promotion course. iii) Refresher courses. iv) High standard combined courses conducted by national level institutes for concerned agencies personnel. v) Oversea courses and observation trip courses which would enable them to acquire a wide knowledge concerning correctional policies and future planning, research and the exchange of knowledge of other agencies, policies and procedures.

3) Enlargement of public participation in correctional activities in order to enable the public to have a better understanding of correctional works. By doing so, the status of correctional officials in the society will also be improved.

Prisoners' Rights and Living Conditions

1. Prisoners' Rights

As to prisoners' rights such as visits and correspondence, religious activities, access to information and procedures for redress of grievance, it came to light that they were provided for in one way or another in statutes, ordinances, regulations, etc. in almost all the participating countries, and that, generally speaking, prisoners were enjoying these rights to a satisfactory degree in individual countries. Mr. Ushijima of Japan explained that prisoners' rights had been recognized in Japan to a very high extent which had invited some complaints from the staff sometimes when they compared jokingly to the staff's rights which were not as highly considered as the prisoners'. He also mentioned that the procedure for the prisoners to redress their grievances had been well managed to an extent that it was sometimes inviting malicious complaints. Also Mr. Hikita of Japan stated that although they had received and investigated many of these complaints, they had very small occasions to

allow prosecution on the staff members. Mr. Rasisuddhi of Thailand expressed his view by saying that prisoner's rights should be highly considered only when it would not hamper the security of the prison, upon which most other participants agreed.

Religious activities were emphasized by Mr. Philips of Sri Lanka as a supporting method for rehabilitation, although some participants showed doubts as for the effectiveness of religious activities in terms of rehabilitation of prisoners. However, there was a general agreement that the prisoners should be allowed to practice the religious activities freely.

2. Living Conditions

In terms of living conditions it was confirmed that in some countries, adequate living conditions in prisons were maintained fairly well, but that, in many participating countries, overcrowding of prisons resulting from the presence of many unconvicted prisoners or short term offenders were causing problems relating to accommodation, health and hygiene. To alleviate overcrowding conditions in prisons, participants felt keenly the necessity of conducting investigation and trial expeditiously in every possible way and renovating or enlarging physical facilities for prisoners.

When the discussion was approaching the treatment of offenders and types of punishment imposed by correctional authority of different countries, corporal punishment such as whipping as disciplinary one came up for discussion. Some Asian countries are at present imposing corporal punishment such as whipping and canings. Mrs. Sembrano of the Philippines and Mr. Mori of Japan agreed on the use of corporal punishment in favour of the idea of imposing such punishment for a certain type of prisoners who had violated prison regulations because of its efficacy to deter further disciplinary offences, although it was not imposed in their respective countries. Mr. Al-Khalessi of Iraq opined that such types of prisoners might have certain personal problems or be mentally disturbed before they committed such violations and that some appropriate methods should then be used in solving their problems outside the prison, instead of imposing corporal punishment. As for the effectiveness of these punishment, some of the participants were of the opinion that corporal punishment had its effects on certain type of offenders so far as deterrence was concerned. Some other participants remarked that such punishment might only be effective on youthful offenders. However, some participants expressed strong disagreement on the use of corporal punishment irrespective of its effectiveness, insisting that it was a cruel, inhuman and degrading punishment.

Implementation of the UN Minimum Standard Rules for the Treatment of Prisoners

1. Difficulties

It seemed that there were lots of difficulties faced by some Asian countries which disabled them to implement some articles of the Minimum Standard Rules. The main difficulties raised through the discussion were as follows:

a) Financial problem due to the domestic financial constriction.
b) Prison manuals lagging behind the Minimum Standard Rules.
c) Political interference in prison management.
d) Unawareness of the Rules among the low ranking officials.
e) Difficulty in the translation of the Minimum Standard Rules into various local languages.
f) Lack of inspectorate unit on national and international level.

2. Suggestions

a) Due to the above-mentioned difficultics, it appeared that the Minimum Standard Rules had not been implemented satisfactorily. On this point, the following matters were confirmed as necessary:

i) Awareness of these rules should not only be essential for the prison personnel but also for the prisoners, and could be done through education, training and distribution.

ii) Incorporation of the Minimum Standard Rules in the national laws and regulations in respective countries is required.

iii) To improve facilities suitable to meet the Minimum Standard Rules, some means of supervision or inspection might be necessary both on domestic and international levels.

iv) Translation of Minimum Standard Rules should be standardized under the authority of the United Nations.

b) Some other prisoner's rights and living conditions such as prison clothes, diet, etc. were also discussed under this topic. In regard to the treatment of foreign prisoners there was a full agreement on the following points:

i) The right of communication with the prisoners' respective embassy should be established.

ii) Special considerations in terms of diet and treatment should be given to such prisoners.

Conclusion

As a result of the discussion on the three topics mentioned above, we came to understand that there were enormous rooms for improvement in the correctional administration in the countries of the regions. Also the necessity is felt for the standardization of the implementation of the Standard Minimum Rules through the meeting of policy making level officials to make its better implementation possible. It seemed one way of solution to the problems faced by many countries of the region, that a powerful authorized inspection committee supervised by the United Nations would give great assistance to ensure a better achievement and improvement of prison facilities and treatment of offenders as well as the interest of the correctional officials.

Session IV: Correctional Policy

Chairman: *Mrs. Susana U. Sembrano*
Advisors: *Mr. Masaru Matsumoto and Mr. Toichi Fujiwara*
Rapporteur: *Mr. Barindra N. Chattaraj*

Introduction

Objectives of punishment change from time to time in keeping with the growth of human civilization, social values and knowledge of criminal behaviour. Retribution as an objective of punishment has toned down in most of the civilized societies. Deterrance and incapacitation have also been proceeded to have limited applications for some special types of offenders. Reformation and rehabilitation of offenders have been accepted, of late, by most of the welfare states as useful means for the protection of society from the antisocial behaviours. Accordingly, increasing stress is being laid on the need for adopting correctional attitudes towards those who come in conflict with laws. Today's prison is therefore, not only a place for detention of inmates but also a place for providing individualized treatment to the prisoners for facilitating their smooth return to the community as law abiding citizens. The prison is expected to be the centre of correctional treatment whose primary aim would be to produce constructive changes in the offenders' personality which may further have a profound and lasting effect on their habits, attitudes, approaches and total value schemes of life.

In pursuance of this objective, correctional programmes in the prisons need to be reorganized in accordance with the treatment need of each offender. Proper classification of prisoners on the basis of age, sex, religion, education, degree of criminality, recidivism, physical and mental condition and a sound system of diversification of institutions constitute the most important ingredients of individualized treatment programmes.

Another important function of the prisons today, is to utilize the community re-

sources to the fullest extent possible as the real success of the treatment programmes lies in the community's acceptance of the ex-prisoners to rehabilitate in the society.

Today's prisons are loaded with the twin functions of treatment and rehabilitation of offenders over and above the function of custody and security. But the increasing trend of prison population in most of the countries in Asian region has posed a serious problem for the correctional administrators to conduct individualized treatment programmes. Moreover, high pressure of administrative duties due to over population in jail, inadequate training facilities and lack of progressive attitudes of the prison personnel, mixing together, have constituted different handicaps in the way of utilization of community resources for the rehabilitation of offenders.

In the above context, the group was engaged i) to examine the current position in respect of prison population of different countries, ii) to find out some probable causes and to suggest some feasible countermeasures against overcrowding, iii) to explore some effective ways of seeking coordination and cooperation with the concerned agencies, iv) to identify ways and means for encouraging public participation and v) to ascertain the role of prison officers in rehabilitation of offenders.

Prison Population

The problem of overcrowding in prisons is prevalent in a number of countries in Asian region. Mr. Rahman of Bangladesh while speaking of the situation of his country expressed a great concern over the problem of congestion in prisons. He mentioned that present population of jails has already exceeded to the extent of sixty-five percent more than the registered capacity. Major causes of the problem according to him, are the detention of remand prisoners and concentration of short termers in the jails. The main reason of detention of under-trial prisoners is mostly due to unusual delay in disposal of cases by the courts. Mr. Chattaraj of India stated that most of the Indian prisons are also suffering from overcrowding problem. He gave a detailed account of the existing condition of the jails and identified four major factors leading to over population in jails. These are i) detention of under-trial prisoners for unduly long period, ii) putting up of women offenders, non-criminal lunatics and prostitutes, iii) sudden influx of political agitaters and iv) legal difficulties in transfering under-trial prisoners from one province to another. According to Mr. Philips, Sri Lanka prisons are facing the congestion problem. He also made the comment that detention of remand prisoners and short termers were responsible for this problem, upon which other participants also agreed. Mr. Leo mentioned that prisons in Singapore are accommodating excessive population of about six times greater than the registered capacity. According to him, the main reason for the over population is the incarceration of fine defaulters who constitute about 30 percent of the total prison population. Mrs. Sembrano stated that the over population in the Philippines prisons is also due to the same reason as indicated by Mr. Leo. She further added that the Government of the Philippines has enacted a progressive legislation in 1970 by which the court is empowered to release an offender who has been imprisoned for less than six months with the fine of 200 pesos and not been able to pay the fine, under guarantee of a respectable person from the community. This enactment has been proved to be very useful in decongesting prisons in the Philippines

While examining the position of jails in Iraq concerning the problem of overcrowding, Mr. Al-Khalessi was able enough to bring out a direct relationship of the problem with the economic and political changes in the country. After giving a detailed explanation of the political, economic changes of his country he mentioned that, at present, prisons in Iraq do not have any problem of overcrowding, although the same was there very much from 1973-78. Mr. Jeong of Korea reviewed the condition of prisons in his country in respect of population by citing different statistical

data and expressed the possibility of prisons being over-populated very soon, although the prisons are not overcrowded at present.

The group devoted considerable time to explore different kinds of solutions of this problem. Pondering over different modes and modalities of dealing with this problem Mr. Lalwani of Pakistan stated that the best way to tackle this problem is to minimise the inflow and to maximise the outflow of prisoners. In order to minimise the inflow and to facilitate the outflow, he stressed that traditional instruments of social control like Panchayat and joint family system need to be strengthened. Mr. Leo opined in favour of opening compulsory community work centres where fine defaulter prisoners can go and work for the repayment of their fines on the instalment basis instead of living in the prisons. Mr. Philips urged for establishing open prisons to accommodate some well-behaved prisoners after proper screening. He remarked that in Sri Lanka, open prisons have shown a great success in the rehabilitation of offenders as well as to relieve the prisons from being overcrowded. Mr. Rogers of Malaysia came out with a brilliant idea of bringing legislators and politicians very closer to prison life by providing them opportunity for being enlightened regarding prison life. He mentioned that prison administrators of his country have been successful in obtaining necessary budget for the construction of nine new prisons by means of convincing legislators.

Mr. Tatila of Tonga enlightened the group by stating the reasons as to why the prisons of his country do not face the problem of overcrowding. The reasons he cited, are good relationship between prison and police departments, close and intimate relationship between prison and community, Minister's personal interest for the prison development and absence of professional criminals. Mr. Rahman suggested for creating specialized institutions for different categories of offenders, and to liberalize the use of probation, parole, home leave to the first offenders. Mr. Al-Khalessi mentioned that in Iraq, under-trials are kept under the police custody. Miss Chan of Hong Kong felt that bail should be liberally granted to the remand prisoners. All the participants of the group unanimously agreed that the maximum use of extramural treatment will be of immense help in solving this problem.

Coordination and Cooperation with Concerned Agencies and Citizens

The group asserted that with a view to facilitating a timely reassimilation of prisoners discharged from the penal institutions, voluntary social welfare agencies have to be increasingly involved in the treatment programmes in the jails. The success of innovated projects like open camps, it was opined, depends considerably on an active participation of the community. The need for strengthening inter-departmental coordination in matters of prisoners' welfare, was forcefully brought out.

Mr. Leo commented that the responsibility of prison officers in respect of rehabilitation of prisoners has to be shared by the social welfare agencies both governmental and nongovernmental. He mentioned that in Singapore, there is a separate division in the Prisons Department known as Social Service Division which is involved in keeping a regular linkage with the social welfare agencies and other voluntary agencies engaged in social welfare services. Mr. Leo further added that the Government Social Welfare Department should also share this responsibility in terms of opening halfway houses for the released prisoners particularly for those who do not have any permanent abode. Giving emphasis on the community participation in prison programmes, Mr. Lalwani remarked that by inviting religious preachers in the prisons and by requesting industrialist to open small scale industries, community participation may be encouraged to a great extent. Mr. Ushijima of Japan explained the importance of roles played by the Volunteer Probation Officers in Japan to bridge the gap between prison and community. He also appreciated the contribu-

tion made by the Women's Association for Rehabilitation Aid to the success of rehabilitation programmes of ex-prisoners. He opined that the exhibition of prison products in the local festivals may prove to be very effective to bring prisoners nearer to community. Mrs. Sembrano talked about the charity organization existing in the Philippines which are devoted in looking after families of prisoners. Mr. Rogers opined in favour of developing a regular public relation system within the department as in Singapore, by which general public may be acquainted with exactly what prisoners are doing inside the prisons. According to him, exposure of prisoners' activities in the newspapers, radio and television for public consumption will definitely go a long way in soliciting public cooperation in the social defence programmes.

Mr. Jeong maintained that the introduction of a system of appointing jail visitors from all walks of life in community will pave the way for accomplishing better understanding between prisons and community. In some countries this system is working very satisfactorily. Mr. Al-Khalessi felt the necessity of convincing labour unions and other related associations to take care of prison labour also. He also asserted for liberal allowance of prisoners in working outside the prison walls.

Mr. Philips stated that the involvement of Lions Clubs and Rotary Clubs will be of immense help in the sphere of community involvement. Mr. Tsuchiya, Deputy Director, by virtue of his long standing experiences in the field of criminal justice system felt the urgent need for interdepartmental coordination among police, public prosecutors, judges, prisons and social welfare services. He stressed on the need of enlightening police, public prosecutors and judges regarding correctional programmes inside the jails.

Mr. Delgoda, Commissioner of Prisons in Sri Lanka and visiting expert of UNAFEI shared his valuable experiences in this regard. He mentioned about the success of his venture of allowing prisoners in taking part in the religious processions in the open community. Mr. Tin of Hong Kong asked the prison officers to adopt an open door policy rather than closed door policy.

Correctional Policy

Modern correctional philosophy envisages that reformation being the ultimate objective of imprisonment, the responsibility of the correctional officers does not cease with the release of an offender from jail but continues until he is resettled as a self-supporting and law-abiding citizen of the country. Institutional care and treatment of offenders are not enough. Prison officers are required to take an active part in a humane, efficient and well-organized rehabilitation programme.

The group felt that theoretically, this proposition is very sound. However, in actual practice, there are some impediments to put this in operation. In many countries in Asia like India, Pakistan, Bangladesh, Sri Lanka to mention a few, the group reiterated that prison officers are normally to remain preoccupied with routine duties of security and custody to such an extent that they find hardly any time to think for rehabilitation of offenders. Moreover, their training and orientation are not sound enough to make them capable of doing this type of work. In this situation, the group felt that the matter of participation of prison officers in the rehabilitation programmes, need to be reconsidered at the policy-making level.

The group discussed elaborately as to how far prison officers are to remain responsible for the rehabilitation of released prisoners. The group members unanimously agreed upon that prison officers can not deny this responsibility altogether. They expressed that prison officers can perform this duty more efficiently if their service conditions are improved and they are given appropriate and efficient training.

Mr. Leo caught attention of the group by commenting that correctional and rehabilitation programmes are not meant for all categories of prisoners. Due to urbanization and industrialization different types of crimes are increasingly on a continuous basis. As a result of that prisons sometimes receive one type of prisoners who are well-educated, intelligent and may not be successfully rehabilitated through the commonly accepted correctional programmes. This group consists of organized gangsters, smugglers and tax evaders. Mr. Leo said that, at present, our treatment programmes like vocational training, education, religious preaching, etc. do not serve any purpose for them. So it is better to exclude this group from the regular correctional programmes. Otherwise, he commented, the energy and time will be wasted which may be purposefully utilized for those, who may really need it. Mr. Rahman fully endorsed the view of Mr. Leo and suggested to segregate this type of offenders from other categories and to treat them with physical labour. Mr. Chattaraj of India felt that this category of prisoners is a serious challenge to the correctional philosophy and it is high time to explore some special techniques for handling them.

Regarding impediments in conducting correctional and rehabilitational programmes in the prisons, Mr. Al-Khallesi said that the old prison buildings which were primarily constructed for the purpose of security do not cope with the requirement of correctional programmes. Lack of proper training and nonavailability of skilled personnel, according to him, pose a serious problem for proper implementation of treatment programmes. Mr. Rahman insisted on minimising prison population in terms of sending under-trials and short termers in separate institutions. Mr. Rogers felt that proper planning and research are essential ingredients for smooth functioning of correctional and rehabilitation programmes.

Conclusion

Prisons in most of the developing countries in Asia are generally in a depressing state mainly due to paucity of funds and over-population. The problem of congestion has been identified as a serious hurdle in the way of accomplishment of modern objectives of reformation and rehabilitation. This problem in jails can not be resolved through *ad hoc* improvisation because existing prison structures are not only old and dilapidated in condition but also unsuitable for diversifying the approach for various categories of offenders. Moreover, in transforming prisons from 'holding up operation' to correctional centres, the quality and calibre of prison personnel need to be developed. All these problems are further related to paucity of funds.

In most of the countries, prisons department does not get priority in budget allocation. The main reason may be public apathy and governmental negligence. So it is the high time for the correctional personnel to explore ways and means to create public awareness regarding the work with which they are at present, engaged in and to convince the government that the investment on prisons is actually investment on human resource development as prisons' ultimate aim is to raise the quality of human life besides protecting society from the criminogenic forces.

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