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Introductory Note

The editor is pleased to present No. 42 in the Resource Material Series including materials from the 90th International Seminar and the 91st International Training Course.

Part I contains materials produced during the 90th International Seminar on "Quest for Solutions of the Pressing Problems of Contemporary Criminal Justice Administration" which was held from 27 January to 29 February 1992.

Section I of Part I consists of papers contributed by seven visiting experts.

Mr. Philip B. Heymann, Director and Professor of Law, Center for Criminal Justice, Harvard Law School, United States of America, in his paper entitled "The Problem of Intimidation in Criminal Justice Systems," describes the current situation of the pervasive problem of intimidation in criminal justice systems and discusses the possible countermeasures.

Mr. Ramon U. Mabutas, Jr., Regional Trial Judge, National Capital Judicial Regional Branch XLII, Manila, the Philippines, in his paper entitled "Combatting Delay(s) in Criminal Justice Administration (Philippine Experience)," analyzes the factors which cause delay in the criminal justice system and introduces the Philippine endeavor in realizing expeditious proceedings.

Mr. Robert J. Green, Chief Crown Prosecutor, Devon and Cornwall Area Office, Crown Prosecution Service, United Kingdom, in his paper entitled "The Creation and Development of the Crown Prosecution Service," introduces the actual function of the Crown Prosecution Service by describing its structure and the criteria for prosecution, etc. and points out its strength and weaknesses.

Mr. Robert J. Chronnell, Chief Crown Prosecutor, North London Area Office, Crown Prosecution Service, United Kingdom, in his paper entitled "The Future of the Crown Prosecution Service in England and Wales," examines the present system and administration of the prosecution and proposes the ways to improve them.

Mr. Joseph M. Whittle, United States Attorney for the Western District of Kentucky, United States of America, in his paper entitled "International Forfeiture: An Emerging Global Response to Crime," introduces the development of the forfeiture of proceeds of crime, by taking up the technical issues related to the Vienna Convention.

Mr. H.G. Dharmadasa, Commissioner of Prisons, Sri Lanka, in his paper entitled "Prison Overcrowding and Its Countermeasures, Strategies for a Wider Use of Non-Custodial Measures," analyses the causes of prison over-

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crowding and discusses effective measures to overcome it, focusing on alternatives to imprisonment.

Mr. Thomas Hutt, Prosecutor-General of Thuringen, Erfurt, Federal Republic of Germany, in his paper entitled "Criminal Prosecution in the Federal Republic of Germany," explains the actual situation of crime in Germany, describes the problems currently faced, and discusses the approaches taken to solve them.

Section 2 contains papers submitted by three of the participants of the 90th International Seminar.

Section 3 includes Reports of the Course.

Section 4 consists of Report of the Special Workshop.

Part II contains materials produced during the 91st International Training Course on "Further Use and Effectual Development of Non-Custodial Measures for Offenders" which was conducted from 13 April to 3 July 1992.

Section 1 of Part II consists of papers contributed by five visiting experts.

Ms. Carol Ann Nix, Deputy Prosecuting Attorney, St. Joseph County Prosecutor's Office, United States of America, in her paper entitled "Alternatives to Incarceration for Drug Offenders in St. Joseph County, Indiana, United States—A Working Model," explains the actual use of non-custodial measures at every stage of the criminal justice system for drug offenders in her County.

Mr. Han, Youngsuk, Director of the Korean Institute of Criminology, in his paper entitled "Current Status and Prospects for Non-Custodial Measures for Offenders in Korea," describes current non-custodial measures for offenders in Korea and discusses some prospects and overall effects.

Mr. Satyanshu K. Mukherjee, Director, Research and Coordination, Criminal Justice Commission, Australia, in his paper entitled "The Use and Effectiveness of Community Service Orders," makes an overview on the global use of community service order, analyses the issue of its effectiveness and discusses the methodology of evaluation.

Dr. Ugljesa Zvekic, Research Co-ordinator, United Nations Interregional Crime and Justice Research Institute, in his paper entitled "Development, Social and Psychological Mediators and Crime," examines the relationship between development and crime by introducing some research done in Yugoslavia.

Mr. Bo Svensson, Justice of the Supreme Court, Kingdom of Sweden, in his paper entitled "Alternatives to Imprisonment in Sweden," introduces the current practical situations of non-custodial measures in Sweden.

Section 2 contains papers submitted by three of the participants of the 91st International Training Course.

Section 3 includes Reports of the Course.

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The editor regrets that the lack of sufficient space precluded the publishing of all the papers submitted by the participants of the courses.

The editor would like to add that, due to lack of time, necessary editorial changes had to be made without referring the manuscripts back to their authors. The editor requests their indulgence and understanding of this necessity which was required to meet editorial deadlines.

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

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

December 1992



Takashi Watanabe

Editor
Director of UNAFEI

PART I

**Materials Produced during
the 90th International Seminar
“Quest for Solutions of the Pressing Problems
of Contemporary Criminal Justice Administration”**

SECTION 1: EXPERTS' PAPERS

The Problem of Intimidation in Criminal Justice Systems

by Philip B. Heymann*

I. Introduction

My subject at this Seminar is a very pervasive problem of criminal justice systems: the intimidation of witnesses, judges, prosecutors, or other officials so as to prevent them from carrying out their responsibilities. I hope we can share our knowledge about how to handle this problem, but before making my contribution to that effort, I think I owe you an explanation of why I pick this problem from among all those faced by the criminal justice systems around the world.

The starting place is that I take most seriously that part of the operations of police, prosecutors, and courts which is centered on finding the facts. We all know that the police—by far the largest portion of this group—do other things as well. They maintain order when people become rowdy *either* as individuals or in small groups *or* in crowds at a riot or political demonstration. They provide assistance to citizens when there has been no crime but only some other form of danger or simply the need for directions or other advice. They discourage crime, often without much hope of catching it, by visible patrol. Indeed, only a small part of the time of the police is spent receiving complaints or investigating crimes.

Why then do I focus on the problem of finding the truth about charges that someone has violated the most basic commands of the society—for that is what the criminal law is? The answer is because of the impor-

tance of truth about these matters to a healthy democracy. I have worked in Central America and seen the corrosive results of an inability to find the truth about violence and corruption—the spread of rumors and suspicion, the growing contempt for governmental institutions. I do not think a democracy can work unless its institutions are capable of getting the truth about the most fundamental concerns of its citizens in a way that is credible, effective, and humane.

What is the particular importance of intimidation in the system that begins with a complaint, generally to the police, continues through investigation and charging, and proceeds to trial and determination of guilt? There are two answers: one, symbolic and emotional; the other, very practical. Democracy depends on a society largely sharing a belief that each of us is equally obligated to obey the law. Nothing undermines that essential belief more than a display of the capacity of one individual to harm another criminally, openly, and with impunity. That amounts to a flat statement that the perpetrator is superior to the victim in privilege and power. It denies the equality of the victim and it denies the central importance of the state as the instrument that equalizes power before the law by protecting the weaker, the poorer, and the less organized.

I am not denying the seriousness of being the victim of a crime like street robbery or burglary or even rape whose perpetrator is never identified. These are very serious problems with very serious consequences for democracy. Authoritarian governments come into office promising to remedy an outbreak of such crimes. But they are different in quality and, in a real sense, less important

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than crimes that are carried out *openly* with an implicit statement that the perpetrator knows the victim can do nothing about it. Intimidation of victims or of judicial or law enforcement officials makes that statement of impunity. That is its special symbolic and emotional importance.

The special practical importance of intimidation flows from the centrality of living, willing witnesses to finding the facts about illegal conduct. Prosecutors and courts may also be essential and they can be intimidated, but this occurs far less frequently. Intimidation can most readily abort the process of finding the truth by denying the process its crucial ingredient, cooperative witnesses.

Start at the very beginning. No system can do much about solving crimes unless it knows that crime has taken place. Since most crimes do not take place in the presence of a police officer, we rely on victims and, less often, other witnesses to call the event to the attention of the authorities. Then, even if the authorities are aware of a crime having been committed, it is generally extremely difficult for them to solve the crime unless the victim or other witnesses are able to narrow the field of suspects to one or a very few either by observation of the suspect at the time of the crime or by giving information as to possible motivations.

The reason is simple. There is no way for the police to check what a hundred people may have been doing at the time of the crime or even to compare the hair or blood-type of a hundred suspects with those found at the scene of a crime. The police cannot search a hundred homes or interrogate a hundred individuals hoping for a confession. All this is too costly in any but the rarest of cases—costly both in terms of police resources and also in terms of the public outrage it would engender.

Thus, there are crucial functions that have to be played by victims and other witnesses in solving crimes (although the use of informants, undercover agents, or electronic surveillance to monitor criminal groups can

sometimes compensate for an absence of help from victims or other witnesses). And intimidation of witnesses is the most serious problem that healthy democracies face in obtaining the crucial cooperation of victims and witnesses.

In third world countries with repressive, incompetent, or corrupt state institutions, intimidation is only one of several devastating causes of failure of citizen cooperation. The police may be regarded with hatred and suspicion, either because they are the instrument of a narrowly based repressive government or because, at a deeper level, the society in which they operate may be severely divided among racial, religious, or ethnic groups which are deeply fearful of each other. The government of a severely divided country will find it far more difficult to convince all segments of its population that its police are neutral, fair, and even friendly. In countries that are not within the category of healthy democracies there also is often widespread contempt for the criminal justice system. I think this is true of much of Central America. The contempt may flow from a realization or a mere belief that it is widely corrupt or simply monumentally incompetent. Contempt can also be nurtured by a feeling that the system is biased in favor of the wealthy or powerful. All of these reasons for contempt were present in Guatemala when Harvard Law School's Center for Criminal Justice worked there from 1987 to 1990. All prevented cooperation with the police.

But for a healthy system the most general threat to citizen cooperation in alerting police to crimes and assisting in their investigation and trial is intimidation. I believe the problem is very general throughout the world. The victim of a robbery or rape in a poor urban area in the United States is likely to be intimidated by the perpetrator. Organized criminal groups in Italy or Colombia specialize in intimidation. Terrorist organizations intimidate witnesses, judges and prosecutors in Germany, France, Italy and

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Colombia. Most dangerous of all, government security forces, even in democracies, may use intimidation against those who would investigate their crimes.

II. The Analytic Framework

A. Categories of Threat

Threat against a witness, judge, prosecutor or investigator can usefully be distinguished by the nature of the threat, its source, its mode of communication, and—most important—its target:

- I will be addressing only threats of physical harm (which I will call “intimidation”) but threat of economic loss or a loss of position or prospects of advancement can also influence criminal justice officials or witnesses.
- Intimidation can come from any of several sources. It is most useful to distinguish three: individuals; well organized criminal or terrorist groups; and suspects within or well connected to the nation’s police or military.
- The harm may be made very clear in an explicit threat; or the danger may be implicit because the suspected individual or group is known to be dangerous (like the military or police or organized crime or some terrorist group of the political left or right).
- Intimidation can be addressed to either of two types of target: those with official responsibilities such as judicial, prosecutorial, or police personnel; or prospective witnesses to the crime who generally have no official role.

The distinction in terms of target is particularly important. For the criminal, it is generally easier—and safer—to attempt to intimidate witnesses rather than officials. Preventing hostile witnesses from testifying is also more effective than bribing witnesses to give false alibi evidence. Careful questioning by prosecutors and judges can discredit

the false testimony of an alibi witness who was not really with a defendant at the time of the crime; there can then still be a conviction based on the testimony of other witnesses who are prepared to tell the truth. But if the only people who can give evidence about the crime and the criminals are intimidated or killed, it is almost impossible to successfully prosecute a crime. (Only rarely does physical evidence by itself prove sufficient.)

B. The Logic of Intimidation

It is worth being rigorous about the logic of intimidation. Intimidation will take place only if the intimidator believes that:

- A) He can effectively take a set of steps, namely, 1. the communication of, 2. a credible threat to harm the individual who is threatened, 3. unless that individual does what he is told to do; and
- B) Compliance by the threatened individual will accomplish the benefit the intimidator seeks; and
- C) The threat is adequate to outweigh the adverse consequences to the person threatened of complying with the demand; and
- D) The threat or carrying it out will not result in unacceptable costs to the intimidator.

C. The Logic of Preventing Intimidation

The steps designed to prevent intimidation can be categorized according to this same logic. The object is to make clear to the intimidator that the necessary conditions for intimidation (set forth just above) are not met.

A) Prevent the intimidator from doing what he knows he must do to convey a credible threat.

1. Inhibit the communication of the threat.
2. By means of protection or insurance, prevent the threat from being credible; and
3. Make it difficult for the individual being threatened to comply with the threat by

- a. Making sure that the individual acts (for example, giving statements to the police) promptly and before the threat is received; or
- b. If the threat has been received, remove the individual from his position, substituting other individuals to do whatever needs to be done.

B) Make it clear that threateners will not accomplish their objective even if they succeed in intimidating a particular person (for example, make sure that an entire organization involving a number of people is in place to carry out the activity).

C) Make compliance with the threat more costly than incurring the risks of disobeying it.

D) Make it known that the effort to intimidate will be extremely costly to the threatener—for example, that there will be a great increase in resources dedicated to investigating the threat *and* the underlying case that the threat is intended to influence.

III. What Can Be Done to Protect Judges and Prosecutors from Intimidation

It is time to become more concrete, beginning with the easier case for dealing with intimidation. Is this framework useful for examining what various countries have done to prevent intimidation of judges and prosecutors? The answer is "yes." Governments make it difficult to communicate threats. They provide physical protection, thus making the threat less credible. They attempt to make compliance impossible. They try to make clear that a threat will not work because no single individual can accomplish what the threatener wants; a team or group shares the responsibility for investigation and trial. They punish compliance with a threat. And they attempt to intimidate the intimidators by making clear that there will be a massive governmental response to threats or harm to judges and prosecutors.

The Italian response to intimidation, described in the attached Appendix, combines most of these steps.

A. Preventing Communication of a Credible Threat

1. *Making It Difficult or Risky to Convey Threats:* Efforts can be made to maintain secrecy about the identity of judges (as France and Colombia do in cases of terrorist trials) or of jurors (as is sometimes done in the United States). Phone numbers can be changed. The official can live temporarily in a new location. The phone of the judge or prosecutor can be unlisted or systematically and obviously monitored by the police. Mail can be screened by the police. In cases where there is reason to fear intimidation, it would make very good sense to announce, as publicly as possible, that through some system of official monitoring, the prosecutor or judge will be denied knowledge of any threat.

2. *Physical Protection:* There are several points to understand about providing physical protection during investigation and trial of a dangerous offender. First, you must be able to trust the police who are providing protection. Since the regular police are not always trustworthy, special, reliable police units may need to be formed and assigned to the courts. (Italy did this.) Second, since physical protection cannot continue forever, it will not discourage intimidators forever; both the threateners and the judge or prosecutor know that a time will come when the threat can be carried out.

Because physical protection is never certain and always temporary, its most important consequences may be symbolic. It signals the public and would-be intimidators that the police and government take seriously any attempts to use intimidation in the criminal justice process. It promises that steps will be taken against anyone who tries to carry out intimidation. It instills a sense of shared mission among judges and those who are protecting them. Italian judges

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report that longstanding, sustained suspicion and conflict between judges and police ended when, under the threat of terrorist attack, the police were called on to protect judges.

Finally, officials fear the consequences for their families (as well as themselves) if they are killed. Providing life insurance can reduce this fear, making any threat that much less credible. (Judges, prosecutors, and police in Guatemala wanted life insurance for their families if they were to be asked to ignore threats as they carried out their duties.)

B. Making Even Successful Intimidation Unhelpful to the Intimidator

When a judge or a prosecutor works alone on a dangerous investigation, intimidators may believe that intimidating or killing one or two of these individuals may affect substantially an investigation and trial. In the United States, there is little effort at intimidation of judges and officials because it is clear that an entire office of prosecutors is responsible for an investigation and nothing would be accomplished by threatening or killing any one of them. Indeed, if one were killed, the investigation would continue with redoubled energy and resources.

Under the threat of terrorist attacks, the Italians and French both changed their systems of investigation and trial in dangerous cases. The Italians assigned individual investigations of the Red Brigades to the chief instruction judge in an area, who then distributed different parts of the responsibility to a number of other magistrates. It was impossible for terrorists to know whom to intimidate, and killing a single magistrate would accomplish nothing. The French accomplished the same thing in major terrorist cases by substituting a large panel of judges in place of solitary judges.

In the United States, intimidation of jurors can be discouraged by making any hint of a threat the ground for allowing the juror to resign and be replaced by a substitute juror.

C. Increasing the Incentives Not to Comply with the Threat

Purposeful failure to carry out one's duties as a judge, juror, prosecutor or policeman would be an obstruction of justice (a serious crime) and the threat would not raise a defense of duress in most United States jurisdictions unless it was a threat of immediate (as well as very serious) physical harm. Since imminence of harm is generally lacking when a judge, juror, or prosecutor is threatened, the threat of punishment for obstruction of justice can counter-balance the threat of harm if the official carries out his duties.

D. Intimidating the Intimidator

The United States, Italy and other nations have the well-known policy of using every available investigative resource in the effort to discover the perpetrators of any attack on police, prosecutors, or judges. This massive commitment of resources, including high rewards for information, increases greatly the chance that the threateners will be caught. To further intimidate intimidators, many nations make it known that, once caught, threateners are punished unusually severely.

Three points deserve special attention here. *First*, for ongoing criminal organizations the threat of greatly increasing the law enforcement pressure on them if a judge, prosecutor, or investigator is harmed creates a powerful economic incentive to control its members. *Second*, the rarity of attacks on law enforcement authorities in the United States makes it possible to mount a massive response whenever this happens; and that prospect helps keep attacks rare and threats less-than-credible. *Finally*, the effectiveness of the law enforcement response can create, among even generally ruthless criminals, a custom of restraint in dealing with law enforcement and judicial officials. This seems to be true in the United States.

IV. Steps to Protect Witnesses from Intimidation

The major steps here fall into the same four categories: preventing the intimidator from conveying a credible threat; making clear that, even if the witness is intimidated, it will do the intimidator no great good; increasing the costs to the individual threatened of compliance; and making sure that the process is costly for those who make or carry out threats. It is important to note that, in every country, it is far more difficult to protect witnesses than officials.

A. Making It Difficult or Risky to Convey Threats

Credible threats cannot be conveyed if the identity of witnesses is kept secret until after they testify. This is an established practice in the United States. Furthermore, witness identities can be kept secret forever if the investigators are able to use the information provided by the witness to develop a new source of judicially acceptable information. Thus, when the U.S. Federal Bureau of Investigation knows that a witness might be killed, it uses that witness's information to obtain a search warrant or to get judicial permission to tap a phone or conduct some other form of surveillance to get information as to which police officers can furnish the needed testimony. The original witness's identity therefore need never be revealed.

Colombia keeps the witness's identity permanently secret, in cases of organized crime or terrorism, while going well beyond the use of the witness's information merely to justify a search or electronic surveillance. In its courts of "Public Order" the witness's statement can be used as evidence without identifying the witness (by name or revealing items of background) to anyone other than the police and, on demand, a judge. The result is to use evidence that may be quite unreliable, being more easily "doctored" or shaped than the results of a search and yet, unlike normal testimony of an eyewitness or

accomplice, not challengeable by full confrontation, where biases of the witness can be adequately explored (but only if the witness's identity is known).

Finally, witnesses can be offered police protection, although this has all the difficulties already described with regard to judges and prosecutors. In the United States, in a relatively few important cases, a witness who is in danger can be helped to start a new life in another part of the country under a different name. See 18 U.S.C. 3521. Between 150 and 300 witnesses are given changed identities each year and each of them on the average is accompanied by two dependents whose identity is also changed.

B. Making Even Successful Intimidation Unhelpful to the Threatener

There are a variety of ways to make clear that intimidating a witness will not accomplish anything. Most important is to get the witness's statement as early in the process as possible, before a threat can be conveyed. In a civil law system, where the statement can then be used at trial if the witness refuses to testify, statements should be taken as early as possible from witnesses who may be threatened.

In the United States a federal statute (18 U.S.C. 3503) allows the use of a deposition of a witness who refuses to testify at trial, if the deposition is taken subject to cross-examination and in the presence of the defendant (who, if the provision is to be available, must be involved in organized crime). It is seldom used, however, because of the risks associated with premature disclosure of the government's case in connection with cross-examination.

Making a substantial effort to get information from a variety of sources about the same events also makes clear that intimidating any one or two witnesses will not help.

C. Creating Incentives for Witnesses Not to Comply with a Threat

Far fewer witnesses would take the risk

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of testifying against dangerous defendants in the United States if they did not face very serious criminal charges, that will be dropped or reduced only if they testify. In more ordinary cases, testimony from frightened witnesses is often elicited by a threat of being jailed for contempt of court for failure to provide evidence, and a grant of immunity (18 U.S.C. 6003) if the witness claims a privilege not to incriminate herself. The United States also allows very substantial financial incentives to furnish evidence.

D. Intimidating the Intimidators

Finally, as in the cases of judges and prosecutors, there should be a clear commitment by the police, the prosecution, and the court to proceed with unusual vigor and large resources to investigate any effort to intimidate witnesses. Unfortunately, although obstruction of justice is an extremely serious crime in the United States, threats against witnesses—particularly witnesses who are themselves involved in crime—are often ignored. So is the carrying out of the threat.

The result in the United States has been that threats and retaliation against witnesses are very common and often successful. There is no custom among U.S. criminals of keeping hands off witnesses, especially accomplice witnesses. Only in situations like investigations of organized crime has the government persuasively shown witnesses that it would stand by them and take very seriously any threat intended to prevent their furnishing evidence.

V. Explicit or Implicit Intimidation in Cases Where the Security Forces or Others in the Government May Be Responsible for a Crime

The hardest problems of intimidation arise when the military or police (security forces) are involved in an underlying crime and are themselves threatening, explicitly or implicitly, those who would investigate it or testify about it. (Although the threat can come

from either the military or the police, for convenience we will refer here to police only.) Because the police (who are, hypothetically, responsible for the crime) control armed force, generally only other police can safely and thus confidently investigate, and only their organizational enthusiasm for the investigation can make private witnesses feel safe giving evidence by dissipating the implicit or explicit intimidation by the police perpetrators. For anyone else the question then becomes, how can the police be brought to investigate crimes done by other police, even violence carried out for political purposes favored by powerful military or civilian figures? Experience in various countries suggests several answers to this difficult problem.

Many nations have several police forces with overlapping responsibilities. In such countries, it is often understood that one such force investigates crimes committed by another. In the United States, the Federal Bureau of Investigation is responsible for investigating criminal violence and corruption carried out by any local police force. The result is that local police forces are not free to use intimidation to hide their own corruption or violence and many cases are brought to trial each year. Overlapping responsibilities of this sort in Italy in the 1970s made it possible to investigate crimes by terrorists of the Right that formerly would have been protected by neo-fascist officials of one police agency who were friendly to the perpetrators. In France, too, magistrates are free to call on any of several police forces.

If the crimes have been committed at a lower level of a particular police force—and without the approval of high-level superiors—these superiors may be able to direct an effective investigation. The implicit intimidation of witnesses, prosecutors, and judges that may readily occur when even a figure as powerful as a local police chief is investigated and tried may just as readily be dissipated by the vigorous investigative participation of even more senior officers, whose

command of enforcement resources exceeds that of the suspect police chief and whose highly visible efforts, as gauged by their effect on the progress of the investigation, reveals strong evidence that these officials were not themselves involved in criminal acts. In this way the police chief of Guatemala's second largest city was investigated and prosecuted by his superiors in the capital.

All this assumes a willingness of one part of the government—a different police organization or a higher level of the same organization—to investigate another part. But what if there is an obvious lack of enthusiasm for such investigations at the highest levels of government? After all, few countries whose security forces are involved in illegal conduct (generally political violence or corruption) will admit this to their people or to the world. Great Britain, Israel, and Japan have all recently stifled investigations of their police.

If the nation's leaders don't want convictions or even authoritative changes, its law enforcement officers know better than to try to find the facts. Failing to solve the crime may be embarrassing, making the police look incompetent, but the alternative is worse. If the country's officials who are charged with investigating and prosecuting crimes found the facts but then took no action against the politically powerful sponsors of the crime, that admission that their security forces were unofficially immunized from prosecution would make the police look partisan or corrupt. So officials involved in criminal justice can preserve respect while ignoring crimes approved at a high political level only so long as the identity of the perpetrators is hidden. Who, then, will investigate such dangerous suspects as police or soldiers? And if they are investigated, who will want to see them punished?

The answer is that an alliance between private agencies and broad public pressures for equality before the law sometimes steps in to fill the gap where armed officials have violated the law. After all, there *are* other pow-

erful forces besides the police that *can* investigate political violence while preserving the anonymity of witnesses. The press is one. And the willingness of these outside forces to make public their findings—to hold perpetrators publicly accountable—often creates public pressure which can destroy the claim of immunity of the police or military for acts of political violence. For once the facts are out, it is just too costly for a nation's leaders to continue to ignore crimes by its security forces.

Take one example that led to convictions in late 1991. In 1987, a courageous press in Spain revealed and denounced police death squads. The press is sometimes hard to intimidate because it does not have to reveal its sources or even the names of its reporters, and it can have many reporters work on a single story. In the ensuing years, Spain's Parliament, particularly the committees with responsibility for matters involving ETA (the terrorist group whose members were targeted by the police death squad), pursued the story. Once all of that information was in the public realm, judges and prosecutors had no choice but to make arrests and file charges against powerful security forces. Even the highest political figures had to cooperate. Truth and accountability resulted from the courage of a private institution (the media), from the legislature legitimizing and further publicizing the pursuit of the truth, from public outrage, and from the actions of law-enforcement officials who, once the public pressure was great enough, responded with integrity to the demands of self-respect. All were protected by working together and by supporting each other.

This process of allowing public pressure to work on investigators and prosecutors by publicizing facts that suggest the possible guilt of government officials has now been institutionalized in the United States. The Federal Bureau of Investigation and U.S. prosecutors have for some time been expected to investigate high officials of the administration, close associates of the president,

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or even the president himself when a crime may have been committed. This tradition, to pursue the investigation wherever the evidence may lead—the pursuit of the rule of law—was firmly established during the Watergate prosecution of U.S. President Richard Nixon when FBI action and prosecution was initially driven, as in the Spanish case, by press revelations and then by Congressional hearings.

All this is now mandated, without the requirement of a public “head of steam” by a statute that requires the appointment of an independent prosecutor who is not an employee of the executive branch, whenever there is evidence of involvement in a serious crime by any of a list of very high-level executive officials. So powerful officials who need not fear intimidation can be safely brought into action by private individuals who could not safely investigate by themselves.

Conclusion

Intimidation in all its forms is the most serious challenge to finding the truth about violations of an advanced democratic society’s most basic norms. It represents the most open as well as frequent challenge to the accountability of every citizen to the law. It is readily available to a lone rapist or killer, to organized criminal groups and to government agents and agencies. We will never be able to stifle it completely, but criminal justice depends on law enforcement giving first priority to dealing intelligently and vigorously with any efforts to intimidate witnesses or officials. The great costs of social disillusionment that come with indifference to this threat are obvious on every continent.

Appendix

A Description of the Italian Response to Intimidation*

Five crucial steps comprised Italy’s response to intimidation by terrorists or mafia.

(1) Each group of investigating magistrates in a city had a chief of staff called the “investigating counsellor.” Any case where intimidation by terrorists or the mafia was anticipated was assigned to the investigating counsellor (the chief judge of the district) who would then delegate specific assignments to a number of other investigating judges. As Guido Neppi Modona, a former

magistrate of Torino, Italy, describes it:

Perhaps he distributes the work among ten investigating judges, and he orders these judges each to question twenty defendants. The most important factor was that all these judges were working together, and so what one judge knew was known by all the other judges.

The public prosecutors formed a similar “pool” in order to spread the responsibility for the investigation. Says Neppi Modona:

Then another pool was formed by public prosecutors, but within the same city, the two pools were able to share knowledge and work to-

* Professor Guido Neppi Modona, while a visiting scholar at New York University in 1989, recounted these experiences of the Italian criminal justice system to Philip B. Heymann.

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gether.

You see, for terrorists it was difficult to realize who were the judges or prosecutors in charge. Because they saw every day a different judge. Perhaps one day it was X, one day Y, one day B, C, and so on. And so it was very difficult for them to target the real target. That was very important. They did not know really with whom they had to fight because there were so many.

Thus the first answer to intimidation was that it was quite impossible for the terrorists to kill all the investigating judges and the public prosecutors who were working in the pool.

(2) A similar process was used at the trial stage. There, in the Court of Assizes, there were two professional judges and six lay jurors. Even then, the problem of intimidation led to further refinements. Says Neppi Modona:

In 1983 or 1984 we issued a new law according to which for a trial against organized crime—terrorists and mafia—there is always present a second Court of Assizes. I mean not only two professional judges and six lay jurors, but two other professional judges and another six lay jurors who were attending the trial.

If one person was injured or otherwise forced to leave the trial, a substitute from the second Court of Assizes who had followed the trial from the beginning would replace that person.

(3) Specially selected groups of police would work with the judges in the investigation and provide special protection to the judges and prosecutors. Says Neppi Modona:

Both the police and the Carabinieri, [the second of Italy's national police forces], who were working as judiciary police with the judges, were protecting judges. In some way, they were very attentive and the help for judges provided a feeling of security, of safety, to work so strictly with these special bodies of judiciary police.

The people who were in charge of defending the judges and prosecutors were selected with very strict supervision. It never happened that a mafioso or terrorists infiltrated some people

into this group or judiciary police or protective police.

The result was that, at the investigative stage, police, prosecutors, and judges cooperated well with one another. Says Neppi Modona:

Between the police and the judiciary very strong relations developed. Not only do I mean job relations but personal relations, because the police were defending judges and prosecutors twenty-four hours a day.

(4) The prosecutors and judges took extremely seriously any attack on another judge or prosecutor. They and the police made a very serious effort to solve any such crime. Says Neppi Modona:

Perhaps it was too much. I mean, in some cases they went after accused who were not really involved because they wanted very strongly to bring to trial the suspects. It happened sometimes. And when judges were killed by the mafia, the investigations were very strong. The same was of course true when the perpetrator was a terrorist.

(5) Finally, the judges and prosecutors arranged meetings regionally or nationwide to compare information and provide mutual support during their investigations. Says Neppi Modona:

The judges dealing with Red terrorism were able to create a *de facto* body that was collecting investigating judges and public prosecutors all over Italy. I mean, about forty of them every month were able to meet and to share knowledge and information. It was very important for the investigating judges who were assigned an investigation in Padua, for instance, to know what Red Brigades did in Torino or Roma or in Milano. The idea was that the terrorism is a national phenomenon and we have to answer with a nationwide answer. Now, under new law, in investigations against organized crime, public prosecutors belonging to different districts can handle together the preliminary investigations.

Combatting Delay(s) in Criminal Justice Administration (Philippine Experience)

by Ramon U. Mabutas, Jr.*

Courts are the citadels of justice—they are the vanguards of life, liberty and property. They radiate the last ray of hope to those in despair.

Indeed, courts perform a very vital and crucial role in society. They have the enormous task of deciding actual cases and controversies (Section 1, Article VIII of the Philippine Constitution) so that justice may be rendered.

It is in the courts that, our citizens primarily feel the keen-cutting edge of the law. If they have respect for the work of the courts, their respect for the law will survive the shortcomings of any other branch of the government; but if they lose their respect for the work of the courts, their respect for the law and order will vanish with it to the great detriment of society.

Because justice, of which the law and the courts are the primary instruments for its attainment, is the primary goal of our society, the interests of society as a whole impose the duty of prompt and expeditious disposition of cases. The fulfillment by the courts of this duty to promptly resolve controversies is necessary for the people's continued belief in them and respect for the law.

Given these considerations, delay in whatever form, is an "unmitigated evil," undermining the very foundation of a constitutional government. Indeed, the bane of the justice system is the *delay*—cases drag on interminably for years. And such problem—delay—appears to be worldwide. What are

the causes of such problem?

From the Philippine perspective, delay, as filtered, may be classified under four general categories: Institutional factors, practices of some lawyers, practices of some judges, caused by court personnel, and others caused by court-related agencies.

I. Institutional Factors

Adversarial Nature of Judicial Process

The so-called legal delays in our judicial system are apparently inevitable since court proceedings are adversarial and procedural. The due process requirement of our constitution requires a hearing wherein both sides present evidence to establish the facts of the case, with the plaintiff (prosecution) having the burden of proof. It has been observed however, that while "the search for truth is best aided by having two sides argue the same question, the process is time consuming."

The writing of the decision for a particular case also takes time. The judge must weigh the respective evidence and arguments of the parties before rendering decision in the most judicious manner. The judge's task would be rendered even more difficult if the rights of the parties are evenly balanced.

Litigants, therefore, must be aware that delay is inevitable from the very nature of the judicial process—and to resort to delaying tactics would even worsen the situation. The only alternative to the present judicial process is an inquisition, which is totally unacceptable for it violates many of the substantial rights which are protected by the Constitution.

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The Piece-Meal Trial Practice

Cases are generally tried on a piece-meal basis, otherwise known as "segmented" or "split" trial. This means that the trial proceedings are cut-up into small sessions spread out over a period of time—with usually only one witness testifying for maybe an hour or less in one hearing and then continuing it at the next hearing for "lack of material time," a stereotype reason stated. Thus, cases are set for trial on one day and continued or postponed to another date until each party has completed presenting its evidence. In a particular session, a party may be able to present only one witness—depending upon the number of cases set for hearing on that date. The opposing party then would usually seek a postponement of the cross-examination of the witness for another time. It is even possible that the direct examination and cross-examination of a particular witness may be spread out over several sessions. It is, therefore, not surprising to find that the trial period ranges from 175 days to 894 in criminal cases and 148 days to 913 days in civil cases.

II. Delay Caused by Some Practices of Lawyers

Abuse of Procedure

Lawyers are known to use dilatory tactics to gain an advantage over the opposing party. By filing unnecessary motions and petitions for review of interlocutory orders, a lawyer hopes that the opposing party may lose interest in his case or move for an amicable settlement. Or, a lawyer hopes that by prolonging the cross-examination of a material witness of the opposing party, said witness may get tired and will simply disappear. Other dilatory tactics include the presentation of corroborative witnesses to prove matters that have already been established; filing of petitions for certiorari, mandamus or prohibition seeking a review of interlocutory orders of a trial court.

Heavy Volume of Cases Handled by Lawyers

The heavy volume of cases handled by lawyers eventually leads to scheduling-conflicts which result in postponements, thereby inadvertently delaying court proceedings. This problem may be traced to the uneven distribution of lawyers throughout the country. Not only are there less lawyers engaged in actual practice, as compared to the total number of lawyers, but many practicing lawyers are concentrated in the urban centers, particularly in Metro Manila.

Incompetence and Failure to Prepare Adequately for Trial

The heavy caseload of a lawyer would inadvertently lead to inadequate preparation for trial. Thus, a lawyer coming unprepared for trial would most certainly ask for a postponement, thereby delaying the disposition of his case. Inadequate preparation may be excused, however, when the lawyer is inexperienced.

Incompetence and inadequate preparation may arise from the fact that some trial lawyers are not as good and competent as they should be. It has been observed that since trial practice involves so much waste of time, the better lawyers have shunned trial practice and left the so-called "dirty work" to lawyers who are less competent and skilled to become trial lawyers.

III. Delay Caused by the Practices of Some Judges

Incompetence and Ignorance of the Law

The incompetence of some judges has been considered by some as a factor in delays. The failure to keep abreast with the law and jurisprudence also causes undue delay, particularly when a judge is unfamiliar with the rules of procedure. For instance, it has been observed that some judges do not strictly adhere to the requirements and purposes of pre-trial procedure to the point that it has become mostly a formality.

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Heavy Case-Load and Poor Case-Load Management

Almost close to 350,000 new cases are added yearly to the already over-crowded dockets of the courts. This has been traced to our increasing population, the litigious nature of the Filipino and the deterioration of economic conditions. It is therefore important for judges to budget their time not only to resolve new cases but to dispose pending cases as well. As noted earlier, some judges have the propensity to conduct piece-meal trials. There seems to be a tendency to schedule cases after a considerable lapse of time. This is so because there are just too many cases scheduled for a given trial date that it is simply impossible for the trial judge to hear all of them. Those that cannot be heard are re-scheduled for some time in the future. As a result, only a few cases are heard on any given trial-date.

IV. Delay Caused by Court Personnel

Delay may be caused by court personnel who are unprofessional or who lack proper managerial and technical competencies. The scheduling of cases, the issuance of summons and other court processes, record-keeping, the retrieval of information, and the docketing of cases are done by court personnel, thus relieving the judge of the "house keeping" chores of the court. Since the respective jobs of court personnel are inter-related, the absence or incompetence of any one of them can scuttle trial proceedings. For example, the absence of a court stenographer will cause the postponement of all the cases scheduled for hearing, as well as delay the completion of records for those cases that have gone up on appeal.

Delay in the Service of Notices

Parties and projected witnesses who are not notified of the scheduled dates of trial/hearing certainly cannot appear, thereby giving rise to the postponement thereof.

In appealed cases, the problem is general-

ly caused by the failure to deliver the complete record of the appealed case to the proper appellate court. In most cases, the problem lies with the stenographic records. The failure to include the transcript of stenographic notes results from either the loss of the records, the failure to transcribe the records after it was taken down, and the subsequent retirement or resignation of the court stenographer.

V. Delay Caused by Court-Related Agencies

Poor Postal Service

Court processes are usually sent by mail. The dependence of the judicial system on the postal system is such that delays in the delivery of mail matters would result in a corresponding delay in the judicial proceedings.

Uncommitted Warrants Servers

Warrants servers, who belong to the law-enforcement agencies, appear to be either uncommitted to, or ignorant of their task in serving court processes. The return of the warrants issued by the courts either comes in late (long after the scheduled hearing) or they do not come at all—they remain forgotten. Thus, courts are kept in the dark as to what happened with the warrants they had issued. As a consequence, they are hesitant in issuing *alias* warrants.

Such delays have certainly caused disastrous effects in the criminal justice administration. They have resulted in the congestion of court dockets. Indeed, scheduling a case has become difficult after repeated postponements because of scheduling conflicts between the lawyers of the respective parties and even with the judge. The trial of repeatedly postponed cases has become difficult for the judge because he has to repeatedly review the facts of these cases before each trial. After the trial has been completed and a case has been submitted for decision, the judge has the difficult task of recalling the demeanor of the witnesses, especially if he

did not take notes during the proceedings. Worse, if the judge retires before he could dispose of all his pending cases, it would be difficult for his successor to write a decision without intimate knowledge of the facts and circumstances of the case.

To the participants in the judicial process, the effect(s) of the delay varied: Although most of them were generally adversely affected, others were in fact benefited. However, there were instances when both parties were unwilling to go on further with the case and just opted to drop the same or settle for less than what was due to them. If a party was benefited by the delay, he/she did not complain for obvious reasons. However, the party prejudiced by it would feel that justice was denied to him/her. Indeed, the delay was costly to parties/litigants.

On the other hand, the lawyer, particularly the single practitioner, handling a case that has been pending for quite some time would find it increasingly difficult to prepare for it, especially if he is handling other cases simultaneously. However lawyers, who are paid on a per-appearance basis, stood to gain for repeated delays. The anecdote of a lawyer who put his son through law school by means of a long-standing case comes to mind.

As a newspaperman some four decades ago, I heard and felt the public clamor for speedy administration/dispensation of justice. Thus, when I became a trial judge twenty years ago—after finishing a course in this esteemed institution—I took no time in making innovations, in my humble way, toward answering/solving the public clamor. Thus, I innovated my STAR System (continuous trial and disposition of a criminal case in one setting/day), the SPACE System (speedy trial of civil cases), and recently the CARE System (in the pre-trial of civil cases), all of which I humbly branded as the Philippines Expeditious Proceedings. With the lectures I delivered to peer judges starting 1984, through the courtesy of the Institute of Judicial Administration, eyes of the authorities concerned were opened: That con-

tinuous trial system is the best answer to the public clamor for speedy justice. Parenthetically, I shall portray later the mechanics or workings of my personal innovations. In the meantime, I shall continue with what was done by our government to fight/ward off the nefarious delay which had enervated the public patience, and which was obviously a contributory factor to the surging tide of criminality.

Remedies Taken

As if to curb delay, our new Constitution contains several provisions designed to expedite proceedings in the courts. Section 16 under the Bill of Rights (Article III) in the Constitution provides: "All persons shall have the right to a speedy disposition of their cases before all judicial, quasi-judicial or administrative bodies." Of course, the yardstick for speedy dispositions is necessarily relative—depending as it does on the circumstances present that normally allow for reasonable delays (*Beavers vs. Haubert*, 198 U.S. 77).

Moreover, the 1987 Charter fixes the maximum period within which a case or matter should be decided or resolved. By constitutional mandate, the Supreme Court must resolve a case submitted for decision within twenty-four months, twelve months for all lower collegiate courts, and *three* months for all other lower courts (Section, Article 15/1/, Constitution).

Finally, the fundamental law vests upon the Supreme Court full legislative authority to promulgate the rules of procedure in our courts—with the intention of providing "a simplified and inexpensive procedure for the speedy disposition of cases" (Section 5/5/, Article VIII, Constitution).

With its vested power, the Supreme Court amended the Rules of Court, simplifying and giving teeth to the rules on criminal procedure and evidence. The Rules of Court are indispensable to the prevention of needless delays and necessary to the orderly and speedy discharge of judicial business (Manila

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Railroad Co. vs. Attorney General, 20 Phil. 523). It is specifically provided therein that in case of doubt as to their application, they (rules) "shall be liberally construed in order to promote their object and to assist the parties in obtaining just, speedy, and inexpensive determination of every action and proceeding" (Section 2, Rule 1, Rules of Court).

In this connection, we wish to make mention of the introduction of the pre-trial scheme under the 1985 Rule on Criminal Procedure (Rule 118). To expedite the trial—where the accused and counsel agree—the court "shall conduct a pre-trial conference" (without impairing the rights of the accused) to consider the following: (a) Plea bargaining; (b) stipulation of facts; (c) marking for identification of evidence of the parties; (d) waiver of objections to admissibility of evidence; and (e) such other matters as will promote a fair and expeditious trial (Sections 1 and 2 of Rule 118). After the pre-trial conferences the court has to issue an order reciting the actions taken—and any agreement or admission made or entered into has to be signed by the accused and his/her counsel to have the same binding (Sections 3 and 4 of Rule 118).

Such pre-trial conference certainly reduces the trial time since a more orderly presentation of evidence follows—it simplifies the trial process. It is in effect a scalpel that lays bare the factual controversy—it separates the contested from the uncontested matters. Thus, it constitutes an effective means of reducing delay.

The new Rule of Criminal Procedure also provides that "trial once commenced shall continue from day to day as far as practicable until terminated." However, for good cause, it may be postponed "for a reasonable period of time" (Section 2 of Rule 118).

Pursuant to Batas Pambansa Bilang 129 (a national law which paved the way for the reorganization of the courts—below the Supreme Court—in 1983), the Philippines' Highest Tribunal also promulgated the Rule on Summary Procedure for the inferior

courts (Metropolitan Trial Courts, Municipal Trial Courts and Municipal Circuit Trial Courts). Governing the procedure in the afore-mentioned courts, the summary rules are applied to the following criminal cases, to wit:

- 1) Violations of traffic laws, rules and regulations;
- 2) Violations of the rental law;
- 3) Violations of municipal or city ordinances; and
- 4) All other criminal cases where the penalty prescribed by law for the offense charged does not exceed six months of imprisonment, or a fine of one thousand pesos (P1,000.00), or both, irrespective of other imposeable penalties, accessory or otherwise, or of the civil liability arising therefrom: Provided, however, that in offenses involving damage to property through criminal negligence, this Rule shall govern where the imposeable fine does not exceed ten thousand pesos (P10,000.00) (Section 1/B/, Revised Rule on Summary Procedure).

With the objective of achieving expeditious determination of these cases, they may be commenced by complaint or information filed directly with the court, except in Metropolitan Manila and other chartered cities where such cases can be commenced only by information. When the offense cannot be prosecuted officially, the corresponding complaints have to be signed and sworn to before a public prosecutor by the offended party. The complaint or information has to be accompanied by the affidavit of the complainant and his/her witnesses in such number of copies as there are accused, plus two copies for the court's files (Ibid, Section 11). Such affidavits should state only facts of direct personal knowledge of the affiants which are admissible in evidence—and should show their competence to testify on the matters stated therein (Ibid., Section 20). On the basis of the complaint and the af-

fidavits and other evidence accompanying the same, the court may dismiss the case outright for being patently without basis or merit—and order the release of the accused, if in custody. However, when the case is commenced by information, or is not dismissed, “the court will issue an order which, together with copies of the affidavits and other evidence submitted by the prosecution, will require the accused to submit his/her counter-affidavit and the affidavits of his witnesses as well as any evidence in his/her behalf, serving copies thereof on the complainant or prosecutor not later than ten (10) days from receipt of said order. The prosecution may file reply affidavits within ten (10) days after receipt of the counter-affidavits of the defense (Ibid., Section 12).

Should the court, upon a consideration of the complaint or information and the affidavits submitted by both parties, find no cause or ground to hold the accused for trial, it will order the dismissal of the case—otherwise, the court will set the case for arraignment and trial. But if the accused is in custody for the crime charged, he/she will be immediately arraigned—and if he/she enters a plea of guilty, he/she will forthwith be sentenced (Ibid., Section 13). However, before conducting the trial, the court has to call the parties to a preliminary conference during which “a stipulation of facts may be entered into, or the propriety of allowing the accused to enter a plea of guilty to a lesser offense may be considered, or such other matters may be taken up to clarify the issues and to ensure a speedy disposition of the case” (Ibid., Section 14).

At the trial, the affidavits submitted by the parties constitute the direct testimonies of the witnesses who executed the same. Witnesses who testify may be subjected to cross-examination, re-direct or re-cross examinations. Should an affiant fail to testify, his/her affidavit will not be considered as competent evidence for the party presenting the affidavit. However, the adverse party may utilize the same for any admissible purpose. Ex-

cept on rebuttal or surrebuttal, no witness is allowed to testify unless his/her affidavit was previously submitted to the court. Thus, should a party desire to present additional affidavits or counter-affidavits as part of his/her direct evidence, he/she should so manifest during the preliminary conference, stating the purpose thereof. If allowed by the court, the additional affidavits of the prosecution or the counter-affidavits of the defense will have to be submitted to the court and served on the adverse party not later than three days after the termination of the preliminary conference. If such additional affidavits are presented by the prosecution, the accused may file his/her counter-affidavits and serve the same on the prosecution within three days from such service (Ibid., Section 15). The revised rule (it took effect only last November 15, 1991) explicitly provides that: “The court shall not order the arrest of the accused except for failure to appear whenever required. Release of the person arrested shall either be on bail or on recognizance by a responsible citizen acceptable to the court.”

To combat delay and to reduce the court backlog, our Supreme Court issued two circulars—Administrative Order No. 1 of January 28, 1988 and Administrative Order No. 4 of September 22, 1988.

Administrative Order No. 1 contained the following directives and guidelines:

On effective docket control. To exercise better docket control, the presiding judges of trial courts must conduct a physical inventory of their dockets to determine the actual number of cases pending in their respective salas or branches upon assumption of office and every semester thereafter. The cases should be categorized as to those which are pending trial, those submitted for decision, and those that have been archived. An updated inventory must be sent to the Supreme Court every six (6) months thereafter. Cases submitted for decision or resolution before the effectivity of the 1987 Constitution should

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be given preference in the disposition.

On effective court management. The Supreme Court strictly enjoined judges to observe strict rules on punctuality and daily minimum of hours at work, effective use of pre-trial and discovery procedures, effective management of trials, and the availing of annual conferences. Judges were required to formulate a strict policy on postponements and faithfully to adhere to Rule 22 of the Rules of Court on calendar adjustments and postponements.

Presiding judges were also required to closely supervise their clerks of court in the preparation of the court calendar. A rational calendar plan should be followed in order that cases filed are assured of hearing on the scheduled day for trial. Presiding judges were also ordered to keep a calendar of cases submitted for decision, noting the day, month and year when the ninety (90) day period for the disposition of cases under the 1987 Constitution is set to expire.

On enforcement of executory judgments. Noting that it has become a common practice of litigants to file "dilatatory petitions for certiorari and prohibition, for restraining order or preliminary injunction in order to delay the enforcement of final and executory judgments of both the Regional Trial Court or of other inferior trial courts," the Supreme Court advised judges to observe the greatest restraint in giving due course to such petitions to avoid delay in the enforcement of such judgments. Petitions of such nature should be given due course only if sufficient in form and substance, as required by the Rules of Court. The Supreme Court likewise directed judges not to issue restraining orders or preliminary injunction without prior notice and hearing to the parties and that the party praying for such processes shows a clear right thereto.

On judicial writing. The Supreme Court directed judges to scrupulously observe the period for the disposition of cases in the 1987 Constitution. Judges were advised to make a complete finding of facts and closely

scrutinize the legal aspects of the case in the light of the evidence presented.

On motions and other interlocutory matters. The Supreme Court enjoined all judges to act promptly on all motions and interlocutory matters pending before their courts. Ex parte motions or other applications for relief should not be granted unless it is authorized under the Rules of Court or in matters of extreme urgency.

The Supreme Court reminded all courts that no motion for the extension of the time to file a motion for new trial or reconsideration of judgment or final order should be granted. If such motions have to be granted, it should not prevent the judgment or order from becoming final and executory before the lapse of the period to appeal.

To further streamline the judicial process, the Supreme Court issued Administrative Order No. 4 which concentrated on two segments of the judicial process—pre-trial and trial proper.

During the pre-trial stage—after the arraignment—if there is still a need for trial, thereafter, the parties should agree on the following matters:

- (a) The number of witnesses to be presented;
- (b) The approximate number of hours needed by them for the presentation of their respective evidence; and
- (c) The specific trial dates needed to complete presentation of evidence by all parties—all of which must be within a period of three (3) months from the first day of trial.

Cases that have passed the pre-trial stage but have not gone to trial at the time of the issuance of the Administrative Order, had to be called to a conference to agree on the matters set forth above. Cases that had already gone to trial "shall be immediately set for conference in accordance with the procedure set forth in Rule 22, Section 6 of the Rules of Court with the end in view of eventually

setting them for completion of the trial phase within three (3) months." Older cases had to be given preference in the trial calendar.

Under the administrative circular, the agreements reached by the parties should be made in open court before they (parties) are dismissed from the courtroom. Agreed dates should be written on the record of the case—and the parties and their counsel should affix their signatures below the dates. This would serve as notice of the trial dates and no further notice should be sent to them. Parties are then advised that they should be responsible for bringing their respective witnesses on the dates they are scheduled to testify.

The names and addresses of the witnesses that need to be summoned have to be given at the time of the conference so that the necessary *subpoenae* may be issued on time for their scheduled appearance in court. Counsel or their representatives are allowed to serve the *subpoenae* themselves to insure service thereof.

In the presentation of evidence—during the trial proper—the Supreme Court enjoins the parties to present their evidence on the trial dates assigned to them. After the lapse of said dates, a party is deemed to have completed his evidence-presentation. Judges may allow additional trial dates to be scheduled in the afternoons only upon a verified motion based on serious reasons, provided that said extension will not go beyond the three-month limit computed from the first trial-date.

Initially, the Supreme Court designated some "pilot courts" to test the efficacy of the so-called continuous trial scheme. Noting an improvement in the disposal of cases by the "pilot courts," the Supreme Court, beginning February 15, 1990, mandated all trial courts in the Philippines to use the so-called continuous trial system (Administrative Circular No. 3—90, January 31, 1990). Parenthetically, the Highest Tribunal also enjoined all courts—from the Court of Appeals down—to expeditiously dispose of cases involving

tourists—they should be disposed of within twenty-four hours after their filing with the courts by the arresting officers (Administrative Circular No. 5—90, February 15, 1990).

Indeed, as aptly reported out by the Chief Justice of the Supreme Court (on August 11, 1990), the continuous trial system had:

- Brought down to a minimum trial delays;
- Dramatically decreased the number of postponements;
- Stopped the undesirable system of re-setting, with the counsels committing themselves to specific trial dates;
- Increased settlements by plea bargaining in criminal cases. This was brought about by the litigants' exposure to mandatory pre-trial proceedings. With the awareness on the part of the litigants of the merits of their respective cases, they are impelled to arrive at a speedy settlement of their dispute.

The program (continuous trial) had received the enthusiastic support of the members of the Bar and litigants. The last conference (in the Philippines) of chief justices of Asia and the Pacific also took note of the program.

To complement the continuous trial system, decongest court dockets and minimize delay in case-disposition, our Supreme Court has pursued a dual thrust of strengthening the *Katarungang Pambarangay* Law (Presidential Decree No. 1503) and improving the judges' pre-trial skills. The *Katarungang Pambarangay* Law had established a system of amicably settling disputes at the barangay (smallest community unit) level so that the indiscriminate filing of cases in the courts of justice, which contributes heavily and unjustifiably to the congestion of court dockets, can be minimized, if not prevented altogether. Under the system, "no complaint, petition, action, or proceeding involving any matter within the authority of the *Lupon* . . . shall be filed or instituted in court . . . for adjudication unless there has been a confron-

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tation of the parties before the *Lupon* Chairman or the *Pangkat* and no conciliation or settlement has been reached . . . or unless the settlement has been repudiated” (Section 6, PD 1508). It is, therefore, evident that a prior attempt at a settlement at the barangay level, manifested by a certification to that effect, is an indispensable pre-requisite to the filing of the complaint. This is not an absolute rule though, because, in the following cases, the parties may go directly to court:

- Where the accused is under detention;
- Where a person has otherwise been deprived of personal liberty, calling for *habeas corpus* proceedings;
- Actions coupled with provisional remedies, such as preliminary injunction, attachment, delivery of personal property, and support *pendente lite*; and
- Where the action may otherwise be barred by the Statute of Limitations (Ibid., Section 6).

In this connection, the *Lupon* of the *barangay* (which is the body duly authorized to undertake conciliation or arbitration) has the authority to bring together the parties actually residing in the same city or municipality for amicable settlement of all disputes, except:

- (1) “where one party is the government or any subdivision or instrumentality thereof;
- (2) where one party is a public officer or employee, and the dispute relates to the performance of his official functions;
- (3) offenses punishable by imprisonment exceeding 30 days, or a fine exceeding P200.00;
- (4) offenses where there is no private offended party;
- (5) such other classes of disputes which the President may, in the interest of justice, determine, upon recommendation of the Secretary of Justice and the Secretary of Local Government” (Ibid., Section 2).

As earlier stated, the Supreme Court forged a series of agreements with the Department of Justice, Department of Local Government, and the Integrated Bar of the Philippines for the implementation of a program designed to strengthen the barangay mediation, arbitration, and conciliation process.

Aside from the foregoing, the Supreme Court has institutionalized a continuing Judicial Education Program (Administrative Circular No. 6, October 11, 1988) which requires newly appointed judges to undergo a pre-service training before assuming their judicial posts. The pre-service training course includes not only lectures and practical exercises through workshops but also an immersion program whereby a newly appointed judge is required to sit in with a senior judge before he is allowed to preside over his part. Such orientation seminars focus on sharpening the procedural and evidentiary rule proficiency of judges, as well as on improving their communication skills, providing them with techniques in decision-writing, and imbuing them with principles of judicial ethics and decorum.

A career enrichment program was also established for senior trial judges. As spelled out in Administrative Order No. 6, the career enrichment program not only aims to updating the judges on recent laws on jurisprudence but also at providing them with requisite management skills to enable them to effectively manage and use the resources of the courts.

These were among the steps taken by the Philippines’ Supreme Court toward improving the criminal justice system.

On the part of Congress, the legislative branch of our government, it has taken steps (through the enactment of laws) toward speeding up the delivery of justice. Recently passed—second now being implemented—are the following:

—The Witness Protection Law

It has established a program for wit-

ness(es) who is/are threatened or intimidated. Aside from the protection extended to him/her/them (and relatives within the second degree), benefits are also afforded to those enrolled under the program, among which are: security for witness(es) and family; safe-houses or lodging, transportation expenses (and safety) to and from places of trial. In extreme cases, the protected witness under the program will also be assisted in the change of his/her identity and relocation of his/her work. Covering also state-turned witness(es), the program is covered by the mantle of confidentiality—if it is administered by the Department of Justice.

—The New Police Law

It has “civilianized” the police force in that it is now under the Department of Interior and Local Government. Branded as the Philippines National Police (PNP), it is now a bureau under the DILG secretary. The former national police agency, the Philippine Constabulary, a military unit under the Department of National Defense, was legislated out—and its members, who opted to be so were absorbed into the new PNP. This entirely eradicated the militaristic attitude and tendencies of the police officers, and their military titles/designations were scrapped by the new law. With the new law, the police officers are now under the control of the local government officials. Also, they are now triable by the civilian courts (no longer military tribunals)—in their obligations/duties to the court—and to the public in general.

Allow me now to portray the systems I innovated which started some twenty years ago. Let me first tackle the STAR System. The STAR System, which was conceived of some twenty years ago when I was still presiding before the Aklan Court of First Instance, came out in the Philippines' national dailies (newspapers) in 1984 on the occasion of the second national convention of lawyers at the then Philippine Plaza Hotel (PICC) complex along Roxas Boulevard—I

was then presiding before the Regional Trial Court in Calooacan City. The system came to my mind one evening after promulgating the judgment in a murder case where the accused was found innocent after languishing in jail for a number of years. Take note, however, that the case was inherited by me but was disposed of after a couple of months. I was significantly touched by the outcome of that case for immediately after the promulgation, the accused shouted (in Aklanon dialect) “now I have faith in justice” as he surged forward as if wanting to kiss my hand in appreciation. I then told myself: I have hit the bullseye and penetrated the veil of truth, thereby making me feel that I had let justice prevail. That man, who had patiently languished in jail for years for lack of finances to bail himself out must have been losing his faith in justice. Thus, when justice came to him, he could not restrain his emotions—and thus he acted the way he did. That, my friends, gave birth to the STAR System. Back to my hotel room that evening (I was then miles away from my family in Manila), I was haunted by this question: How many more people are languishing in jail charged with crimes they never committed? Having been a newspaperman more than twenty years before, listening and writing about the slow-pace of justice, I saw and felt a strong challenge—although a gigantic task lay ahead since I was then presiding, over three branches in the entire province. However, the urge to help the poor and the oppressed scuttled whatever fears and doubts I had—and after conferring with the provincial fiscals (now called public prosecutors) and practitioners, start with my innovation which I then called the two-STAR System.

The two-STAR System consisted of two settings—one for the prosecution to present all its evidence in a continuous non-stop trial and the other for the defense. Perhaps, you may ask: Why two-STAR System? I then called it two-star, because every setting was as difficult as reaching for a star. Difficult, indeed, was the task, but we were able to do

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it—and we succeeded.

Years later in 1983—when I was in Caloocan City, a city north of Manila and after seeing the jail thereat teeming with prisoners, including women—I invited my trial fiscal (now called public prosecutor) and the then president of the IBP (Integrated Bar of the Philippines) chapter to a merienda and proposed to them to adopt the system I had concocted in Aklan, to which they conformed (they had no other alternative). I challenged them, as I sought their cooperation to reduce the two-day trial/proceeding to one day (since in Caloocan City, transportation was no problem). Thus, the STAR System was actually born—a one-day continuous non-stop trial. During the experimentation period (it lasted for months before its exposure to the lawyers in convention), things appeared rough—we had to undergo a lot of trials and tribulations. Take note, our supreme court has not yet mandated a continuous trial of cases. Just take a look at the system which we applied in 1983 in Caloocan—before the promulgation of the 1985 Rules on Criminal Procedure: On the scheduled trial date, I had to have a preliminary conference with the trial fiscal (now called public prosecutor) and the defense counsel—to ascertain whether or not their witnesses were around. If not, steps were immediately taken to have said witness(es) appear so as not to derail the proceedings. During the trial, the other witnesses—except the accused and the one testifying—stayed at the office of the clerk of court to obviate any pollution in the evidence being presented. Thereafter, after a post-trial conference with the public prosecutor and the defense counsel—during which the evidence presented was filtered—the judgment was promulgated, with the judge dictating the decision in open court. Indeed, the system meant a yeo-man's job—but we succeeded and we were able to stabilize the same. It thereby became known that the trial of a case, including the promulgation of judgment, can be finished in one day, one setting. As we look back, we saw

the Divine Hands of God guiding us in our super-human endeavor.

I dare say that the system is not a one-man affair—for its success, there must be team work. Hence, if I succeeded, I do not claim a personal credit—it goes to my team. And who are my team mates? Those who work with me in every case—the public prosecutor, the defense counsel, the court personnel, and the other pillars in the criminal justice system (like the policemen who serve the subpoena/*el*; the witness, etc.). Thus, to make the system workable, I had to use a secret weapon which I am revealing to you now so that you may also avail of it. I call the weapon *DISC*, spelled like the disco (pubs) which continuously emit irritating noise to the ears of the intellectuals. *DISC* consists of the following:

D—stands for determination, duty-consciousness and angelic dignity. Determination to do something for the good of mankind and, above all, for the greater glory of God, for He is the Lord and Master of everybody; He is the source and giver of all things; with Him, everything is possible—every good thing can be done/achieved. As a matter of fact, “*D*” is the first letter of the Latin word *Deus*, God “*D*” also signifies discipline.

I—stands for integrity which embraces honesty, a good name and an unblemished/untarnished image. A person with integrity is credible—he inspires others around him to do things he wants, for he acts and moves for goodness' sake. No evil or selfish motive can be attributed to him. The letter “*I*” also signifies instrument. A person who dispenses/administers justice must realize that he/she is merely an instrument or tool of God in his assigned task—thus, he/she should always discharge the same in accord with His will. Indeed, with the Almighty always guiding and lighting us in the altar of justice, we cannot go wrong. For a clean and clear conscience will ward off and will always prevail over wagging and dirty tongues. The torch of truth and justice

will always hover over and protect the innocent.

S—stands for service and sacrifice—self sacrifice and total surrender of oneself to serve mankind in the pristine altar of justice. Complete disposal of a case in one-day non-stop, continuous proceedings, from preliminary conference through presentation of all evidence by the disputants up to promulgation of judgment—is not a joke. It calls for a lot of self-discipline and self-sacrifice, e.g. delayed-taking of one's lunch, but the same is compensated by the thought that one has delivered/rendered justice fast—in accord with what the Almighty wants.

And the letter C stands for cooperation, coordination on the part of those involved in the administration of justice—the judge, the public/private prosecutor, the defense counsel, the community the witness/es/, and the court personnel—and caring for others. They have to discharge their respective tasks with total self-surrender—without looking at their time-pieces—for their sole objective is to deliver justice within the earliest possible time. Without such cooperation, the judge, no matter how good/honest his intentions are, is bound to face a blank wall. Indeed, we need the so-called “attitudinal” changes—reforms not only in the system(s) but especially in the individuals. As a matter of fact, during these times when good national values and traditions are fast disappearing, we need more changes in the individuals—for service to mankind means service to God. Hence, we should exert our utmost in discharging our respective assignments in life.

That is the anchorage of the STAR System, which is an acronym of Speedy Trial, Assessment/Appreciation (of evidence), and Resolution (of the case)/Rendition (of judgment). Indeed, the judgment of every case is promulgated on the same day it is tried. Thus, those people who had worked with me in my STAR System found relief in the now continuous trial scheme of the Supreme Court under Administrative Circular No. 4,

as amended, which mandates the termination of trial within ninety days from its inception. How do I go about the Supreme Court's continuous trial scheme?

In criminal cases, I set the arraignment and pre-trial conference soon after the accused is arrested or puts up a bailbond. On the date set, the accused is arraigned (to obviate any delay just in case he/she jumps bail)—and later asked if he/she wants to undergo a pre-trial conference, as provided in the 1985 Rules on Criminal Procedure, as amended. Why do I set the arraignment and pre-trial conference at the same time? The purpose is obvious; to minimize any delay. If the accused opts for the holding of a pre-trial conference, we can immediately proceed, e.g. like plea-bargaining, marking of exhibits, stipulations, admissions, etc. However, if the accused waives pre-trial conference, we can immediately agree on the trial dates—since the accused and the offended party/complainant are around, thereby obviating any delay in the sending of notices. You know, in Metro Manila, the problem oftentimes crops up in the scheduling, because the practitioners shuttle from one court to another. However, pursuant to the continuous trial circular, I hold the prosecution and the defense responsible for bringing all their evidence (witnesses) on the dates assigned to them—and to take the necessary moves before the trial—with a stern warning that the assigned dates will be intransferable in character and that failure on their part to present their evidence on said dates will be construed as a waiver thereof—and thereafter appropriate action/steps will be taken.

In the assignment of trial dates, I take into consideration, among others, the following:

- The court calendars of the litigants' counsel—of course, subject to discreet verification and corresponding sanction later if they were found not telling the truth relative to their appointments;
- The number of witnesses and the nature

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of their testimonies; and

—Above all, the court calendar relative to other cases previously set—to obviate any postponement or cancellation of the setting due to time-constraint. I have to warn the litigants and their counsel that trial may spill down the afternoon session if the same cannot be finished in the morning. Thus, I let the lawyers and their clients sign such agreement or the result of a pre-trial conference to avoid any excuses in the future. As I always say, “*Pacta sunt servanda.*” In assigning the dates of trial, I see to it that the same (case) is finished within the soonest—not to exceed two months. Reason: Just in case there will be a derailment in the agreed settings due to a valid or meritorious ground, we still have period of one month to fall back—and we do not have to go to the Supreme Court for any extension of the proceedings. I economize even on trial-dates—reserving for the rainy days as I often say. Parenthetically, we now have a new law—RA 6975, legally known as the Department of Interior and Local Government Act of 1990, which contains a provision regarding the trial of criminal cases against officers and members of the PNP—it mandates a continuous trial which should be terminated within ninety days from arraignment of the accused (Sec. 47).

With respect to civil cases—where pre-trial conference is mandatory under the Rules of Court—I have another system which I called *SPACE System*. Actually, it is an acronym of *Speedy Proceeding in the Adjudication of Civil Entanglements*. I thought of said name, because the system calls for a *spacing* between the pre-trial conference and trial proper—designed to provide a cooling-off period for the disputants. I conceived of this system after perfecting any *STAR System*—a by-product of my twelve-year experience as a trial judge in the provinces. I wrote about this system in 1985—and my article had appeared in the *Judges Journal*. Like the *STAR*

System, I conceived of the *SPACE System* when I was in Aklan, having stumbled over a fifteen-year old case wherein the lawyers did not even know how many witnesses they would present, much less who those witnesses were. Having been teaching law in Manila before my provincial appointment, I was flabbergasted with my discovery. I then required the disputants’ lawyers to submit pre-trial briefs—without telling them that my purpose was to make them study anew (if they had already conducted a first study) their case and to assess their respective evidence. Thus, I acquired the practice of requiring parties to submit pre-trial briefs (which I call pre-trial “guides” to distinguish them from appeal briefs), which practice I imported to my subsequent judicial assignments. Such practice, I observed, was not heartily welcomed by lawyers since the preparation thereof meant additional work, but the rationale behind it was aptly echoed by one veteran lawyer (in Zambales) when he said: Your Honor, I have come to know completely my case after preparing the pre-trial “guide.” Nonetheless, there were doubting Thomases who haphazardly prepared pre-trial “guides” just for compliance purposes. Fortunately, Administrative Circular No. 4 (on continuous trial) mandates the filing of pre-trial briefs—and failure thereof will be a ground for default.

I wish to share with you some insights I had in the conduct of pre-trial conferences. I had verbally reported the result of this judicial innovation bordering on pre-trial to our Chief Justice of the Supreme Court—and he told me to share it with others—but I just did not have the material time to reduce the same to writing because of too much work in Manila. (More than 30 cases are raffled to each Branch monthly).

The judicial experiment started in the month of January last year—and after six months, it brought forth a golden harvest: My court docket went down to less than one hundred. Parenthetically, when I was transferred to Manila in November, 1986, the

docket of my branch was more than 639 cases, aside from nineteen cases which were submitted for decision. In passing, I wish to state that I had to give priority in deciding the so-called "inherited" cases—and I had no problem when the Supreme Court focused its attention on the so-called "inherited" cases.

Although my SPACE System emerged in 1985 when I was still in Caloocan City, I have continuously refined it—placing a new apparatus to make the same more effective. As I had earlier mentioned, that was January last year when I discovered and started availing of the new tool which I called CARE. What does CARE mean? It is simply an acronym, to wit:

C—stands for Christian;
 A—stands for Approach;
 R—stands for Reconciliation; and
 E—stands for Enemies.

In short, CARE means the application of Christian approach toward the reconciliation of enemies. As a renewed Christian, I believe that people (brothers and sisters) fight because they are spiritually sick—either possessed or oppressed by the devil. Hence, they must be healed to pave the way for a reconciliation between the disputants/litigants. And I feel that such spiritual healing (done without the knowledge of the warring parties) can appropriately be done during the first phase of the pre-trial conference. This I do with the assistance of my staff, majority of whom are renewed Christians—and the effect is terrific.

During the first phase of the pre-trial conference, which is held in an informal atmosphere, the parties and their lawyers are asked if they had traversed all avenues toward an amicable settlement (especially if they are relatives or neighbors) and if they had availed of the different modes of discovery. It is at this juncture when the parties must be made to realize that: They are brothers and/or sisters in the eyes of God; that

they are loved by God even to the extent of making His only Son give up His life for their redemption; that what they are fighting over are merely material things—they are merely temporarily possessed and they cannot be brought or carried over to the next life; and that the most important thing is to be reconciled with God and with one another in order to attain real happiness. Biblical teachings are then imparted. Thereafter, the parties are given a breathing spell—geared toward a reconciliation. After the break (say thirty minutes), if there is reconciliation, appropriate moves/steps will be taken—and that puts an end to the case(s). Otherwise, we proceed to the second phase—pre-trial conference proper.

During the pre-trial proper, the parties are made to lay their cards on the table—the exhibits intended to be presented are marked, admissions are made or stipulations entered into; issues are defined; and projected witnesses as well as their intended testimonies are portrayed. Thereafter, the dates for trial are fixed and agreed upon, with a warning that they are intransferable. Hence, they should be ready with their witnesses on the scheduled trials. Such things are all embodied in a pre-trial order which is signed by the parties and their counsel in order to have a stronger impact—they will not be able to deviate in the future from what was agreed upon. With a systematic and detailed pre-trial conference, the parties and their lawyers can almost see what is forthcoming. Hence, they will be spurred to take moves toward compromises or amicable settlements—in short, early disposition of cases short of trial. Also, it may result to either summary judgment of the pleadings. Parenthetically, my branch clerk of court has observed that under our system, seven out of ten cases are disposed of/or terminated before reaching the trial phase. By the way, the scheduling of trial in civil cases is done in the same manner as in criminal cases, which system we have already mentioned. The proceedings must be done punctually—morning sessions

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must start at exactly 8:30 a.m. and afternoon sessions at 1:30 p.m.

I have portrayed and shared with you the systems I have been using for the last eight years bordering on the so-called continuous trial scheme, which systems I personally call the Philippines Expeditious Proceedings (PEP)—a pep in the administration/dispensation of justice which had been the object of public criticism for the last century. Tedious they may appear to you, but they have certainly yielded a golden harvest. In connection with the continuous trial scheme, I have observed the following good effects:

- There is a faster flow of cases. Hence, the public cry against delayed-delivery of justice dissipate into oblivion;
- It is easier to write decisions as the evidence presented/gathered is still fresh in one's mind;
- There will resultantly be more cases terminated and disposed of;
- Litigation expenses are reduced to the minimum, for the trial of case can be done in one or a couple of settings;
- Tension on the part of warring parties—especially those locked up in the jail—will be eased, because the pendency of a case in short is cut to the minimum period. Thus, people will resort to judicial process instead of taking the law into their hands.

At the same time, I find that the continuous trial scheme is not totally free from problems—and some of the problems are:

- Absence of witness(es) during, the scheduled hearing/trial. Then the counsel moves for postponement or continuation thereof for reasons not attributable to him/her and his/her client—and allegedly in the interest of justice. This is where judicial discretion has to be exercised wisely and soundly. What I usually do—if I feel that the move to postpone is fishy—I deny it and compel the appearance of said witness(es).

Bench warrants may be issued and the proceedings suspended in the meantime. Otherwise, I will consider such absence as a waiver to present or continue presenting evidence—and the adverse party may be allowed to present his/her evidence. If I find the move to postpone or continue meritorious, I will grant the same—but the previously agreed setting(s) should not be disturbed. In short, I shall let the parties agree on a date before the previously agreed setting. For example, the next setting previously agreed is April 31. I shall allow the parties to agree on a date before April 31—subject, of course, to the availability of the court's calendar. Such dilemma should, however, be met with stern warning—to prevent any repetition.

- Absence of counsel. Sometimes the parties are around, but their counsel is nowhere—what should be done? Without any valid reason(s), such counsel certainly deserves to be held in contempt of court—especially if he or she had previously agreed to such setting. As ruled by the Supreme Court, a counsel should not assume that his/her motion will be granted by the court—that is if he or she had taken move for postponement. This is again an instance where the judge should exercise his sound discretion. If this happens to us—and I find the move meritorious—I may grant it, without, however, disturbing the previously agreed setting(s) and with a stern warning against repetition.

- Unprepared counsel. Sometimes the judicial timetable is scuttled because some people go to court unprepared—thus, presentation of evidence is done in a topsyturvy manner or the cross-examination conducted as if there is no end—just like the long-playing records. This is an instance where the patience of the judge is put to test. If this happens, I usually deny any move for continuance—especially if the witness is under cross examination—to obviate any possible coaching and to ward off possible tainting of the testimony.

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al evidence. I observed that when a talkative individual gets hungry, he/she will stop with his/her examination. Another so-

lution is to spill to the afternoon session or the following day—without again disturbing the previously agreed upon settings.

The Creation and Development of the Crown Prosecution Service

by Robert J. Green*

The introduction of the Crown Prosecution Service (CPS) in 1986 was a major reform of the Criminal Justice System in England and Wales. It separated responsibility for the investigation of criminal offences from the responsibility for prosecution.

The CPS was created following the recommendations of the Royal Commission on Criminal Procedure which reported in 1981.

Historical Background

Prior to the establishment of the CPS the police controlled the investigation and prosecution of offences. Many police authorities had their own prosecuting lawyers departments, with lawyers employed by the police to prosecute cases on their behalf. In areas where there were no prosecuting lawyers departments, cases would be presented in court by private legal firms under instructions from the police or by police officers themselves.

The Royal Commission on Criminal Procedure under the Chairmanship of Sir Cyril Phillips which reported in 1981 found major defects in those arrangements:

- (1) The prosecutor was not independent of the police—a relationship of lawyer and client existed. The police were not only investigators but had the final control of the decision whether or not to prosecute.
- (2) There was a lack of consistency in prosecution policies of individual police forces. In particular cautioning rates varied dramatically.
- (3) There were too many evidentially weak

cases being pursued by some police forces.

- (4) The prosecution arrangements were haphazard, differing from one part of the country to another, and there was a lack of accountability.

The Royal Commission was concerned to ensure that a new system fulfilled standards of fairness, openness, accountability and efficiency.

The Creation of the CPS

The creation of the new independent Service had all-party support and it was set up by the Prosecution of Offences Act 1985. The Government favoured a nationally integrated system with strong local features. As a result decisions in the vast majority of cases are now taken by Crown Prosecutors at a local level—the range varies from careless driving to murder. All cases are now prosecuted in court by a Crown Prosecutor (either solicitor or barrister) or an agent lawyer of the CPS.

The objectives of the CPS include the provision of a high quality independent prosecution service with a high level of consistency in decision-making. One of our primary responsibilities is to eliminate weak or inappropriate cases.

The Structure of the CPS

The Crown Prosecution Service is a Government Department and the Head of the Service is the Director of Public Prosecutions. The Service has, as its superintending Government Minister, the Attorney General.

The country is divided into 31 Areas each headed by a Chief Crown Prosecutor. Chief

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Crown Prosecutors are designated under statute by the DPP and we have responsibility for the management of the Service in our Areas and special responsibility for the most sensitive and complex cases. Examples include difficult homicide cases, major frauds, certain fatal road accident cases, counterfeiting, child abduction or any case in which the alleged offender is in a high profile or sensitive position in the community.

Day to day responsibility for casework rests with the Branch Crown Prosecutors, who lead teams of Crown Prosecutors, law clerks and administrative staff in approximately 100 different branch offices across England and Wales.

The CPS is responsible for the prosecution of all criminal cases arising from police investigations in England and Wales with the exception of certain minor traffic offences. The right of private prosecution remains subject to the power of the CPS to take over any prosecution if it considers it should do so. The CPS may discontinue such cases but in practice does so in very few cases. The CPS is not responsible for prosecutions instituted by Customs & Excise, Trading Standards Departments, RSPCA and a number of other specialist public bodies.

Statistics

In 1990/91 the CPS nationally finalised 1.6 million cases. In 97.5% of cases in the Magistrates' Courts there were convictions (85% having pleaded guilty) and 87.2% in Crown Court. Annex "A" to this paper includes statistical information from the Annual Report of the CPS for 1990/91.

The CPS employs about 2,000 lawyers and is the largest employer of lawyers in the country. In addition to lawyers, the Service employs 3,500 other staff. All staff are civil servants.

Progress

Some 2 years ago the CPS was the subject

of a searching inquiry by the House of Commons Home Affairs Select Committee. The tone of their Report was encouraging:

"The CPS is a fairer and more just prosecuting system than was in place before."

The Service is now an established and equal partner in the Criminal Justice System. The career structure for lawyers has been significantly improved and the Service now faces the prospect of virtually full recruitment.

Any shortages of staff are met by the use of private solicitors or barristers who prosecute as agents of the CPS. We prefer to use our Crown Prosecutors whenever possible as only they have the authority to make decisions on the amendment or discontinuance of charges.

A major advantage of the new national Service is its ability to create and develop consistent national policies and practices and communicate them rapidly to the 31 Areas and to keep us up to date with the latest changes in the law and current law reform developments.

The Criteria for Prosecution

The police at present retain the initial decision to charge a person.

Once a defendant has been charged the police must send the file to the CPS for "review" and prosecution. The "review" function is fundamental to the independence of the prosecution. By virtue of S.23 Prosecution of Offences Act 1985 the CPS has power to discontinue proceedings in Magistrates' Courts in order to ensure that only fit and proper cases are taken to trial.

Parliament has by statute given Crown Prosecutors a quasi-judicial function in that we exercise a discretion as to which cases should be prosecuted and which should not. In doing so Crown Prosecutors apply the principles contained in the Code for Crown

CREATION AND DEVELOPMENT OF CPS

Prosecutors. The Code is issued by the Director of Public Prosecutions under S.10 of the 1985 Act. There are 2 basic tests which must be applied:

Firstly, is there sufficient evidence? A prosecution should not be started or continued unless the Crown Prosecutor is satisfied that there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by an identifiable person.

The CPS applies the test of whether there is a realistic prospect of conviction. The Code sets out a number of factors to be assessed in making that decision and in particular requires the prosecutor to look beneath the surface of witness statements. If there is no realistic prospect of conviction the case must be discontinued.

Secondly, assuming there is sufficient evidence, the Crown Prosecutor must then consider whether the public interest requires a prosecution. The more serious the offence the more likely it is that a prosecution will follow. But in less serious cases the Crown Prosecutor will take into account a number of factors such as the interests of the victim, whether the offence is racially motivated, the likely penalty, staleness of the offence, the age of the defendant, such factors as old age or infirmity, mental illness, the prevalence of the offence in the locality, the views of the local community, other methods of disposal e.g. a caution, and a number of other matters.

If having applied all the criteria set out in the Code, the Crown Prosecutor is still undecided, then he or she should continue the proceedings as it can rightly be said that the final arbiter should be the Court.

Before discontinuing proceedings the CPS has a policy of consulting with the police wherever practical but Crown Prosecutors should not hesitate to terminate a prosecution if it would be inappropriate to proceed.

Cases are subject to continuing review throughout their progress. The CPS lawyer has authority to alter the charge preferred

by the police if the facts reveal a more appropriate alternative charge or he may discontinue a case if the circumstances have changed since he accepted the case at the initial review stage.

In 1990/91 the CPS discontinued 9.4% of all cases (151,236 defendant cases).

Juvenile Specialists

The CPS pays special attention to juvenile offenders and there is a much stronger presumption against prosecution if some other form of disposal is suitable. Unfortunately juveniles do commit serious "adult crimes" and then a prosecution may be the only option. Specially trained Crown Prosecutors review all juvenile cases.

Pre-Charge Advice to the Police

The police, whilst retaining the initial decision to charge can, and often do, take pre-charge advice from a Crown Prosecutor. This has advantages including:

- (1) reducing tension between the police and CPS;
- (2) may prevent a complainant having his expectations raised and then dashed by a decision to stop a case;
- (3) results in more appropriate charging;
- (4) reduces the discontinuance rates and saves CPS court time.

Relationship with the Police

The CPS and police are now constitutionally independent of each other but we maintain a close working relationship. Independence does not mean isolation. The 2 bodies have different functions to perform in the Criminal Justice System but we have a common aim in bringing criminals to justice and to elicit all relevant evidence for submission to the courts with a view to securing this conviction.

In court, however, the prosecutor's job is

not to try and obtain a conviction at all costs but to present the facts fairly before the court and to test the defence evidence by cross-examination.

Crown Prosecutors regularly take part in police training courses. This provides an opportunity to explain the role of the CPS and for officers to cross examine us about our role! In turn senior detective officers have given talks to our staff about the management, techniques and demands of the investigation of crime.

For both agencies to work efficiently there needs to be a constant exchange of information together with consultation and mutual respect.

Further, the CPS, Police, Courts, Probation Service and other agencies are in regular liaison to try and improve the Criminal Justice System. It is recognised that co-operation between all agencies is vital and does not prejudice their independent functions. Court user groups are but one example of that co-operation.

The Quality of Case Papers and the Working Group on Pre-Trial Issues

I wish to stress that whilst the CPS is independent, its ability to "review" cases effectively and to take action at the correct time is very much dependent upon the timely submission of papers by the police, in a complete and legible form.

We are only as good in court as the material with which we are supplied. If the material is supplied in good time, is legible and complete, then we have no excuse at all for performing badly in court. If the file is not complete and legible, the finest advocate will find it difficult to present properly.

There has been a great deal of consultation at a national level in an effort to bring about the consistent timely provision of adequate material from the police. The recent inter-agency Working Group on Pre-Trial Issues has addressed these issues in addition

to many others. The agencies who were party to that Working Group included the police, CPS, Justices' Clerks and Lord Chancellor's Department.

The 165 different recommendations of that Group have Ministerial backing from the Attorney General, Lord Chancellor and Home Secretary.

The recommendations also seek to set national standards of police file quality, reduce delays in the progress of cases, improve the care and warning of witnesses (especially victims), the speedy provision of the results of cases, and the maintenance of accurate criminal records.

Is the English Criminal Justice System in Crisis?

In the 1970s the IRA (Irish Republican Army) terrorists bombed public houses on the English mainland, killing many people. A number of people were arrested by the police and prosecuted for these horrific crimes. They received long prison sentences. Many years later, and after vigorous campaigns on behalf of the convicted defendants, their cases were re-investigated by the police. Their appeals were successful in the famous cases known as the "Birmingham 6," the "Guildford 4" and "The Maguires." They were all freed from prison. The defects in the cases consisted largely of allegations of police duress and falsification of confession statements; lack of any corroboration of alleged confessions and inconclusive forensic evidence used to detect alleged traces of explosive substances.

In addition, in the 1980s the West Midlands Serious Crime Squad secured convictions for a number of serious crimes including robbery and burglary. A subsequent inquiry revealed malpractice by this police unit which included the falsification of confession evidence. There then followed a number of successful appeals by defendants convicted several years before. The police disbanded the West Midlands Serious Crime Squad as

a result of the inquiry.

More recently during riots on Broadwater Farm Estate in London the police were attacked with petrol bombs, firearms, stones and other missiles. One officer, PC Blacklock, was murdered after being attacked by several rioters. Three men stood trial for his murder and were convicted. A campaign for their release continued for several years and this year they were freed by the Court of Appeal because of poor identification evidence but more seriously because of fresh evidence tending to show police fabrication of confession statements or parts of those statements.

Some commentators see these cases as evidence of a crisis in the Criminal Justice System in England. Or is it a crisis of confidence in a system that is basically sound? I find it rather difficult to judge. But as a result of these cases a Judicial Inquiry has been set up under Lord Justice May which will report later this year. Further a new Royal Commission under the Chairmanship of Lord Runciman is examining the Criminal Justice System as a whole with particular terms of reference to address the prevention of miscarriages of justice in future. The Royal Commission is due to report in 1993 and Mr. Chronnell will tell you more about the issues they are addressing and potential solutions in his talk later this week.

What is important to emphasize is the fact that all of these cases to which I have referred were investigated before the introduction of two major reforms of our own system:

- (1) The Police and Criminal Evidence Act 1984 which in effect clarifies and specifies in detail police powers of arrest and detention, search and seizure and the questioning and treatment of suspects. In particular, nearly all police interviews of suspects are now tape-recorded; and
- (2) the introduction of the Crown Prosecution Service in 1986 with its independent prosecution responsibilities.

Other Improvements in the UK System

- (1) The creation of the Serious Fraud Office which deals with the prosecution of the most serious cases of commercial fraud including the BCCI international banking fraud and the present inquiry into the Robert Maxwell printing and publishing empire. The SFO has investigatory powers, unlike the CPS. It has on its staff lawyers, accountants, police officers and other investigators.
- (2) DNA Profiling by forensic scientists.
- (3) Time limits for various stages in criminal proceedings where defendants are in custody awaiting trial.
- (4) Improved extradition arrangements.
- (5) Publication of a Victim's Charter.
- (6) Closed circuit TV links or screens for child witnesses.

The Accountability of the CPS

Prior to the creation of the CPS in 1986 the prosecution arrangements lacked accountability according to the Royal Commission on Criminal Procedure. The DPP and CPS are now accountable in the following ways:

1. The AG is answerable to Parliament for prosecution policy generally. He appoints and superintends the DPP and CPS and may call for reports from the DPP.
2. The Director is required to publish a Code for Crown Prosecutors which is a public declaration of the principles applied by Crown Prosecutors.
3. The DPP provides an Annual Report to the Attorney General who in turn presents it to Parliament.
4. Parliamentary questions from Members of Parliament are answered by the Attorney General. MPs' letters on behalf of constituents are answered by the Attorney General or DPP.

5. The CPS is responsible for its decisions and is expected to respond directly to members of the public, the courts, etc.
6. Parliamentary Select Committee Inquiries.
7. National Audit Office Inquiries.
8. Parliamentary Public Accounts Committee Inquiries.
9. The CPS has its own inspectorate in the form of the Field Director (Operations).
10. Obligations under the Citizen's Charter/Victim's Charters.
11. The CPS can appeal an unduly lenient sentence to the Court of Appeal in indictable (serious) cases.
12. Strong integrated Service capable of influencing law reform and general improvements in the Criminal Justice System.

Strengths and Weaknesses of the Present Prosecution System

Strengths

1. Independence from the police or political influence. The CPS has the final decision whether or not to prosecute.
2. Integrated national structure capable of implementing consistent policies and practices e.g. Code for Crown Prosecutors and national policy and procedure manuals.
3. Accountability to Parliament through the Attorney General and in other ways.
4. Strategic approach to achieving its objective of providing a high quality, independent prosecution service working in the interests of justice.
5. Committed to inter-agency approach in solving problems of the CJS.
6. Good training programmes.
7. Good career prospects, secure conditions of service and interesting work provide job satisfaction.
8. The right of an individual to bring a private prosecution remains. (Some would argue that this is a weakness.)
9. The CPS has power to take over any prosecution and either continue the case or discontinue.
10. The Lord Chancellor has announced the proposed appointment of a Junior Minister who will be responsible for the courts. (But not CPS, Probation, Police or Prisons, etc.)

Weaknesses

1. Police retain initial decision to charge.
2. No power to direct the police e.g. for failure to deliver complete files on time. No effective sanctions other than discontinuance.
3. No power to direct police at investigation stage or to carry out further enquiries. No independent investigator on the CPS staff.
4. Some police resentment over loss of decisions to prosecute—can create police "attitude problems."
5. No power to interview witnesses.
6. No diversion powers e.g. caution, "conditional waiver" of prosecution, prosecutor fine, caution plus warning, etc.
7. Only deal with police-initiated cases—not DSS, RSPCA, NSPCC, TVLRO, local authorities.
8. No Ministry of Justice, therefore inter-agency negotiations tend to be resource dominated.
9. The police criminal records system inadequate and frequently inaccurate.
10. Inadequate provisions for care of witnesses especially victims.
11. Crown Prosecutors have only limited Rights of Audience at Crown Court.
12. Crown Prosecutors have no power to recommend sentence. (Only limited right to appeal unduly lenient sentences in very serious cases.)

Conclusion

In this paper I have described the creation of an independent prosecution system in England and Wales and my views of its development and strengths and weaknesses. In

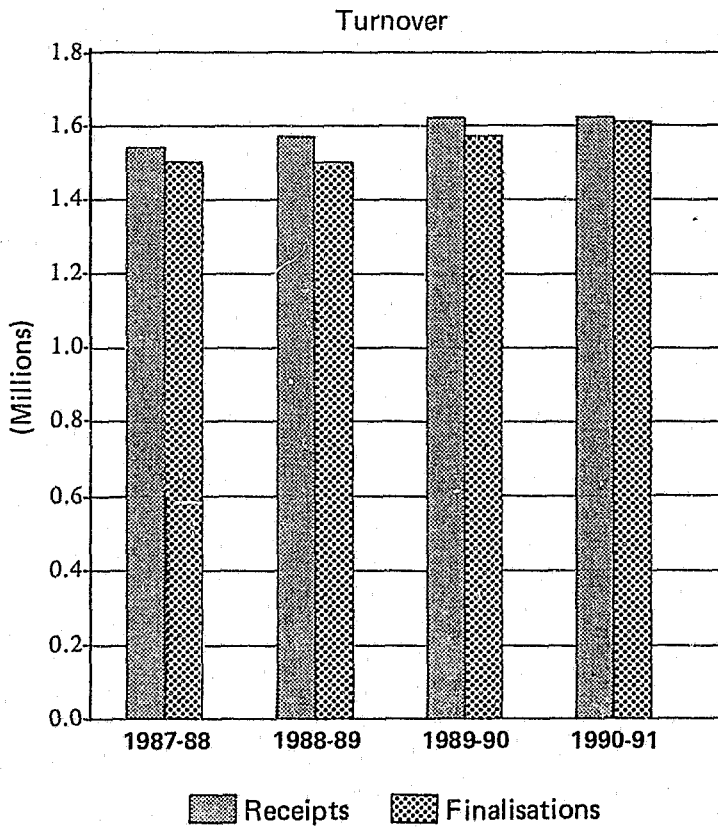
CREATION AND DEVELOPMENT OF CPS

doing so I have raised issues which I believe have relevance to other jurisdictions around the world. My colleague, Mr. Chronnell, will

be developing some of these issues in his paper, particularly where they affect the prosecutorial function.

Magistrates' Court Turnover

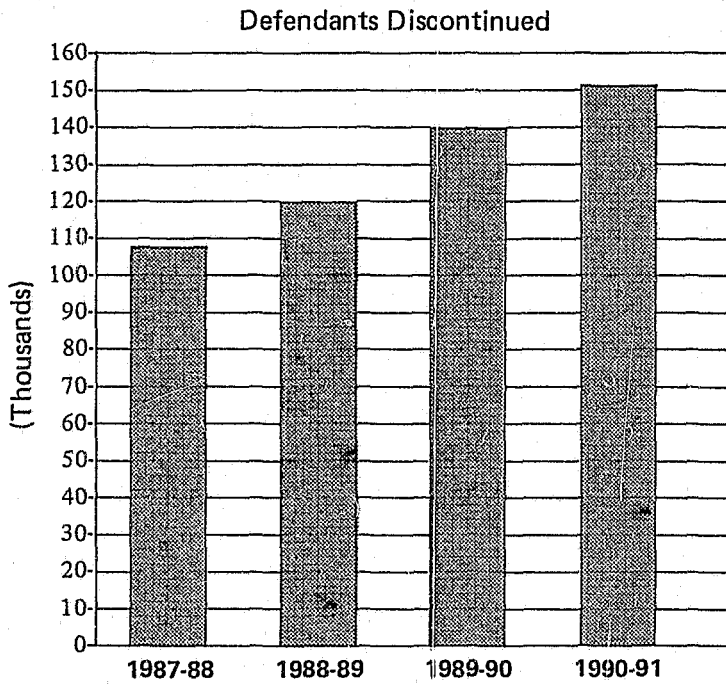
	1987-88	1988-89	1989-90	1990-91
Defendants Received	1,548,000	1,574,116	1,622,347	1,625,057
Defendants Finalised	1,500,972	1,508,348	1,575,047	1,612,429



EXPERTS' PAPERS

Magistrates' Court
Discontinuances

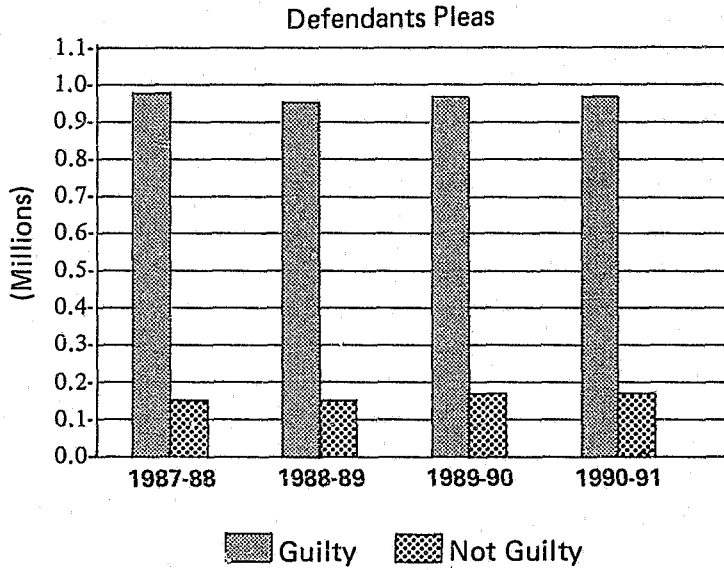
	1987-88	1988-89	1989-90	1990-91
Defendants Discontinued	108,900	120,714	140,313	151,236



CREATION AND DEVELOPMENT OF CPS

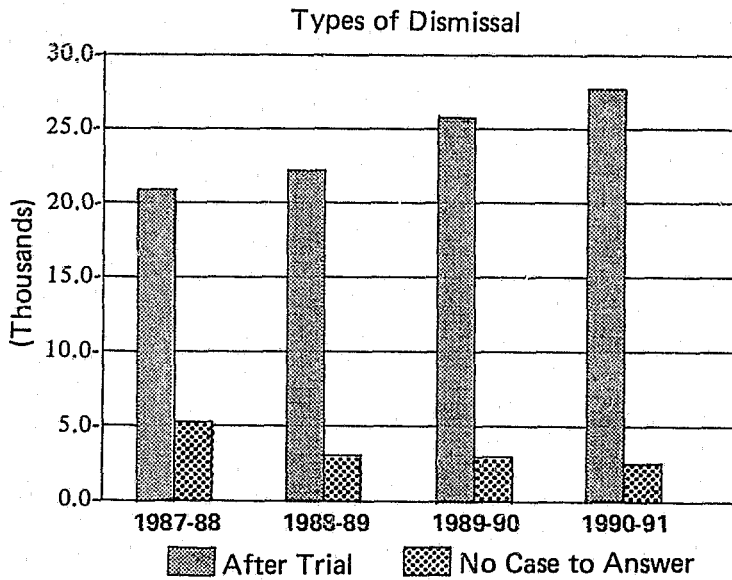
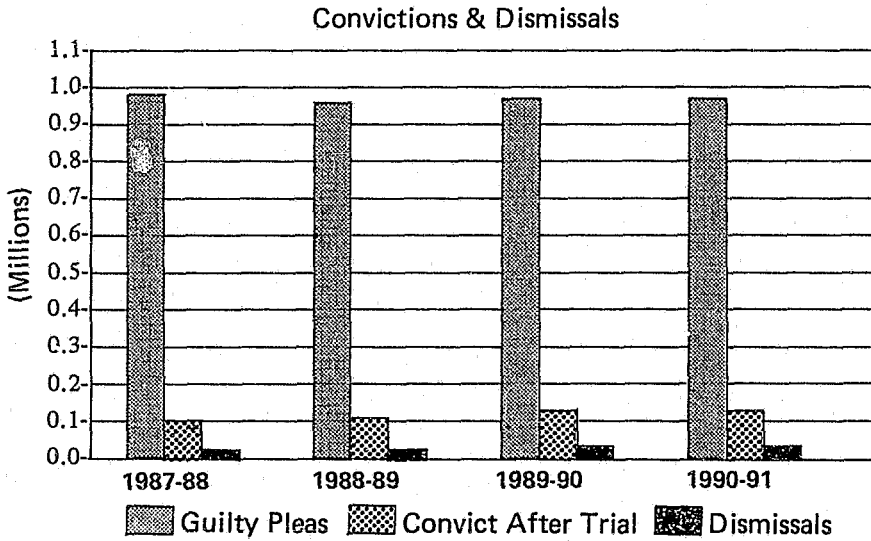
Magistrates' Court
Defendant Pleas

	1987-88	1988-89	1989-90	1990-91
Guilty Pleas	979,353	957,199	969,287	974,793
Not Guilty Pleas	152,882	152,943	171,431	170,139
Percentage Guilty Pleas	86.5%	86.2%	85.0%	85.1%



Magistrates' Court
Conviction and Dismissals

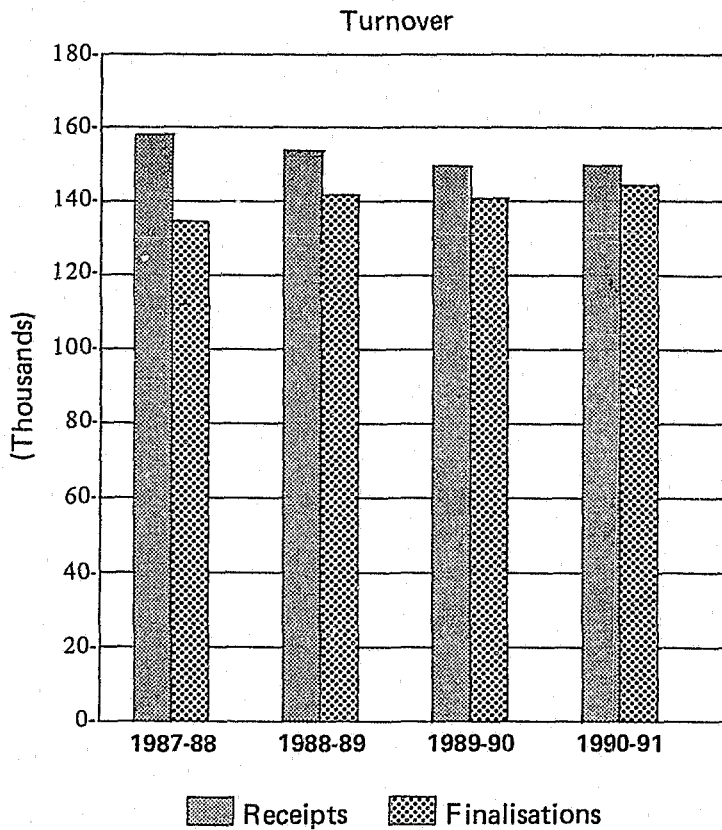
	1987-88	1988-89	1989-90	1990-91
Guilty Pleas	979,353	957,199	969,287	974,793
Convictions after Trial	101,159	115,668	132,921	127,388
Total Dismissals	26,973	25,653	28,172	28,128
Dismissals after Trial	21,424	22,635	25,468	25,607
Dismissals No Case	5,549	3,018	2,704	2,521



CREATION AND DEVELOPMENT OF CPS

Crown Court
Turnover

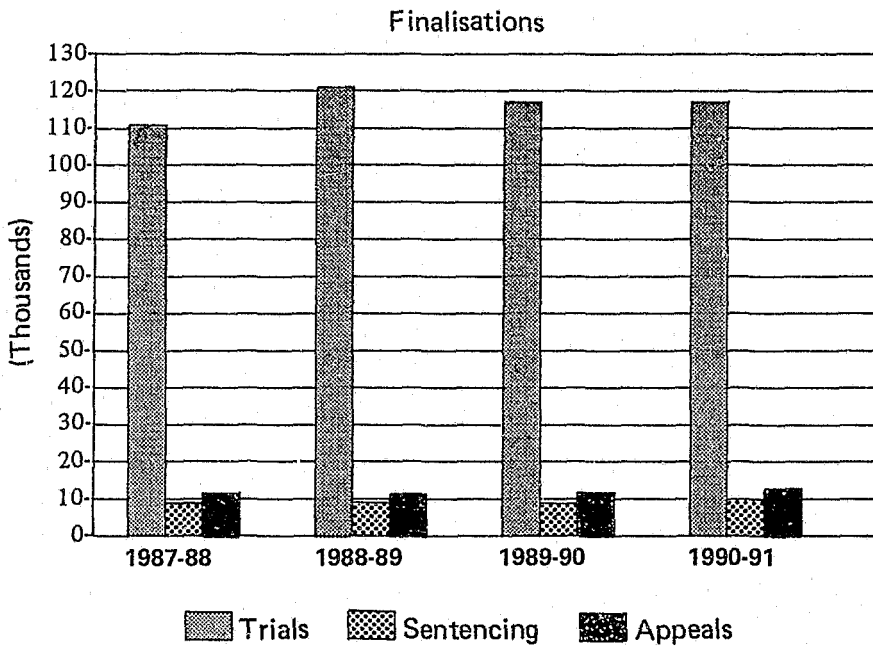
	1987-88	1988-89	1989-90	1990-91
Defendants Received	158,300	154,300	149,957	150,446
Defendants Finalised	135,157	142,775	141,701	145,811



EXPERTS' PAPERS

Crown Court
Finalisations by Category

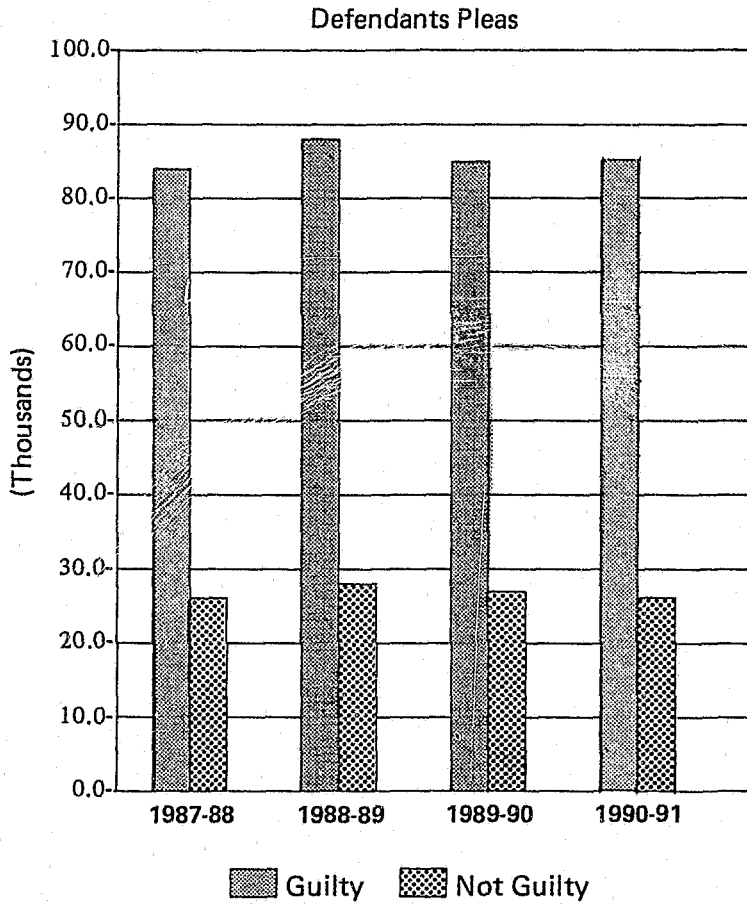
	1987-88	1988-89	1989-90	1990-91
Committals for Trials	115,056	121,912	117,661	117,384
Committals for Sentence	8,524	9,175	9,406	10,341
Appeals	11,577	11,632	12,910	13,835



CREATION AND DEVELOPMENT OF CPS

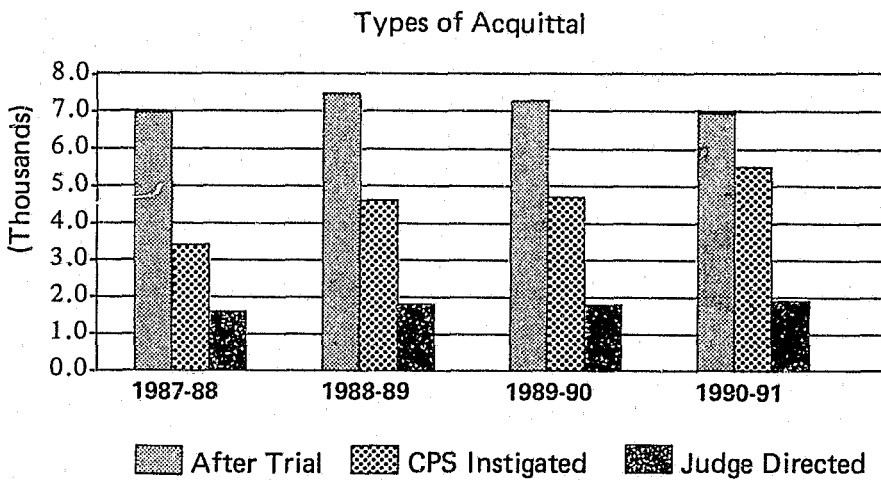
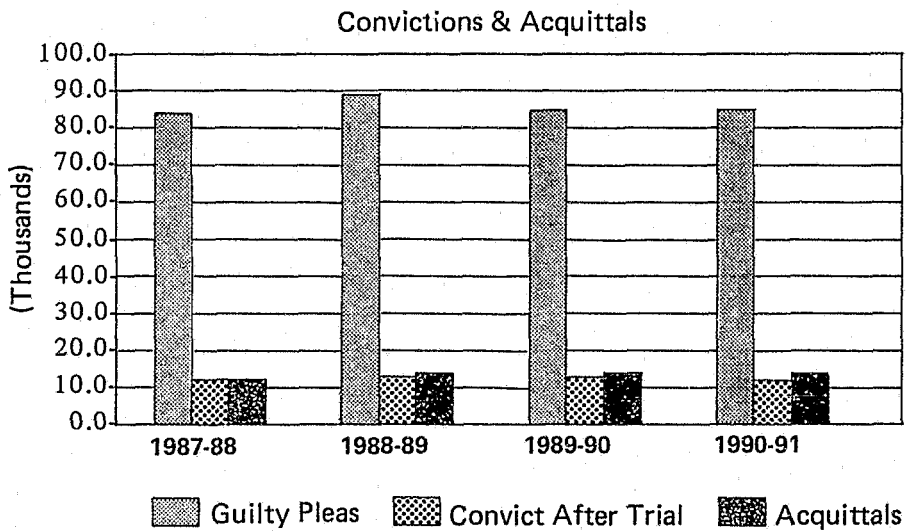
Crown Court
Defendant Pleas

	1987-88	1988-89	1989-90	1990-91
Guilty Pleas	84,593	88,834	85,466	85,623
Not Guilty Pleas	26,492	28,381	27,087	26,662
Percentage Guilty Pleas	76.2%	75.8%	75.9%	76.3%



Crown Court
Convictions and Acquittals

	1987-88	1988-89	1989-90	1990-91
Guilty Plea	84,593	88,834	85,466	85,623
Convictions	12,149	13,453	12,860	12,260
Total Acquittals	12,197	14,031	13,919	14,353
Acquittals				
After Trial	7,050	7,588	7,312	6,944
CPS Instigated	3,487	4,624	4,785	5,512
Judge Directed	1,660	1,819	1,822	1,897



The Future of the Crown Prosecution Service in England and Wales

by Robert J. Chronnell*

Introduction

My colleague Mr. Green has told you something about the history of the Prosecution System in England and Wales and of how the Crown Prosecution Service (C.P.S.) came into existence in 1986. He has also told you how we go about our work and of the Code for Crown Prosecutors (the Code) which contains the criteria that we apply to our casework. I am now going to look to the future. I am going to take some of what Mr. Green called the weaknesses of the present system and examine what might be done to strengthen the C.P.S. and, I believe, improve the administration of Criminal Justice in our Country. The views I am about to express are essentially personal ones and I am not a spokesman for the C.P.S. and I do not claim to represent the opinions of anyone other than myself.

The Future of the Crown Prosecution Service

What direction will the Crown Prosecution Service in England and Wales take in the next 20 years? As another Royal Commission examines the scope for change the different agencies within the Criminal Justice System are once again under scrutiny. The role and powers of the Police are being questioned and, despite its comparative youth and its rather tentative start, it is likely that the remit of the Crown Prosecution Service will be widened. How this will be done remains to be seen but I set out below some thoughts

on a few of the possible changes that might occur.

Discretion—The Legality and the Expediency Principles

Prior to 1986 the only discretion regarding prosecutions rested with the Police. The Prosecutor had none. Now the expediency principle is firmly established in our Country.

The Crown Prosecution Service is now firmly established as an independent agency within the Criminal Justice System. In the exercise of our independent role we are governed by the Code for Crown Prosecutors which lays down the criteria that we apply to the casework that we receive from the Police. You know that we examine every case initially to see whether there is sufficient evidence to merit a realistic prospect of a conviction. Thereafter, once that test is passed we must satisfy ourselves that it is in the public interest to proceed. In 1951 a former Attorney General said this:

“It has never been the rule in this Country—I hope it never will be—that suspected criminal offences must automatically be the subject of prosecution. Indeed the very first Regulations under which the Director of Public Prosecutions worked provided that he should . . . prosecute ‘wherever it appears that the offence or the circumstances of its commission is or are of such a character that a prosecution in respect thereof is required in the public interest.’ That is still the dominant consideration.”

Thus the Crown Prosecution Service is not obliged to prosecute every case where there

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is sufficient evidence to justify a conviction. Nevertheless, the burden of deciding what is in the public interest is a heavy one. No doubt all the agencies in the Criminal Justice System in England and Wales and no doubt the agencies to which you all belong in your own Countries, would maintain that you carry out your work in the interests of the public you serve—whether you are Prosecutors, Police Officers, Civil Servants or hold some other public office.

The Code itself does, of course, lay down certain guidelines to assist a Crown Prosecutor in deciding whether a prosecution would be in the public interest. You can see what these are if you look at the Code for yourselves. I am referring to such things as the staleness and triviality of an offence, and the age and health of a potential Defendant. However, there are other significant paragraphs in the Code which I wish to draw to your attention. I quote in particular:

“Crown Prosecutors at every level in the Service will have great scope for the exercise of discretion at various stages of the prosecution process and in respect of many different functions. The responsible use of that discretion, based on clear principles, can better serve both justice, the interests of the public and the interests of the offender, than the rigid application of the letter of the law. The misuse of discretionary powers, on the other hand, can have severe consequences not only for those suspected of crime, but also for the public at large and the reputation of justice and the Service itself.”

Particular care must of course be paid to the young and it is now generally accepted in England and Wales that the prosecution of juveniles—anyone under the age of 17, is a matter of last resort. The Crown Prosecutor's Code says this with regard to juveniles:

“It is a long standing statutory requirement that the Courts shall have regard to

the welfare of the juvenile appearing before them, in criminal as in civil proceedings. It is accordingly necessary that in deciding whether or not the public interest requires a prosecution the welfare of the juvenile should be fully considered.

“There may be positive advantages for the individual and for society, in using prosecution as a last resort and in general there is in the case of juvenile offenders a much stronger presumption in favour of methods of disposal which fall short of prosecution unless the seriousness of the offence or other exceptional circumstances dictate otherwise. The objective should be to divert juveniles from Court wherever possible. Prosecution should always be regarded as a severe step.

“It will never be right to prosecute a juvenile solely to secure access to the welfare powers of the Court. Where the Crown Prosecutor thinks that there may be grounds for care proceedings and that this might better serve the public interest and welfare of the individual he should invite the Police to put this possibility to the local social services authority.”

The title we give to the disposal of cases that we receive from the Police and where we believe that a prosecution is not necessary is “diversion.” Diversion itself can take many forms. Non-prosecution or diversion is something that, currently, is mainly done by the Police since they have established procedures over many years for the cautioning of juveniles and other offenders and for the referral of offenders to other agencies for care, counselling and assistance as alternatives to prosecution.

Who Takes the Decision?

Cautioning is presently administered by senior Police Officers in Police Stations and the Police do not need to consult the CPS beforehand. I regard this as being unsatisfactory. In my view, the Police should be free to carry out their investigations into com-

plaints of criminal behaviour but, once their investigations are complete, they should be under a statutory duty to hand their file over to the CPS. A Crown Prosecutor would then be able to decide whether it was necessary to a) prosecute, b) not to prosecute, c) caution, without prosecuting or d) divert a Defendant for assistance in some other way.

In common with many other European Countries I can foresee that discretion on the part of the Prosecutor will be increased. I expect the CPS to be given wider powers to exclude prosecutions on the ground of public interest.

However, the Prosecutor must be accountable for his decisions and, therefore, I personally would welcome the limits of the Prosecutor's discretion being set out quite clearly. There will always be the risk that State Prosecutors will abuse their power and therefore, there must be effective safeguards against the misuse of their discretion. Thus, I am in favour of an extension in England and Wales of the expediency principle but the Prosecutor's discretion must be clearly defined in our Code so that non-prosecution decisions can be tested against the established criteria. As Prosecutors, we are not infallible and we must guard against the danger of corruption and the misuse of power.

The Power of the Police and the Role of the Prosecutor

Hand in hand with the increased discretion of the Prosecutor there must, in my view, go an increase in the Prosecutor's power to call for papers from the Police. At present, we have an unsatisfactory situation in which the Police, whilst retaining their investigatory role, nevertheless also take the initial prosecution decision. The Police in England and Wales are not obliged to report complaints to the Crown Prosecution Service. Although the Royal Commission of 1981, which advised the creation of the CPS, recommended taking the power to prosecute away from the Police, the reality is that they have re-

tained it.

The Police receive complaints from the public, investigate them and then decide whether suspects should be charged, cautioned or not proceeded against at all without being under any obligation to report these matters to the CPS or to seek our approval. We now have a situation whereby 70% of all juvenile offenders (10-16-year olds) and about 20% of young adult offenders (17-20-year olds) who are suspected of having committed criminal offences are cautioned by the Police without any reference to the CPS. It is becoming quite common for adult offenders (21 years of age and over) to be cautioned for a whole series of offences ranging from the most trivial traffic infringements to very serious offences such as attempted murder and rape.

In 1989 the Police formally cautioned 238,000 persons and yet they have no Regulations governing this practice. The Home Office have issued cautioning guidelines to the 43 Police Forces in England and Wales, but these are interpreted quite differently from Force to Force and cautioning rates for juveniles and adults alike fluctuate widely from one part of the Country to another.

I believe the next important and logical step in the development of the CPS is for it to be given much greater powers in this regard. I would be happy with a system whereby all Police enquiries, once completed, would be handed to the CPS who would decide whether a prosecution, cautioning or some other form of diversion was called for in the public interest. For the last six years the CPS has been left with the power to discontinue proceedings commenced by the Police which, of course, does act as a check upon Police discretion but the public Prosecutor, charged with the responsibility of acting in the public interest in accordance with our Code, has been left with little or no influence over the many thousands of cases the Police deal with on their own without our involvement.

What is more, we currently have no pow-

er to call for additional papers from the Police or to insist that they carry out further enquiries in relation to those cases that we do receive. Thus, we are wholly dependent on the discretion of the Police with regard to our case papers and the many decisions that we make will usually be taken on the basis only of what the Police have chosen to tell us. As a result, decisions to continue with a prosecution, to discontinue a case, to oppose bail and to accept guilty pleas to lesser charges, can all be taken in ignorance of matters known to the Police but concealed from the Prosecutor. I am not for one moment suggesting that this practice is widespread or that the Police deliberately conceal evidence from us. I am simply making the point that the 1981 Royal Commission has not succeeded in its objective of removing the prosecutorial function from the Police.

The time has come to make a clean break and to invest the CPS with the power to decide the outcome of all criminal investigations. I am not seeking the power to direct Police investigations although, I believe that the CPS should have the power to call for the Police to complete certain enquiries if the Prosecutor considers them to be necessary.

Diversion

A natural consequence of extending the powers of the Prosecutor in the way I have described above is to invest him with wide discretionary powers for dealing with offenders. This discretion needs to be carefully circumscribed and its exercise monitored but once the Prosecutor has been given the authority to take the initial decision on prosecution or non-prosecution he must have a range of options available. It is already a feature of our Code that we do not have to prosecute in every instance where the necessary evidence is available. The public interest may dictate otherwise. There is, throughout many Countries nowadays, a growing realisation that the public interest is not always best served by prosecuting

offenders. Mr. Green has already discussed the CPS Code with you and you will, therefore, have a good idea of our present guidelines. However, the public interest cannot be served by ignoring crime and offenders but, if prosecution is to be regarded as a matter of last resort, the Prosecutor must be able to decide what is best for individual Defendants and for the community by having available to him, alternatives to prosecution.

(1) Cautioning

As I have already said, this is currently done by the Police and is usually carried out without any CPS involvement whatsoever. I believe this power should be taken away from the Police and given to the Crown Prosecution Service. When I talk of cautioning I am not here thinking of the kind of informal caution administered by a uniformed Police Officer that might follow a very minor infringement of a Road Traffic Law—the kindly “word of advice” that many of us may have received! Nor am I thinking even of the written letter of warning often, but not exclusively, reserved for minor traffic and other offenders. The current formal cautioning system in England and Wales is quite different. Home Office guidelines ensure that there must be the necessary evidence to afford a realistic prospect of conviction, an admission of guilt from the suspect and his consent to being cautioned. In the absence of any of these requirements, a caution may not be given (Home Office Circular 59/1990). Most important of all is the fact that an individual who has been formally cautioned may have that caution cited in any subsequent Court proceedings. Thus, it may affect sentencing and, in some instances, it may well affect the Prosecutor when deciding whether to continue with criminal proceedings.

Cautioning by the Police, the only body that may impose a formal caution, is governed by Home Office guidelines published in 1990. In many respects these follow very closely parts of the Code for Crown Prosecutors, so that, in effect, the decision to pros-

FUTURE OF CPS

ecute or caution are based on essentially similar criteria. Copies of the cautioning guidelines published by the Home Office and issued to all Chief Officers of Police in England and Wales have been circulated separately to all seminar participants.

My plea, essentially, is for responsibility for cautioning to be removed from the Police and given to the CPS. However, the power to caution is something the Police have simply acquired without any proper legislative basis. What is needed is for cautioning to be put on a proper statutory basis by Parliament so that its importance within the Criminal Justice System is fully and officially recognised. Giving the responsibility to the CPS, instead of 43 different Police Forces, would enhance the status of cautioning, and should ensure greater consistency of approach.

(2) Expanding the Cautioning System—"Caution Plus"

I have already said that I believe the Prosecutor should be invested with wider discretionary powers and that there should be a greater number of disposable options from which the Prosecutor can choose for individual Defendants. With proper safeguards, the interests of the community and offenders could be served, time and resources saved and the interests of victims equally well protected by diverting some offenders, especially for minor offences, away from formal Court proceedings. Thus scarce resources and the time of the Courts could be saved for more serious offenders and their proceedings would be dealt with more quickly by the diversion of greater numbers of less serious offenders from the Courts. Clearly, proper Regulations would be required to regulate this increased power of the Prosecutor and proper safeguards would have to be built in to any expanded system to ensure that it was not abused.

"Caution Plus," as it is now called could include the following forms of disposal:

(a) The Diversion of an Offender, Who Satisfies the Cautioning Criteria, to the Probation Service for Some Form of Community Service

The Probation Service is independent of other agencies in the Criminal Justice System. Its Officers prepare Reports on offenders for the Courts, supervise convicted Defendants who are made the subject of Probation or Community Service Orders and monitor the progress of discharged prisoners. The CPS ought to be able to refer certain categories of minor offenders to the Probation Service as an alternative to Court proceedings. A Probation Officer would supervise the offender in the carrying out of some form of charitable work on behalf of the local community.

(b) Conditional Cautioning—On Payment of a Monetary Penalty to the State or Compensation to the Victim

Here again the CPS would be able to divert away from the Courts certain offenders responsible for minor property crimes. Regulations would be required to specify the extent of this power and the consent of both offender and victim would be required. The kind of offences I have in mind are minor theft and criminal damage. There would have to be some modest financial limit above which conditional cautioning would not be available and the Prosecutor would have to take an offender to Court.

(c) The Referral of an Offender to One of the Welfare Agencies for Help or Counselling

Many unhappy and inadequate people find their way into the Criminal Justice process. People who cannot cope with adversity can commit offences for a variety of reasons. Often prosecution is not appropriate but there may be little or no alternative. Minor offenders who have got into financial difficulties and persons whose marriages or partnerships have broken down are the kind of people who might be suitable for this form of diversion. What they need is a combina-

tion of sympathy and support to help them through a difficult phase in their lives. If these people can be identified, what they need is help rather than punishment and the CPS ought to be able to play a role in this regard in the interests of the community.

(d) The Referral of Mentally Disordered Offenders for Psychiatric Treatment

Every society possesses a significant minority of citizens with some form of mental disorder. Quite apart from the more serious mental illnesses, depression is something that affects a very large number of otherwise quite normal, healthy people. Many people who come into these categories are not appropriate for prosecution through the Criminal Courts and would benefit from being referred for psychiatric treatment or counselling. The CPS should be able to identify these people and establish links with a local hospital or health service and have the power to divert these people away from the Courts.

(e) The Referral of Offenders Addicted to Alcohol or Drugs to Medical or Voluntary Agencies for Assistance

Sadly, offenders with alcohol or drug-related problems are becoming increasingly common in our societies. I do not need to detail the difficulties. I am sure you know them only too well for yourselves. Many minor offenders need help and treatment, something which rarely results from prosecution and which our Courts are often unable or unwilling to provide. The CPS could play a role in ensuring that those who would benefit from medical or other help were offered the assistance they needed rather than finding themselves caught up in the prosecution process. Abuse of alcohol, drugs and other substances are amongst the worst of the scourges of modern society. The prosecution of serious offenders will always be necessary but minor offenders would benefit more from care and counselling and need not trouble the Courts.

(f) Arbitration or Conciliation

The term "Bind Over" is applied to a form of sentence or disposal of the Criminal Courts. Strictly speaking, it is not a sentence imposed on conviction of a criminal offence. It is an ancient form of disposal by the English Courts which has its roots in the 14th Century. A person is "bound over" to be of good behaviour for one or two years. If he returns to the Court during that period he will have to forfeit a sum of money by way of penalty. It is a kind of warning to a Defendant to behave himself during that period. If he does, nothing further will happen. No other penalty or sentence is imposed and the "bind over" acts as a kind of warning or caution to the Defendant. A conviction is not recorded but a "bind over" can be cited in future Court proceedings.

Many minor offences of public disorder, domestic dispute and quarrels between neighbours, friends and colleagues come to the attention of the Police. They can be very heated affairs and can absorb a very great deal of Police time, much of which can be wasted. Many complaints are made in domestic affairs which are subsequently withdrawn and, in the case of disputes between neighbours the Criminal Courts simply provide a platform for the opposing parties verbally to attack each other. These kind of offences or disputes could often be dealt with by some very informal procedure falling short of prosecution through the Courts.

At present a "bind over" can only be administered by a Court of Law and, although not strictly a criminal sentence it can play a very important part in helping to maintain the peace between opposing factions. I am not suggesting that the Crown Prosecution Service should have the power to "sentence" these offenders. However, I would like to see some mechanism whereby the CPS could refer matters of this nature to either a single magistrate or some other form of tribunal for informal disposal by way of Arbitration or Conciliation. Of course, in appropriate circumstances, and assuming the pre-conditions

for a proper caution applied, an offender in this category could be cautioned by the CPS. On the other hand, matters of this nature can often drag on for years unresolved and some form of conciliation procedure might serve a very useful purpose. The Parties could be brought together for informal discussion in front of the conciliator who would act as a kind of arbitrator to help resolve the dispute.

(3) Failure to Comply with Caution Conditions

In all the above instances, if an offender agreed to be cautioned, he would not be prosecuted provided he fulfilled the conditions of the caution. If he failed to comply with the conditions he could be prosecuted, although that too would be in the discretion of the Prosecutor.

The Role of the Probation Service

In all the above instances I would envisage the CPS having the power to refer offenders to divert offenders away from the Criminal Justice process, using the Probation Service as the point of referral. Good relations have already been established between the CPS and the Probation Service in England and Wales. That Service already fulfils a very important role within the Criminal Justice process and is accustomed to providing care, counselling and support to offenders and their families. They could be a kind of intermediary between the prosecuting authorities and minor of offenders. The kind of things I have proposed would be perfectly logical extensions to their existing work.

The Disadvantages of Expanding the Cautioning System

I quote from the recently published written evidence of the Crown Prosecution Service to the present Royal Commission on the future of the Criminal Justice System:

“It could be argued that the increased use of cautioning and cautioning ‘plus’ usurps the function of the Court. Of

course, there is merit in this argument and safeguards would have to be built into any expanded system to ensure that it was not abused. Clearly, a financial limit would be imposed above which non-judicial penalties would not be allowed to be set; equally, a limit on the number of hours any offender could spend attending certain institutions or performing community service could be set. In addition, it is perfectly possible to limit the type of offence in which caution ‘plus’ would be a possible option. All these steps would ensure that the primary function of the developed cautioning programme would be safeguarded, namely the diversion of the minor offender from the formal Court system. In addition, it must be remembered that the existing caution system to some extent usurps the function of the Court. Taken to its logical conclusion, all forms of discretion exercised by the Prosecution could be said to operate in this way.

“It is, therefore, important to place the role which is envisaged for cautioning ‘plus’ into perspective. It is simply an alternative method of ensuring that those cases where there is a proper penalty existing outside the formal Court system can be dealt with without prejudice either to the offender or the system. In implementing the caution ‘plus’ system, the Courts would be free to deal with those more serious matters which would remain. By circumscribing the use to which cautioning ‘plus’ can be put in the ways identified, the system would be a proper adjunct to the formal Court process rather than a competitor. If it were believed to be appropriate, limiting the availability of the ‘plus’ option would ensure that, as far as possible, cautioning ‘plus’ is only used in those cases where the Courts would be likely to impose a similar penalty.

“It could also be argued that the potential for miscarriages of justice would be increased by the removal of the Courts’ supervision of the proceedings. Again, there

are safeguards available to ensure that this does not occur. The present cautioning guidelines require sufficient evidence to be available to justify proceedings, and for the suspect to admit the offence and agree to be cautioned before the diversionary option can be considered. It is envisaged that the same requirements would be brought into force in any extension of the cautioning system. The suspect accepting his guilt, accepting the penalty and an agency other than the Police assuming responsibility for the decision to offer a diversion package are all safeguards against the possibility of a miscarriage of justice. Furthermore, in order to prevent abuse of the system in the other direction, there would have to be a system of measures to ensure that the matter could be taken before a Court in the event of unsatisfactory completion of the penalty by the offender. This would ensure that caution 'plus' is not seen as a 'soft option' by those who receive it and that they would be aware that failure to complete what was required would result in the matter being placed before the Court.

"Depending on the nature of the 'plus,' the co-operation of other agencies would be essential to the success of the programme. It is pointless obliging individuals to attend a drug rehabilitation course if there are no places available at the centre. The need for inter-agency co-operation in the scheme is therefore critical. Clearly, any expansion to the present diversion system can be taken in stages; penalties of a financial nature might provide an initial pointer to the potential success of any expanded programme. This would offer a yardstick by which the caution 'plus' system could be measured."

Resources

Naturally, all this would require additional resources. The CPS, the Probation Service and other agencies to whom offenders were referred for help would all need to be

expanded to cope with this additional workload. I do not pretend that this kind of intervention can be done cheaply and I am under no illusion about how difficult it would be to obtain the necessary funding. However, some Countries have already chosen to adopt these or similar measures as alternatives to prosecution for minor offenders and I would like to see them introduced in my own Country.

The Credibility and Status of the CPS

The biggest problem for the CPS in this regard is lack of credibility. The CPS is still a comparatively young organisation which has faced enormous problems in establishing itself as a responsible Service with the confidence and respect of the Police, the Courts and the community. The problems of understaffing have largely disappeared but lack of experience on the part of many of our lawyers is still a major problem in some Areas. Increasing our powers in the ways I have suggested would clearly require additional staffing resources and there would be many people in other Criminal Justice System agencies and the community at large who would not feel confident in giving the CPS additional powers at this stage. I do not underestimate these difficulties and, like any public service, the CPS does need the confidence of the public and the other agencies in the System in order to be fully effective. However, I believe that diversion is here to stay and that there is a growing realisation that criminal prosecutions through the Courts are very often not the best forms of disposal for particular Defendants.

There is also growing unease about the power, influence and role of the Police and I believe that some extension of the powers of the CPS is not only advisable but inevitable. The CPS must be ready to accept these challenges and these responsibilities. It will not be able to do so overnight and a slow process of change must be anticipated. Nevertheless, I am sure that the dye is cast and that the Prosecution of Offences Act of 1985

has introduced a process for change in the Criminal Justice System that has got a lot further to go. The CPS must be ready to play a full part in these changes and I believe that, given time and the necessary resources, we shall be able to do so for the benefit of the Criminal Justice System and the community at large.

Control of the Prosecutor's Discretion

Obviously, giving the Prosecutor such immense power and discretion, even in a stable democracy, does require the introduction of certain checks and balances. One of these that already exists in England and Wales is the right of an individual to bring a private prosecution. This ancient right was retained by the Prosecution of Offences Act 1985 despite the introduction of the CPS. It is a right that most Prosecutors can accept without difficulty and, to date, is one that has been used very rarely. Even so, the Crown Prosecution Service can intervene to terminate a private prosecution and this may be necessary in certain cases where a private individual may be exercising his right unfairly with regard to a particular Defendant.

Most private prosecutors are the victims of crime who find it difficult to accept a CPS decision not to prosecute. In my experience, most Prosecutors are sensitive to the needs of victims and always take their interests into consideration when considering the wider public interest.

In any event, a combination of factors should provide the necessary safeguards. Recruiting staff of the highest calibre, training lawyers to the highest possible standards and the leadership given by experienced colleagues in accordance with published criteria, generally provide the right kind of climate in which decisions can be taken. In addition, there are always the checks provided by public feedback via the media and the Courts which would help to educate Crown Prosecutors to come to the right decisions.

Furthermore, recent research tends to suggest that most victims do not want offenders punished. They are more interested in compensation, reparation and the prevention of further crimes.

Nevertheless, I would want our discretion clearly set out in legislation and regulated by guidelines to prevent abuse. The Code we have at present would provide a natural basis for any future guidelines. In addition, one would have to accept both internal and external inspection of our decisions to ensure that the guidelines were being observed.

Alternatives to Prosecution

In discussing alternatives to prosecution the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders that met in Havana in August 1990 adopted the following statement:

"In accordance with National Law, Prosecutors shall give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally, or diverting criminal cases from the formal justice system, with full respect for the rights of the suspect(s) and the victim(s). For this purpose, States should fully explore the possibility of adopting diversion schemes not only to alleviate excessive Court loads, but also to avoid the stigmatization of pre-trial detention, indictment and conviction, as well as the possible adverse effects of imprisonment.

In Countries where Prosecutors are vested with discretionary functions as to the decision whether or not to prosecute a juvenile, special considerations shall be given to the nature and gravity of the offence, protection of society and the personality and background of the juvenile. In making that decision, Prosecutors shall particularly consider available alternatives to prosecution under the relevant Juvenile Justice Laws and Procedures.

Prosecutors shall use their best efforts to take prosecutory action against

juveniles only to the extent strictly necessary."

We are conscious of and greatly appreciate this guidance. It will be taken fully into account when we consider the discretionary powers of the CPS in England and Wales. The sentiments expressed by the U.N. Congress should find support throughout the world.

Other Possible Future Developments

I have gone into considerable detail on some of the principal changes that might affect the Crown Prosecution Service. Time will not allow me to devote the same time to other possible developments, although there are several other matters of interest to the CPS currently being debated. Here are a few of them.

(1) Juveniles

The prosecution of juveniles is the responsibility of the Crown Prosecution Service. However, nearly 70% of juvenile offenders are formally cautioned by the Police at present without any involvement on the part of the CPS. The Police do consult other agencies that have the care of juveniles before cautioning or recommending a prosecution to us but the CPS is not normally involved in these procedures. Since particular attention is paid to the welfare of young people great care is taken to divert them from the Criminal Justice System if at all possible. Bearing in mind the role I have suggested for the CPS in the future I believe the CPS must become involved at a very early stage when proceedings against juveniles are being contemplated. As in other spheres, I do not believe that it is right for the Police to take responsibility for cautioning or charging offenders, particularly juveniles, since this is in conflict with the *raison d'être* of the CPS as well as being in conflict with the investigative role of the Police.

(2) Rights of Audience

Many of you will know that the legal pro-

fession in England and Wales is divided into Barristers and Solicitors. Only Barristers at the Private Bar have a right of audience in the Crown Court and in the Higher Courts. All lawyers have rights of audience in the Magistrates' or lower Court. Approximately 1,500,000 persons are prosecuted every year in the Magistrates' Court by the CPS and only 150,000 in the Crown Court. However, the Prosecution of persons in the Crown Court can only be conducted by Barristers at the Private Bar and 25% of the total annual running costs of the CPS are attributable to these cases.

It is a source of great disappointment and some annoyance to many in the CPS that our own lawyers cannot appear in the Crown Court and prosecute to a conclusion those cases that they have started in the lower Courts. The rights of audience debate is a complicated one and I do not have time to discuss all the relevant issues. Suffice it to say that it would greatly aid the efficient handling of prosecutions in the Crown Court were we able as a Service to retain responsibility for the conduct of these cases. It would also greatly improve career development and job satisfaction for our very many able lawyers who are presently deprived of the opportunity of appearing as advocates in the Higher Courts.

(3) Lay Presenters

At present, only lawyers have rights of audience even in the Lower Courts. Although there are simple procedures for dealing with very minor motoring offences—called "specified offences"—which avoid the need for the parties to appear or to be represented in Court, consideration is currently being given to the possibility of non-lawyer members of the CPS staff presenting simple straightforward cases of a minor nature. This would enhance the job satisfaction of some of our able staff who are not lawyers and would release the lawyers themselves to deal with more serious work.

(4) The Warning of Witnesses for Court

In 1993 the Crown Prosecution Service will assume responsibility for the written warning of all civilian witnesses who are required to give evidence in criminal prosecutions. At present this is done by the Police and has been the source of considerable friction in the last few years. We will not, however, warn witnesses in person. Where this is required, the Police will continue to be responsible.

Many of us in the CPS regard this as being a logical step for the CPS to take. It is good for us to maintain contact with our witnesses and this change in policy will enable us to establish and maintain closer links with victims who are often the most vulnerable of all those who become involved in the Criminal Justice process and who, very often, do not receive the attention and support that they need.

(5) Disclosure of "Unused Material"

At present there is considerable disquiet that the Police do not disclose to the CPS all the material that they have acquired during the course of a criminal investigation. Since it is rightly the duty of the Prosecution to disclose all the material in its possession to the Defence, the CPS must have the power to demand from the Police the complete investigation file.

I have already said that I, personally, do not wish to see the CPS assume responsibility for criminal investigations but I do wish the Service to have the power to call for all the papers in the possession of the Police and to direct that further enquires be made if the CPS regards this as being necessary.

(6) The Criminal Trial

As you well know the criminal trial in Court in England and Wales is the subject of what is called an adversarial process. Many other Countries, including many on the mainland of Europe, enjoy an inquisitorial system. In some Countries this permits the Prosecutor to become involved in the inves-

tigation and, in some instances, part of the enquiry is conducted by or, in front of, a Judge or Magistrate. Many feel that the inquisitorial system is a better method of reaching the truth about a suspect's involvement in a particular crime. The critics of the adversarial system dislike the fact that the criminal trial becomes a contest between the Prosecution and the Defence, aspects of which run counter to the wider interests of justice. Time will not allow me to develop the arguments on both sides. Suffice it to say that many of us in the CPS would be very reluctant to become involved in the investigation of crime.

Whilst the present adversarial system could be changed for the better we would prefer to retain it. However, I believe the balance is presently weighted too far in favour of the Defendant and certainly some changes could be introduced to make the balance fairer to the Prosecution.

Conclusion

In this paper I have concentrated on the future of the CPS and how its role within the Criminal Justice System might be changed. I have deliberately avoided discussion of other possible changes within the criminal sphere, although some would undoubtedly affect the CPS. For example, any recommendations from the present Royal Commission regarding the powers of the Police would inevitably impact on the CPS.

A number of important matters are being discussed by the various agencies within the Criminal Justice System. One is what is called the "Right to Silence" of a suspect when being questioned by the Police. There is pressure for the Prosecution to be allowed to comment on a suspect's silence in the face of Police questioning which is not permitted at present. This would be an important development and one which could have significant implications for the CPS.

Audio tape recording of all interviews with suspects being questioned about serious

offences has now been made compulsory and several experiments have now begun in which video recording equipment is being used. There is talk of not permitting the interview of any suspects unless a lawyer is present.

All these matters are of great interest to the Prosecution. They are important not only because of their impact on the work of the CPS but because of their impact on the Criminal Justice process as a whole. It is now clear that the CPS is in the very centre of this Process and is already beginning to have a considerable influence upon it. These topics and everything else to which I have referred in this paper must be of interest to Prosecutors, not only as lawyers for the Prosecution but as members of the legal profession and as citizens in our community. They will all impact on the quality of justice and on the performance and administration of the Criminal Justice System. They are, therefore, matters in which Prosecutors must take a very close interest since the kind of System we have will greatly influence our society. Prosecutors must accept their share of responsibility for the Criminal Justice System and the society that we all share.

The Prosecutor performs an important role in the Criminal Justice System of every Country. It is a noble calling. The independent Prosecutor is charged with the responsibility of ensuring that Police investigations are properly carried out, that evidence has been properly obtained, that only those persons are prosecuted against whom sufficient reliable and admissible evidence is available, that the proper procedures of the Court are observed and that those persons who are convicted according to due process of law are sentenced correctly in accordance with the lawful powers of the Court. These responsibilities are carried out in the name of the public whom the Prosecutor represents. He must be free to do his duty without undue pressure from elsewhere. He must remain independent of other agencies in the Criminal Justice System and be fearless in upholding

the right of individuals, whether they be victims, witnesses or offenders. He must at all times act in the interests of justice without fear, favour or discrimination. A Prosecutor plays a crucial role in the administration of justice. He should play his part in ensuring that the system within which he operates, is fair and equitable and affords effective protection to all citizens against crime. A Prosecutor must at all times observe the very highest ethical and professional standards in the performance of his public duty.

The eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders which met in Havana in August 1990 described the role of the Prosecutor in criminal proceedings as follows:

“Prosecutors shall perform an active role in criminal proceedings, including institution of prosecution and, where authorised by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of Court decisions and the exercise of other functions as representatives of the public interest.

“Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the Criminal Justice System.

“In the performance of their duties, Prosecutors shall:

- (a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination.
- (b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect.

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- (c) Keep matters in their possession confidential, unless the performance of duty or the needs of justice require otherwise.
- (d) Consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

“Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.

“Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognised by International Law and, where authorised by law or consistent with local practice, the investigation of such offences.

“When Prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect’s human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.”

I welcome every word of that declaration. As a Prosecutor I encourage those sentiments and I would encourage every Prosecutor in every Country to do the same. Let me end on a very personal note.

Your theme is “The quest for solutions of the pressing problems of contemporary Criminal Justice Administration.” This In-

stitute is dedicated to the prevention of crime and the treatment of offenders. Those are very worthy aims and it is important that everyone of us involved in the administration of Criminal Justice in our countries should not forget them. In my view the Public Prosecutor must adopt these objectives as his own. However, the Prosecutor does not exist in a vacuum. He does not exist to serve his own ends, whatever they may be. The Prosecutor is only part, albeit a very important part of the Criminal Justice process. Nevertheless, he should have the same objectives as the other Agencies in the system otherwise there is a danger that the various Agencies will compete against each other in pursuit of their own individual aims. This is precisely what happened in England and Wales in 1986 after the establishment of the Crown Prosecution Service.

In my Country, we are accustomed to regarding Parliament as being the source of all authority, since it is Parliament that represents the people. I would expect Parliament to establish the framework within which the various agencies and participants in the Criminal Justice System can operate. It is Parliament also that I would expect to set the objectives and the priorities for the Criminal Justice System so that everyone in the system can subscribe to the same objectives and can know the part each has to play in the system as a whole.

My experience is confined almost exclusively to England and Wales but it is difficult to resist the conclusion that our Criminal Justice System is simply concentrating on the symptoms of the disease and not tackling the root causes. More crime is being committed, more crimes are being created and more ways are being devised with which to deal with offenders and yet it all seems to have very little impact on the crime rate which continues to rise. At least, it is reported crime which is on the increase. The volume of unreported crime is simply not known but is often said to be many times that which is reported.

Every civilised Country wishes to reduce the incidence of crime and yet, in all the so called developed Countries of the West, crime continues to rise. Should this be a matter of concern to the Public Prosecutor? Should his role not be simply to enforce the law that his Government has decreed? Certainly he must do that but, in my opinion, that is not enough.

I do not believe that any Prosecutor should be ignorant of the causes of crime. They are well known and seem to be very similar at least throughout the developed world. Crime is not only rising in every developed Country but new ways of offending against what is conceived to be the public good are constantly being devised. A rise of drug related crime is perhaps the most obvious instance of this phenomenon.

There seems to be a growing realisation in many Western Countries that punishment, and especially prison, do not have much impact on patterns of crime or on the reconviction rates. Indeed, in my own Country, the more often a person is sent to prison the more often he is likely to offend. At the same time more and more ways of keeping offenders, especially the young, out of the system are being devised. It is almost as if contact with the formal prosecution process made things worse. Simultaneously with

all these developments, the detection rate declines.

I believe that the fundamental question for all of us, as members of society as well as Prosecutors, is "how can we prevent crime." We should be asking ourselves why is crime a phenomenon that manifests itself almost entirely in the young male, and why is it that some persons commit crime and others do not. The eradication of criminal behaviour may be impossible but we should be able to reduce the incidence of crime and thus reduce the number of investigations, prosecutions and offenders with which all the Agencies in our Criminal Justice Systems have to deal. This would, however, require social and political change and social and political will. Without the will and the courage to introduce the right policies to help prevent crime in the first instance, you and I and all our colleagues in the other Criminal Justice Agencies will be left to do the best we can to cope with the rising tide of crime. We in England and Wales are already obliged, by virtue of the Code for Crown Prosecutors to which I have already referred, to consider the public interest. But we are not alone. I believe all the Agencies desire the public good. It is how we achieve that objective that is so difficult.

International Forfeiture: An Emerging Global Response to Crime

by Joseph M. Whittle*

I am told that there is an old Japanese proverb: "A single arrow is easily broken, but not ten in a bundle." This proverb, I believe, commends the efforts of this Institute and the participants at this seminar. Together, the many nations of the world can win the war against crime. Separated, our countries are destined to be overrun by crime. Not only must our countries unite in fighting crime, we must use a variety of tools. One method, or even a few methods, of law enforcement will no longer suffice. We must employ a wide variety of methods of fighting crime.

In the time I have before you, I would first like to comment briefly on the movement towards international cooperation in law enforcement. Then, I will spend the majority of my time discussing an important tool of law enforcement—"confiscation," or "forfeiture" as we know it in the United States.¹

The Globalization of Crime

Crime, as I think everyone would agree, is no longer a matter confined within the walls of our own countries. Criminals look around them, and see legitimate businesses profiting in international trade. They see countries becoming more dependent upon one another, and they see technology making the world smaller. Criminals realize that their enterprises too can expand by entering the international market. Like parasites, they thrive on new technology, and closer ties between countries. At the same time, criminals see large cracks in international law enforcement. Like barracudas, they hide in these

cracks, striking out only long enough to commit their crimes, and returning to their safe havens.

Trafficking in Controlled Substances

One area of increasing international concern is the trafficking in illegal drugs. It has been estimated that in 1990, the illegal drug trade produced upwards of \$300 billion in proceeds, and that drug traffickers are now using financial institutions in as many as 50 countries to advance the drug trade.² The United Nations, through the 1988 Vienna Convention, underscored the severity of the problem, by reminding us that the large wealth generated by drug trafficking "enabl[es] transnational criminal organizations to penetrate, contaminate and corrupt the structures of government, legitimate commercial and financial business, and society at all levels."³

As a result, the international drug trade has been a topic of concern at meetings of the European Community, the United Nations, and numerous other bilateral and multilateral exchanges. Fifty countries have signed the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which took effect in November 1990. Another fifty-three signatories are in the process of ratification, and many others have declared an intention to ratify as soon as possible.

In signing the 1988 Vienna Convention, these countries recognized that "illicit traffic is an international criminal activity, the suppression of which demands urgent attention and the highest priority."⁴ Signatories covenant to provide the full range of mutual legal assistance in connection with narcotics trafficking and related money laundering in-

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vestigations and prosecutions. Signatories are also obligated to criminalize narcotics trafficking and related money laundering activities, making money laundering an extraditable offense under existing extradition treaties, and setting up a program for the tracing, seizing and forfeiting of the profits of narcotics trafficking in member countries.

Fraud

Another area requiring international attention is fraud. Through my work in Washington, D.C., I am constantly reminded that shysters and con men are moving to the international level, raising the stakes of their "game." They are seeking bigger targets and more money. Even in my own district in Kentucky, in the last few years we have prosecuted at least one foreign subject who defrauded local citizens of thousands and thousands of dollars.

The case involving the Bank of Commerce and Credit International (or "BCCI"), an international corporation doing business in 69 different countries, reminds us that there are still many gaps in the multinational laws governing financial institutions. For years, BCCI officials surreptitiously manipulated its books and records to create the impression and to represent to its depositors and regulators that it was a healthy institution, when, in fact, it was insolvent. However, thanks to an international law enforcement effort, we were able to detect and unravel BCCI's schemes. BCCI and its principal corporate subsidiaries recently pleaded guilty in the United States to criminal charges, and BCCI has agreed to forfeit \$550 million to the United States, to be used in part to compensate BCCI's innocent victims.

This case, and others, make it apparent that we must broaden the net of law enforcement. We must begin by improving our efforts to prevent fraud. We can do this through stricter laws, and greater cooperation among nations. All too often, lax laws or lax enforcement, are a welcome mat for international criminals. In those instances

where fraud cannot be prevented, we must improve our methods of detection by employing some of the principles which the 1988 Vienna Convention uses to fight drug crimes. Countries should, for instance, enhance their laws governing the reporting of monetary transactions. And, the money laundering provisions of the Vienna Convention should be extended to international fraud. In those instances where fraud is committed, the defendants should be stripped of the proceeds of their wrongdoing.

International Efforts against Violent Crimes

Violent crime, once a localized phenomenon, has become an international concern. Violent criminals have fled their home countries, seeking refuge abroad, sometimes using weaknesses in international law as a shield against prosecution. Drug traffickers, who are now plying their trade on an international scale, have become increasingly violent. Terrorists have also moved onto the international scene, skipping from nation to nation, bent on causing death, destruction and fear throughout the world.

Again, our only hope in confronting these trends is international cooperation. Mutual Legal Assistance Treaties are a vital component of this cooperation. Without them, gathering evidence outside our own countries for investigations and trials becomes extremely difficult, if not impossible. The United States Department of Justice has negotiated or extended twenty-one Mutual Legal Assistance Treaties with foreign governments in the past ten years. At the beginning of the 1980's, only one such agreement — with Switzerland — was in effect. The United States is strongly committed to continuing the progress in this area. Ten additional treaties are being negotiated, or will soon be negotiated.

Extradition treaties are another vital component of international cooperation. When they exist, criminals who flee to a distant location can only postpone the day of reckoning; they cannot escape prosecution. The

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United States Department of Justice has updated or negotiated new extradition treaties with a dozen countries in the last decade. Negotiations have been held with seven others, and we will seek authority to conclude at least eighteen more treaties.

I cannot emphasize enough how committed the United States Department of Justice is to opening, and improving avenues of communications and cooperation with our counterparts in other nations. The Attorney General confers regularly with the Ministers of Justice and chief law enforcement officers of European Community countries, Latin American nations and other countries throughout the world. The Attorney General has also conducted bilateral talks with his counterparts in other nations in an effort to focus on particular law enforcement problems such as the need for money laundering legislation or the importance of support for a mutual legal assistance treaty.

The Attorney General has also insured a growing role by the United States in Interpol, the International Criminal Police Organization, which links the national police forces of over 120 member nations. Despite the inherent structural problems in such a large organization, Interpol has proven increasingly effective in a variety of anti-crime roles.

On a regional basis, the United States has taken the lead in sharing its technical resources and expertise with neighbor nations. In exchange, we have sought and obtained access to informational networks and support for United States policies such as crop eradication and substitution. We believe that the marked decline in international violence during the 1980's is attributable in large measure to the cooperation fostered by these contacts.

Another prime example of the benefits of international cooperation in the area of investigating and prosecuting violent crimes, is the investigation and recent indictment of the criminals who bombed Pan American Flight 103, the jetliner destroyed over Scotland in 1988 with the loss of 270 lives. This

investigation involved thousands of investigators from the United States, the United Kingdom, Switzerland, Malta, Germany Sweden and France. And as a result of the team effort and the cooperation among countries, we were able to solve an extremely complicated crime. Recently, two members of a Libyan intelligence organization were indicted in the United States on charges of destroying Pan Am Flight 103.

Yes, as the old Japanese proverb says, "A single arrow is easily broken, but not ten in a bundle." We are many nations. Standing alone, we may be broken. Together, we will prevail.

International Forfeiture

This Japanese proverb has application in another way. Not only must we stand together, but we must use a variety of methods in fighting crime. No longer will one or two arrows suffice. We must use the entire bundle.

One "arrow," which has seen only limited use in some parts of the world, is the "confiscation," or, as we in the United States more commonly call it, the "forfeiture," of criminally-derived proceeds and instrumentalities. The motive for most major crimes is money. Take away the money, and you take away the motive for the crime. Four years ago, the United States Congress, in promulgating new forfeiture provisions, stated that "if law enforcement efforts to combat racketeering and drug trafficking are to be successful, they must include an attack on the economic aspects of these crimes."⁵ The United States Supreme Court has also recognized that forfeiture provisions are an important tool in fighting crime.⁶

Many of the nations represented at this Seminar have, like the United States, ratified, or are considering ratifying, the United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances. This Convention, as I stated earlier, requires each signatory nation to implement a comprehensive, domestic forfeiture

system to divest drug traffickers of their drugs, their materials and equipment, and most importantly, their profits. The Convention also requires signatory nations to enable their "competent authorities to identify, trace, and freeze or seize proceeds, property, instrumentalities . . . for the purpose of eventual confiscation." Finally, the Convention provides means for one signatory nation to request another to trace, seize, and forfeit the proceeds of drug trafficking and drug related money laundering found within the requested nation's jurisdiction.

Legislatures of some of the nations represented at this seminar are now undertaking to implement the provisions of this Convention. They are fashioning comprehensive forfeiture systems, which reach the proceeds of both domestic and foreign crimes. Each nation, in devising laws and procedures, will confront similar questions: What assets should be made forfeitable? What types of offenses should be covered? How will innocent third parties be protected from the unfair application of the forfeiture laws? How will one nation's forfeiture laws successfully interplay with the forfeiture laws of other countries, particularly its treaty partners, to maximize international cooperation?

In the time that remains, I will address these and a few other issues. I will rely mostly on my experience with forfeiture in the United States. This is not to say, however, that the American system is necessarily the best. Indeed, the Vienna Convention makes clear that each nation will have to decide for itself how best to implement the Convention's requirements. Nonetheless, I hope that the United States' experience will be helpful, and that it will provide a springboard for further discussions within your nations.

I. What Type of Assets?

Historically, most American forfeiture laws were designed simply to protect the public treasury. In other words, Congress provided, in enacting certain customs and revenue statutes, that failure to pay the ap-

propriate duty or levy made the item subject to forfeiture. The item became property of the United States Government. Even the First Congress of the United States, which had many issues to face in establishing a new government, enacted forfeiture statutes, making ships and cargoes involved in customs offenses subject to forfeiture.⁷ Thereafter, for the next two hundred years, forfeiture statutes remained basically the same.

Today, forfeiture is used much more broadly, as a tool of law enforcement. During the 1970's and 1980's, Congress greatly expanded the types of property subject to forfeiture. Initially, these statutes concentrated on the property which was used to commit particular crimes. Congress provided, for instance, that property used in violation of federal gambling laws was subject to forfeiture.⁸ Examples of items subject to forfeiture included gambling paraphernalia, gambling equipment, and other items used in an illegal gambling operation. The idea was to strip criminals of the tools of their trade. Congress enacted similar provisions to fight drug crimes, making equipment, vehicles, and other tools of the trade subject to forfeiture. These statutes, by and large, applied both to personal property and real property—any property that was used to facilitate the violation of certain criminal statutes.

These statutes advance law enforcement, not only by depriving criminals of the tools of their trade, but also by reminding the public of what will happen to property used to violate the law. For example, many people consider their expensive car to be their most prized possession. Therefore, if a person uses his car for drug trafficking, take it and then both he and the community receive a strong message that drug dealing will not be tolerated and will not pay. In my office in Kentucky, we have filed forfeiture actions against local business establishments which everyone in the community knew were being used for drug trafficking. These establishments, which were at one time symbols

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of defiance of federal drug laws, thereafter became symbols of our commitment to clean up the community.

Congress recently expanded the scope of forfeiture laws, recognizing that taking away the tools of the trade was not enough, but that criminal enterprises must be stripped of the fruits of their crimes. Therefore, laws were enacted making the *proceeds* of drug crimes subject to forfeiture.⁹ Congress also enacted laws stripping criminals of the proceeds of money laundering. Congress also enacted forfeiture laws aimed at racketeering criminal organizations.¹⁰ These organizations, Congress determined, were particularly dangerous as they often infiltrate, misuse, and destroy legitimate businesses in pursuit of illicit ends. Thus, Congress made both the criminal organizations, and the proceeds of their crimes, subject to forfeiture.¹¹

In the international realm, we can see an evolution in forfeiture laws paralleling the evolution in the United States. In 1987, the International Conference on Drug Abuse and Illicit Trafficking, which ultimately lead to the 1988 Vienna Convention, issued a report noting: "In line with the provisions of article 37 of the 1961 Convention and article 22, paragraph 3, of the 1971 Convention referring to objects directly associated with the commission of a drug trafficking offence, most national criminal or civil legal systems make provisions for the seizure and forfeiture of the tools and devices actually used in committing the offense."¹² However, the report further noted that "[m]ost of such existing provisions . . . cannot be construed as being applicable to assets acquired by means of the proceeds resulting from drug trafficking."¹³ As a result, the 1988 Vienna Convention included provisions specifically making proceeds of drug offenses subject to forfeiture.

This trend should continue. If forfeiture statutes are to be effective, we must deprive criminals of both the tools of their trade, and the profit—their incentive—for committing crimes.

II. What Crimes Should Be the Predicate for Forfeiture?

In the United States, forfeiture is purely a statutory creature. We have no common law, or "court-created" forfeitures. Thus, over the years, Congress has had to determine which crimes should carry a forfeiture provision. This process, having spanned two centuries, has meant that we have no omnibus forfeiture provision which neatly lays out all of the offenses giving rise to forfeiture. Instead, we have over a hundred civil forfeiture statutes, and a number of criminal forfeiture statutes scattered throughout the United States Code.

As I noted earlier, Congress has enacted forfeiture statutes for drug trafficking,¹⁴ money laundering,¹⁵ racketeering,¹⁶ gambling,¹⁷ and pornography,¹⁸ to name but a few. By far the most frequently used statutes, however, are the ones relating to drug crimes and money laundering. As you may know, the United States has monetary transaction reporting requirements. Monetary transactions greater than \$10,000, with certain exceptions, must be reported to the government. Failure to report such a transaction can be a crime, as can the structuring of a transaction to avoid the reporting requirement.¹⁹ Additionally, money involved in an unreported transaction can be subject to forfeiture.²⁰

On the international level, the Vienna Convention, as I have noted, deals only with drug crimes and drug-related money laundering. These provisions are an important beginning, but a nation's forfeiture laws should extend further. If forfeiture is truly going to be successful, it must target all forms of criminal activities which generate significant revenues. If your nation or jurisdiction is now considering the enactment of forfeiture laws, you have an excellent opportunity to make those laws as diverse as the types of criminal activities which threaten the peace of your communities.

III. *What Type of System—Civil, Criminal, Both, or a Hybrid?*

The Vienna Convention does not specify whether property should be forfeited in civil, criminal or some other type of proceeding. Ultimately, each signatory nation will have to make its own determination.

Again, I will refer to my experience in the United States. There, we have both civil and criminal forfeiture statutes, though we use the civil statutes more frequently.

What is the difference between civil and criminal forfeitures? There are a variety of procedural differences, but the main difference is this: civil forfeitures proceedings are *in rem*, that is, they proceed against the property itself; criminal forfeitures are *in personam*, that is, they proceed against a criminal defendant's interest in the property. Civil forfeitures use the civil rules of procedure, and criminal forfeitures use, predominantly, the criminal rules.

There are two types of civil forfeiture proceedings. Both follow a similar procedure. The most common procedure is a "judicial forfeiture," that is, the property is forfeited by a court. In such a case, the government files a civil lawsuit naming the property as the defendant. The government must then prove that it is more likely than not, or in other words, that there is probable cause to believe that the defendant property was used to commit a crime, or that it was proceeds of a crime. Notice of the lawsuit is given and any person having an interest in the property, whether fee simple title or simply a lien, must file a claim.²¹ This claim must be filed within ten days of receiving notice of the complaint, and must describe the nature of the person's interest in the property.²² Thereafter, the person, or "claimant," has 20 additional days in which to file an answer, as one would do in any other civil proceeding. Thereafter, to defend the case, claimant must prove either that the government's allegations of wrongdoing are untrue, or that the claimant has a valid defense (and I will speak on defenses in a moment). Civil for-

feitures do not require that anyone be convicted of a crime. Again, this is because they proceed on the legal fiction that the property itself is guilty. If the government proves its portion of the case, and no one has a valid claim to the property, all rights are transferred to the government. In some instances, where the one person's rights are forfeited, but a valid claim remains, the government and the prevailing claimant are co-owners. In some circumstances, the property will be sold, and the proceeds distributed according to each party's interest. In other cases, some courts have held that the government merely has a lien, which it cannot enforce through sale. In these cases, typically involving marital property, the government gains full title to the property only if the innocent owner dies before the non-innocent owner.

The other type of civil proceeding, besides a "judicial forfeiture," is the "administrative forfeiture." Congress has given certain law enforcement agencies the power to forfeit personal property valued below a specified dollar amount. Under this procedure, the law enforcement agency provides notice of its intent to forfeit the property. The property owner has several decisions: (1) he can accede to the government's wishes; (2) he can plead his case before the agency, or (3) he can file a cost bond and ask for a judicial review. If he seeks a judicial review, the government then files a complaint, and follows the procedure for a "judicial forfeiture," which I described earlier.

Finally, let me describe criminal forfeitures. A criminal forfeiture is part of the criminal prosecution. Without a conviction, the property cannot be forfeited. The process goes something like this: The government obtains an indictment against a person, alleging that the person committed some crime. The indictment then gives notice to the defendant that the government intends to forfeit his interest in a certain parcel of property. A jury then decides whether the defendant is guilty of the crime, and if so, whether the particular parcel of property was

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used to facilitate the crime, or whether it was proceeds of the crime. If so, the defendant's interest in the property is transferred to the government. This, however, does not give the government clear title. The government must still give notice to all other persons holding a potential interest in the property. If these persons file a claim, and lack a valid defense, all right to the property is then transferred to the government.

The clear-cut advantage of the civil statutes is that they provide for forfeiture, regardless of the property's owner. The owner may be dead or a fugitive, yet his property would remain civilly forfeitable since the property itself, and not any individual, is the "defendant" in the suit. Criminal forfeiture, on the other hand, does have at least one advantage, in that many of the criminal statutes allow the government to "substitute assets." That is, if the government can prove, for instance, that a drug dealer generated \$50,000 in proceeds from his crimes, but the government is unable to trace the \$50,000 into a specific bank account, the government can simply substitute an asset worth \$50,000, whether it is cash or something else.

If your nation is considering which approach to take, you might consider a "hybrid," combining some of the best elements of both. Canada, for instance, generally uses a criminal forfeiture system, requiring a conviction before property can be forfeited. However, in those cases where the accused has died or fled, the prosecutor can apply to the court for leave to proceed with the forfeiture even without a conviction.

IV. Property-Focused or Value-Based Confiscation?

The Vienna Convention provides two different approaches for determining what property should be subject to forfeiture. On one hand, member nations may forfeit the "[p]roceeds derived from [the specified criminal] offenses . . ." ²³ This is known as the "property-focused" approach, and requires the government to prove that specif-

ic property was used to violate the law, or was proceeds of a crime. The other approach, frequently called the "value-based" approach, allows the government to forfeit "property the value of which corresponds to that of such proceeds." ²⁴ Under the value-based approach, the government obtains a money judgment based on the value of the criminal proceeds, and the government can enforce this judgment against the defendant's assets, without having to trace those assets to a criminal offense.

The United States, as mentioned earlier, generally uses a property-focused approach, whereby the government must link the property to specific criminal conduct. (Again, this is because civil forfeitures proceed on the fiction that the defendant property itself violated the law.) The United States does have certain criminal statutes which allow the government to use a "value-based" approach. We call these statutes "substitute asset" statutes, because they allow the government to substitute one asset for another. However, the government is restricted in when it can substitute assets. ²⁵ Generally, we must prove that the original assets are unavailable, because the defendant either dissipated them, or transferred them beyond the jurisdiction of the court.

V. Where Should Onus of Proof Be Placed?

The Vienna Convention suggests that member countries "consider ensuring that the onus of proof be reversed regarding the lawful origin of alleged proceeds or other property liable to confiscation, to the extent that such action is consistent with the principles of its domestic law and with the nature of the judicial and other proceedings." ²⁶

In the United States, the government bears the initial burden of proof. The government must establish "probable cause," or "a reasonable ground for belief of guilt, supported by less than prima facie proof but more than mere suspicion." ²⁷ The government may use hearsay to meet its burden. ²⁸ Once the government establishes probable

cause, the burden shifts to the claimant to either disprove the government's case, or prove a valid defense by a preponderance of the evidence.

In criminal forfeitures, the American courts are divided on the government's burden of proof. Some courts require the government to establish its case by a preponderance of the evidence, while others require proof beyond a reasonable doubt.²⁹

VI. What Should Be the Notice Requirements?

Notice to potential litigants is one of the cornerstones of due process. In the United States, the government must provide notice that is "reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."³⁰ Moreover, the rules governing the complaint require the government to plead its case with more particularity than in most civil suits.³¹

In criminal forfeitures, the government must serve actual notice of the forfeiture on the criminal defendant. The criminal rules require the indictment to describe "the extent of the interest or property subject to forfeiture."³² The indictment should also contain "a plain, concise and definite written statement of the essential facts constituting the offense charged."³³

If your nation is drafting forfeiture statutes, you might also consider these issues: Who is entitled to notice? How will such notice be served? Will personal service be required? What provisions will be made to secure default judgments in cases where no one files a claim?

VII. What Defenses to Forfeiture Should Be Recognized?

The Vienna Convention provides that "[t]he provisions of this article shall not be construed as prejudicing the rights of *bona fide* third parties."³⁴ This provision reflects an important concept: that forfeiture laws must be firm, but fair. If the laws are not fair, they will not work. They will only incite the

wrath of the community. Provisions, therefore, must be made to protect the rights of innocent owners.

In criminal forfeitures, this is rather easy. The conviction of the owner is a condition precedent to forfeiture. His acquittal terminates the forfeiture proceedings. Any defense to the crime charged, therefore, is also a defense to the forfeiture.³⁵ For those parties who are not charged in the indictment, such as co-owners or lien holders, special provisions must be enacted. In the United States, the courts will exclude from forfeiture any claim where the claimant demonstrates (1) a legal interest superior to the defendant's or that the claimant is a *bona fide* purchaser, and (2) that the claimant had no reason to believe that the property was used to facilitate a crime.

In civil forfeiture proceedings, however, an acquittal is generally not a defense to forfeiture.³⁶ A criminal conviction is not required because civil forfeitures proceed on the legal fiction that the property itself committed the crime. If one took this fiction to its extreme, however, one could argue that the innocence of the property owner is totally irrelevant.

The United States Supreme Court has recognized that forfeiture would be inappropriate where the property owner did not know of, or consent to, the property being used to commit a crime, *and* the property owner did everything reasonably possible to prevent the property from being used to commit a crime.³⁷ This is a tough standard for a property owner to meet. In one case, the property owner had leased a yacht to persons who turned out to be drug dealers. The police found marijuana on board the yacht, and thereafter, the government filed a forfeiture proceeding. The Supreme Court held, that even though the property owner did not know about the crime or consent to it, the forfeiture was nonetheless valid because the property owner had not done everything reasonably possible to prevent the yacht from being used to commit a crime.³⁸

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Congress has attempted to allay the fears of innocent property holders, such as banks, absentee owners, and others, by including "innocent owner defenses" within the forfeiture statutes. These provisions are generally more favorable to the property holders, than is the Supreme Court standard. Thus, the courts will recognize the right of a person who proves by a preponderance of evidence that he did not know of, or did not consent to the property being used to violate the law.³⁹

The Department of Justice has added to the statutory and common law protections, by enacting regulations to expedite the handling of claims asserted by innocent lienholders, and by providing an administrative procedure for the remission or mitigation of property.⁴⁰

What about other potential defenses? In the United States, the death of the property owner is not a defense to a civil forfeiture action.⁴¹ Similarly, in a drug forfeiture proceeding, "it is immaterial whether the amount . . . is relatively small."⁴² The courts have also held that property that was seized illegally can still be forfeited so long as there is untainted evidence to establish probable cause.⁴³ A claimant might have a defense, however, if the government seized the property, and then waited an unreasonable length of time before instituting a forfeiture proceeding.

VIII. How to Ensure Availability of the Assets for Forfeiture?

If forfeiture laws are to be effective, the government must have some means of preventing criminals from dissipating or hiding their assets prior to a final order of forfeiture. Thus, the Vienna Convention requires member nations to "enable . . . [their] competent authorities to . . . freeze and seize proceeds, property, instrumentalities or any other thing [enumerated in the Convention] . . . for the purpose of eventual confiscation."⁴⁴

In the United States, in civil proceedings, we petition the court for what is called a

"warrant of arrest *in rem*." This warrant, issued upon a showing of probable cause, allows the government to restrain the property while the forfeiture is litigated.⁴⁵ In criminal proceedings, prosecutors can seek an injunction against an on-going fraudulent business,⁴⁶ and they can petition the court for a restraining order, which, like the warrant of arrest, prevents dissipation of the assets.⁴⁷

IX. What Kind of Asset Management System?

The Vienna Convention is silent as to what, if any, measures the government should take to preserve property which has been seized for forfeiture or property which is pending disposal upon forfeiture. In the United States, we have found that it is essential to provide for the proper management of forfeitable or forfeited assets. Great care must be given to management of such assets as ranches, houses, horses, and business firms seized for forfeiture. If improperly managed these assets may be useless, or their value greatly diminished, by the time the court grants forfeiture. Indeed, in some cases, a government may find itself liable for the damage caused by a neglected asset under its control which has become a public nuisance or danger.

Fortunately, the United States Marshals Service has performed the asset management function ably in our country. Nations enacting a forfeiture system should not disregard this often overlooked, but crucial, aspect of forfeiture. Such nations would do well in creating or designating a corps of experienced property managers.

X. Creation of an Asset Forfeiture Fund?

Again, the Vienna Convention does not speak of the creation of an assets forfeiture fund. That is, a government account where the proceeds of successful asset forfeiture cases are deposited to be used for specific purposes, such as law enforcement training, equipment, and personnel support. Our Assets Forfeiture Fund, which was created in 1984, has had a dramatic impact on the de-

velopment of the forfeiture program in the United States. Since 1985, deposits into the Fund have increased twenty-fold, and this despite, or perhaps because of, the fact that during the same period the United States has shared forfeited assets with other cooperating domestic and foreign jurisdictions, thereby increasing immeasurably inter-jurisdictional cooperation. What the success of the Fund demonstrates, I believe, is that an investment in asset forfeiture law enforcement pays off. Forfeited assets can help pay for the war on crime, and result in even additional and bigger cases.

XI. What Kind of International Forfeiture Assistance Will Be Offered?

Recognizing the diversity of legal systems among nations, the Vienna Convention provides that a requested nation may seek the forfeiture of property at the request of another nation in one or both of two ways.⁴⁸ First, the requested country may initiate its own forfeiture proceeding against the property in question, drawing upon the evidence provided by the requesting country. Alternatively, the requested nation may give full faith and credit to a forfeiture order issued by the competent authorities of the requesting nation.

For our part, the United States, in cases of foreign drug violations, can proceed civilly against drug trafficking proceeds found in the United States.⁴⁹ Thus, upon receiving a request from one of our Vienna Convention partners, the United States can, provided there is evidence to warrant it, file a civil complaint against property found in the United States which was generated by a foreign drug trafficking offense. Indeed, the United States can use a certified foreign forfeiture order against such property as its initial showing of probable cause to initiate the action. The United States' approach is an example of one nation's attempt to accommodate its legal system and traditions to the demands of increased international forfeiture cooperation. I am certain that your countries

have, or will, meet that same challenge with equal or greater success.

The Vienna Convention also encourages member nations to enter into bilateral agreements providing for mutual forfeiture assistance. In the last few years, the United States has entered into a number of such mutual legal assistance treaties "MLATs" with other nations. Unlike the Vienna Convention, these "MLATs" provide for cooperation beyond drug offenses. In most cases, they explicitly provide a means through which one nation may request another to (1) immobilize or freeze assets; (2) request another to initiate a forfeiture action against the property in question; (3) repatriate assets located abroad so that they can be forfeited in the requesting nation; or (4) request the other nation to enforce a forfeiture judgment issued by a court in the requesting nation.

We shall see more and more of such bilateral and multinational initiatives in the coming years. Such initiatives must also provide, as does the Vienna Convention, that domestic bank secrecy laws must not serve to block international forfeiture cooperation.

Simply put, the international law enforcement community realizes that, without such cooperation among all nations affected by the scourge of drugs and other organized crimes, criminals can all too easily retain their wealth, thereby ensuring the success of their endeavors.

XII. International Asset Sharing?

The Vienna Convention provides that forfeited assets should be disposed of according to the domestic laws of the nation which obtained the forfeiture of the assets.⁵⁰ The Vienna Convention, however, suggests that countries consider sharing forfeited assets with other member countries.⁵¹

The United States Department of Justice believes that reciprocal asset sharing promotes greater international forfeiture cooperation.⁵² Investigative agencies everywhere face heavy caseloads, competing demands for investigative attention, and scarce re-

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sources. International sharing should become an effective means to ensure that investigators will give the same high priority to international investigations that they give to their wholly domestic cases.

International asset sharing is not, of course, a means through which countries may "buy" each other's cooperation. The United States is fully committed to the international forfeiture effort, whether there is international sharing or not. We should all recognize, however, that the prospect of sharing will spur greater cooperation, and thus deprive drug traffickers and other organized criminals of their illicit holdings.

Conclusion

Forfeiture is fast becoming one of the most universal and important law enforcement techniques. Savvy drug traffickers and other organized drug criminals, however, constantly improve their methods of hiding and sheltering substantial illicit wealth outside the jurisdiction where such wealth was generated. For that reason, our efforts must not stop at our national borders. Rather, working together, we must vigorously pursue the forfeiture of assets, regardless of where they are secreted.

Forfeiture aims to take from the criminal what he or she has illicitly gained and return it to the community in the form of enhanced law enforcement protection. To realize this aim fully, our efforts must now be global.

In this way we can make our world a smaller place for felons, and our country a better place for the rest of us.

References

1. My thanks to the following persons for their valuable assistance in preparing this address: William F. Campbell, Assistant U.S. Attorney, Western District of Kentucky, Douglas Frazier, Deputy Director, Executive Office for U.S. Attorneys, George Proctor, Director, and Juan Marrero, Attorney, Asset Forfeiture Office, Criminal Division, U.S. Department of Justice.
2. Int'l Narcotics Control Strategy Report, U.S. Dept. of State Bureau of Int'l Narcotics Matters, Mar. 1991, at 335.
3. Preamble, United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988.
4. Preamble, United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988.
5. H.R. Rep. No. 98-1030, 98th Cong. 2d Sess. 4, reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3374-75.
6. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 417 U.S. 663, 686-87 (1974) ("Forfeiture of conveyances that have been used—and may be used again—in violation of the narcotics laws fosters the purposes served by the underlying criminal statutes, both by preventing further illicit use of the conveyance and by imposing an economic penalty, thereby rendering illegal behavior unprofitable").
7. Act of July 31, 1779 §§ 12, 236, 1 Stat. 39, 47 and Act of August 4, 1970, §§ 13, 22, 27, 28, 67, 1 Stat. 157, 161, 163, 176. See generally Smith, D., *Prosecution and Defense of Forfeiture Cases* (1987).
8. 18 U.S.C. § 1955(d).
9. See 21 U.S.C. § 881(a)(6) (1978).
10. 18 U.S.C. § 1963.
11. See 18 U.S.C. §§ 1961, 1963.
12. "Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control," United Nationals International Conference on Drug Abuse and Illicit Trafficking 61 (June 26, 1987), reprinted in, 26 Int'l L. Materials 1637, 1698 (1987).
13. *Id.* at 62, 26 Int'l L. Materials at 1696-97.
14. 18 U.S.C. §§ 853, 881, & 981.
15. 18 U.S.C. §§ 981, 1956; 31 U.S.C. § 5324.
16. 18 U.S.C. §§ 1961, 1963.
17. 18 U.S.C. § 1955(d).
18. 18 U.S.C. §§ 2253, 2254.
19. 18 U.S.C. §§ 5322, 5324.
20. 18 U.S.C. § 981.
21. The property interest, however, must be "real and substantial." Bare legal title resulting from a sham transaction is insufficient. See e.g., *United States v. 526 Liscum Dr. Dayton. Montgomery County*, 866 F.2d 213, 217 (6th Cir. 1988); *United States v. One 1982 Porsche 928*, 732 F. Supp. 447, 451 (S.D.N.Y. 1990).

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22. The applicable rule states: "The claim shall be verified on oath or solemn affirmation, and shall state the interest in the property by virtue of which the claimant demands its restitution and the right to defend the action. If the claim is made on behalf of the person entitled to possession by an agent, bailee, or attorney, it shall state that the agent, bailee or attorney is duly authorized to make the claim." Rule C(6), Supp. Rules for Certain Maritime and Admiralty Claims.
23. Article 1(a).
24. *Id.*
25. 18 U.S.C. § 982; 21 U.S.C. § 853(p); *see e.g., United States v. Ginsburg*, 773 F.2d 798, 801 (7th Cir. 1985); *United States v. Conner*, 752 F.2d 566, 576 (11th Cir. 1985).
26. Article 7.
27. *United States v. \$22,287.00 United States Currency*, 709 F.2d 442, 446-47 (6th Cir. 1983). This is the same standard use for obtaining search warrants. *United States v. One 1975 Mercedes 280S*, 590 F.2d 196, 199 (6th Cir. 1978).
28. *United States v. 1964 Beechcraft Baron Aircraft*, 691 F.2d 725, 728 (5th Cir. 1982).
29. *Compare United States v. Sandini*, 816 F.2d 869 (3d Cir. 1987) (preponderance) with *United States v. McKeithen*, 822 F.2d 310, 312 (2d Cir. 1987) (beyond reasonable doubt).
30. *See, e.g., United States v. One Parcel of Real Property*, 763 F.2d 181, 182-83 (5th Cir. 1985); *accord Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).
31. Rule E(2), Supp. Rules for Certain Maritime and Admiralty Claims ("[T]he complaint shall state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading."); *see also*, Rule C(2), *Id.*
32. Fed. R. Crim. P. 7(c)(2).
33. Fed. R. Crim. P. 7(c)(1).
34. Article 8.
35. The American rules also provide that prior to an indictment, a property owner can seek return of his property if he establishes (1) that he is entitled to lawful possession, and (2) that the property was seized illegally. Fed. R. Crim. P. 41(e).
36. *See generally, One Blue 1977 AMC Jeep CJ-5 v. United States*, 783 F.2d 759, 762 (8th Cir. 1986). Some states, such as Kentucky, have enacted laws requiring a conviction before the state government can forfeit real property.
37. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 417 U.S. 663, 690-91 (1987).
38. *Id.*
39. Willful blindness to an illegal use, however, will not bar forfeiture. *See e.g., United States v. One Parcel of Real Estate*, 721 F. Supp. 287, 290 (S.D. Fla. 1989), *aff'd* without opinion 914 f.2d 268 (11th Cir. 1990).
40. 28 C.F.R. § 9.3.
41. *In the Case of One 1985 Nissan 300ZX*, 889 F.2d 1317 (4th Cir. 1989).
42. *United States v. One 1975 Mercedes 280S*, 590 F.2d 196, 198 (6th Cir. 1978).
43. *United States v. \$252,771.48 in U.S. Currency*, 734 F. Supp. 254 (N.D. Tex. 1990).
44. Article 2.
45. In the case of perishable goods, we seek an interlocutory sale, and hold the proceeds in an escrow account pending resolution of the forfeiture proceeding.
46. 18 U.S.C. § 1345.
47. The procedures governing criminal forfeiture proceedings also provide for pre-indictment restraints (with or without notice to persons appearing to have an interest in the property) against property that will be listed in the indictment. However, such restraints are of limited duration and require an evidentiary showing by the government that, *inter alia*, the government will prevail on the issue of forfeiture, the restraint is necessary to prevent the destruction or alienation of the property, and the need to preserve the property through a restraint order outweighs the hardship on any party against whom the order is to be entered. *See* 18 U.S.C. § 1963(d); 21 U.S.C. § 853(e).
48. Article 4.
49. 18 U.S.C. § 981(a)(1)(b).
50. Article 5.
51. The United States has three statutory bases for transferring forfeited assets to countries which facilitate or make possible a successful forfeiture action under United States law, *i.e.*, 18 U.S.C. § 981(i), 19 U.S.C. § 1616(c)(2), and 21 U.S.C. § 881(e)(1)(E).
52. The concept of international sharing was bor-

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rowed from our highly successful domestic equitable sharing program. Sharing among law enforcement jurisdictions creates an incentive for further cooperation and, hence, more investigations, seizures, forfeiture actions, and ultimately, the generation of even more funds to be distributed. Although over \$200 million

in forfeited cash and property was equitably shared with state and local law enforcement agencies in the United States in fiscal year 1990 alone, each year more is deposited in the U.S. Department of Justice Assets Forfeiture Fund than in the previous year.

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Prison Overcrowding and Its Countermeasures, Strategies for a Wider Use of Non-Custodial Measures

by H.G. Dharmadasa*

Introduction

Prison overcrowding is one of the most pressing problems faced by the Criminal Justice Administration in many countries. This is not a phenomenon observed only in the developing nations. Several developed countries too are facing the problem of acute prison overcrowding. Overcrowding of prisons, one may say is a relative term and would have different meanings in different countries. We, in Sri Lanka are talking of a 300 to 500 percent overcrowding while Australians would talk of a 4 to 5 percent overcrowding. However, the criteria for the measurement of overcrowding in prisons is generally selected against the background of the United Nations Standard Minimum Rules on accommodation for prisoners. Rule 10 stipulates that "All accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard be paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation."

Therefore, prison overcrowding does not mean only a problem of space. In most countries, it is a problem of gross inadequacy of essential facilities for sanitation, lack of lighting, heating and ventilation.

The European Committee for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment after examining several Prisons in England in their report made several observations regarding some

of its prisons. The report had painted a picture of Brixton, and Leeds prisons, two of the main prisons in the country and stated that conditions there were inhumane and degrading. It reported that cells in these prisons designed for one inmate frequently held three. It said, where this occurred prisoners were practically confined to their beds with buckets and washing bowls taking up most of the floor space. The Committee had commented that overcrowding had reached "an outrageous level" at Leeds Prison which was holding 1,205 inmates—merely double the Home Office certified normal accommodation level. The report added that "prisoners were provided with a bucket with a lid for relieving themselves when locked up in the cell. Prisoners made every effort not to defecate in front of their cell mates but on occasions were "caught out." It further said, "on occasions prisoners carrying their buckets were forced to squeeze past others carrying food trays on narrow walkways. This is both unhygienic and uncivilised."

Overcrowding of Prisons is a problem in the United States too. The September 1991 issue of the National Institute of Justice gave the following statistics of the United States Prison population.

- (a) Nationwide about 1 in 50 persons is under the control of correctional authorities.
- (b) The Nation's prison population essentially doubled during the 1980s to more than 600,000 people. If you include the jail population that is a million people behind bars.
- (c) The growth of America's prison population is over 10 times that of general population.

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What I have described to you were situations and conditions about prison population in two of the most developed countries in the world. It is needless for me to go into the details in less developed nations.

With the rapidly changing economic and social conditions, rapid urbanization, large-scale migration to cities and various other contributory factors crime has increased in many countries, specially in the developing world. Better and improved policing facilities, application of modern technology in investigations and detections have increased the rates of crime detection resulting in more numbers coming into prisons. However, in many countries the number of correctional institutions and the accommodation has not kept pace. This has been one of the causative factors for the overcrowding of prisons.

Overcrowding—The Effects

Many countries, specially among the poorer nations are facing difficulties in observing the Standard Minimum Rules for the Treatment of prisoners due to increasing prison populations and the resulting overcrowding. Overcrowding causes severe strain on already limited essential services resulting in the deprivation of basic necessities for human living. Classification and segregation become difficult under overcrowded conditions. Very often prisoners of different age groups, hardened criminals and marginal offenders, convicted and unconvicted, long and short term offenders have to be housed in the same institutions. In Sri Lanka, the overcrowding of remand jails became so acute that a section of prisons meant for convicted offenders had to be set apart for remand prisoners. Overcrowded conditions not only make adverse conditions for the inmates but also for the prison officers. Maintenance of discipline becomes difficult when different categories are put together and when the inmates to officer ratio is low. This brings down the morale of the prison officer and in some instances, such situations could

result in the officer's position being insecure. Therefore, one of the worst effects of overcrowding is the deterioration of staff inmate relationship.

The damage done to a person when imprisoned is immeasurable. Prisons must be judged by what they are and not what they ought to be. Prisons cannot prepare men for a good social life in society. Repressive regimentation of the prison cannot teach the prisoners how to direct their activities in constructive ways. (There are rules for every little thing in the prison—waking up, washing, eating, writing letters, meeting visitors, working, leisure and even sleeping). The demand for the conformity to rules and regulations repress all efforts at constructive expression. Work without the operation of economic motives, motivation by fear of punishment rather than by hope of reward, cringing rather than growth in manliness kill the spirit in man.

The celebrated Oscar Wilde has said:

“The Vilest
deeds like prison weeds
bloom well in Prison Air,
It is what is good in man
that wastes and withers there.”

(Wilde himself was a prisoner for several years).

When prisons are overcrowded and living conditions and relationships with staff deteriorate the situation is worse.

The problem of overcrowding of prisons could be better understood by examining the two main divisions of prisoners, the convicted prisoners and the unconvicted (remand or awaiting trial) prisoners. Some countries are faced with the problem of overcrowding of convicted prisoners while others are faced with the problem of overcrowding of remand prisoners. There are also other countries such as Sri Lanka that are burdened with the problem of overcrowding of both categories of prisoners. Examination into these two

main divisions enables us to identify the problem areas and suggest possible solutions.

Overcrowding of Unconvicted Prisoners

Overcrowding of unconvicted prisoners or remand prisoners is experienced by many

countries, specially in the Asian region. The following two tables indicate the annual admissions of convicted and remand prisoners and their daily averages in Sri Lanka.

Table 1 indicates that there is an average of 1 to 5 convicted remand ratio on the annual admissions and more than 80% of annual admissions are remand prisoners. Table 2 would show that the remand popula-

Table 1: Annual Admissions of Convicted and Remand Prisoners (1981-1990)

Year	Admissions			Ratio			Remandees % of Total Inmate Popula- tion
	Convicted	Remandee	Total	Convicted	Remandee	Total	
1981	11,086	63,952	75,038	01	06	07	85.0
1982	9,543	59,850	69,393	01	06	07	86.0
1983	9,532	65,146	74,678	01	07	08	87.0
1984	12,983	65,669	78,652	01	05	06	83.0
1985	13,269	57,245	70,514	01	04	05	81.0
1986	14,617	61,952	76,569	01	04	05	81.0
1987	13,355	59,452	72,807	01	04	05	82.0
1988	8,299	40,216	48,515	01	05	06	83.0
1989	8,014	38,559	46,573	01	05	06	83.0
1990	14,128	57,095	71,223	01	04	05	80.2

Table 2: Daily Average of Convicted and Unconvicted Prisoners (1981-1990)

Year	Daily Average of Convicted	Daily Average of Remandees	Total	Ratio of Daily Average			Percentage of Remandees
				Con- victed	Re- mandees	Total	
1981	4,211	5,991	10,202	01	1.4	2.4	59.0
1982	3,843	5,720	9,563	01	1.5	2.5	60.0
1983	3,909	7,311	11,220	01	1.9	2.9	65.0
1984	4,252	7,441	11,693	01	1.7	2.7	64.0
1985	4,690	6,472	11,162	01	1.4	2.4	58.0
1986	5,274	6,177	11,451	01	1.2	2.2	54.0
1987	5,346	6,834	12,180	01	1.3	2.3	56.0
1988	4,415	6,175	10,590	01	1.4	2.4	58.0
1989	2,798	5,079	7,877	01	2.0	3.0	65.0
1990	3,871	6,222	10,093	01	2.0	3.0	61.6

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tion is about 60 percent of the daily average. This by any standard is a very high ratio of remand prisoners.

There are several contributory factors for the increasing number of remand prisoners. Common among them are "Laws delays" or delays in bringing remand prisoners to trial, excessive bail or inadequate use of bail. In the Sri Lankan Prisons, it is common to see persons lingering in jail for their inability to furnish the bail ordered by the Courts. There are also persons on remand either too ignorant or too poor to retain counsel or to make applications for bail.

In many developing countries remanding of suspects is used as a punitive measure by the Police. This is specially so in countries whose detection rates and successful prosecution rates are poor. There is also unnecessary and excessive remanding of persons often abusing the power to remand. In Sri Lanka we have experienced remanding of Vagrants, Beggars, Drunkards, persons of unsound mind, ticketless travellers, petty thieves, prostitutes and drug addicts. Keeping such persons in remand custody for long periods is a total waste of human life and prison accomodation.

Overcrowding of Convicted Prisoners

Due to absolute lack of tolerance to every kind of deviance many countries still carry prison sentences for far too many offences. The social systems in these countries have

a general tendency to rely too heavily on the law and the legal process in the search for solutions for their pressing social problems. The legal systems and the law enforcement authorities of these countries overemphasise imprisonment as the most powerful weapon against crime. The assignment of a variety of human conduct to the Criminal Law and its process has resulted in a problem of "overcriminalization." As a result Courts resort to imprisonment of offenders far too often. In Sri Lanka, this trend could be observed from the large number of prisoners sentenced to prison for short terms. On the average about 50 percent of all offenders sentenced to prison are sentenced under 6 months and about 80 percent are under one year. It is obvious that Judges passing short sentences think of the punitive aspect of the sentence only as such short sentences do not serve to rehabilitate the offender or protect the society.

Another significant feature causing overcrowding of convicted prisoner population in Sri Lanka is the prison sentences passed on the fine defaulters. In the recent years, in Sri Lanka, the sentencing of fine defaulters to prison has shown a tremendous increase. At the beginning of the decade in 1981 only 27 percent admitted to prison were fine defaulters; in 1990 it was 81 percent. (i.e. 11,504 of the 14,128 admitted were fine defaulters).

Sentencing of drug offenders and illicit liquor (Excise) offenders to prison too is a

Table 3: Direct Admission of Convicted Prisoners According to Narcotic Drugs and Excise Offences (1986-1990)

	Year									
	1986	%	1987	%	1988	%	1989	%	1990	%
Narcotic Drug	3,722	25.5	3,642	27.3	2,337	28.2	3,091	38.6	6,654	47.1
Excise	3,593	24.6	2,970	22.2	786	9.5	1,275	15.9	2,248	15.9
Other Offences	7,302	49.9	6,743	50.5	5,176	62.4	3,648	45.5	5,226	37.0
Total Admission	14,617	100.0	13,355	100.0	8,299	100.0	8,014	100.0	14,128	100.0

major contributory factor for the increase of convicted prison population in Sri Lanka.

This table indicates that on the average more than 50 percent of prison admissions were for narcotic drug and illicit liquor offences. In 1990, the figure was 63 percent.

In their enthusiasm and eagerness to fight the drug menace, some countries such as Sri Lanka have revised their drug and alcohol laws or introduced new laws to enhance the punishments on the offenders. Longer prison sentences and heavier monetary fines on these offenders have contributed to the overcrowding situation in prisons. However, unfortunately most of those who are convicted under these laws are the drug addicts and not the "King Pins."

The populations in many developing countries have increased many times during the last few decades, but there have been very few or no new prison facilities constructed in the past several years. In Sri Lanka except for two, all other closed prisons are over a hundred years old. Built in the latter part of the 19th century when the population of the country was less than three million this prison system cannot meet the demands of the present day. Today the population of Sri Lanka is 17 million and the country is plagued with the problem of terrorism and narcotic drugs. In most countries like Sri Lanka, construction of prisons take a very low position in the total socio-economic development plan. On the side of the social development the emphasis is on construction of school buildings, hospitals and development of housing, etc. and not prisons. Therefore prisons continue to be overcrowded.

How to Overcome Prison Overcrowding

Prison services in many countries do not have any control over the number of prisoners coming into their system. Therefore, the solutions to the problem of prison overcrowding could not be found within the Penal Administration alone. It is a problem that has

its roots in government policy, courts, prosecutors and above all community attitude. Therefore, solutions to the problem have to be sought through an integrated approach involving all the branches of the Criminal Justice Administration and the community.

Countermeasures to overcome the overcrowding of remand and convicted prisoners have to be examined separately as principles involved are different.

Reducing of Remand Population

As I have mentioned earlier far too many persons are ordered to be kept in remand custody in some countries. For example, in Sri Lanka for every single person convicted and admitted to prison there are five persons admitted as remand prisoners. In 1990, the number of convicted prisoners admitted to prisons were 14,128 while the remand admissions were 57,095. Our studies also have shown that only about 20% of those remanded are finally sentenced to prison. It is obvious that a great number of these remand orders could have been avoided.

Studies have shown that many of the crimes with which people are charged are minor. The potential exists to have many of these people remain in their communities awaiting trial rather than imprisoned. It can be done through the efforts of the Judges and Police. They must be trained in the proper use of remand. The Judges and Magistrates should closely examine the cases and decide on the necessity to remand.

It is necessary to take bold and courageous steps where necessary to reduce remanding of persons. As some countries have already done, policies must be developed and enabling legislation introduced where necessary to encourage the use of summons in lieu of arrest and detention. Policy should make provision for certain categories of offences for which a Police officer should be required to issue summons in lieu of arrest and detention depending on the character and conduct of the offender. Provision also must be made

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to give discretionary authority for Police to issue summons in other cases where Police have reasons to believe that the accused will respond to the summons and does not pose a threat to the society or himself. When an arrest is made by a Police officer there must be provisions made authorising supervising officers to re-evaluate the decision to arrest and to issue summons in lieu of detention where desirable.

Criminal Justice Policy in the countries must also take steps encouraging Magistrates and Judges to issue summons in lieu of arrest warrants in all cases where the Magistrate or the Judge has reasons to believe that accused will respond to summons. A requirement must be made that a Judicial officer issuing a warrant of detention state his reasons for doing so in writing. Some countries have already included such provision into their legislation.

The Prosecutors or the Police officials who apply for such warrant of detention should be required to accompany the request with a brief report on accused person's personal background, trustworthiness, and his stability in the community. Implementation of such procedures will ensure that judicial officers issuing warrants of detention have a certain amount of basic information so that he can make an intelligent choice between alternatives.

In many countries delays in the prosecution procedures cause longer stays in prisons for the remand prisoner. Delays in obtaining medical reports, analyst reports, experts reports, etc. essential for evidence, absence of key witnesses and officers assisting the prosecutors, lawyers requesting postponements on various grounds, heavy case loads in courts are often the causes for delays in disposing of cases, specially in the lower courts. Therefore, measures have to be taken to speed up prosecution and trial procedures to avoid long periods in detention awaiting prosecution and trial.

This problem has been examined by expert committees in various countries. Some

of them have suggested setting up mandatory time limits for the completion of investigation and prosecution. Some jurisdictions have already set mandatory time limits in their statutes. Time limits also could be set regarding the period that a person could be kept in remand.

It is suggested that hard bail laws existing in some countries be relaxed and liberalised in order to send more persons on bail. In the Sri Lankan remand prisons it is common to see remand prisoners languishing in jails due to their inability to furnish the heavy bail ordered on them. Judges tend to order bail on the assessment of the gravity of the offence and not taking account of the offender's ability to furnish it.

In 1990, Sri Lanka introduced the "Release of Remand Prisoners Act" under which the following reliefs were granted to certain categories of remand prisoners through the courts. Most of these are remand prisoners whose alleged offences are considered non-dangerous.

- (1) When a person who had been granted bail but continued to remain in remand on the expiry of one month due to his inability to furnish bail is produced before the Court, remanding such person and the court releases such person upon his executing a bond without sureties for his appearance in Court.
- (2) Where a person has been on remand for over three months and if no proceedings have been instituted against such person, the court releases such person on his executing a bond without sureties.
- (3) Where a person has been in remand for over a year and the trial against him has not commenced such person is released upon his executing a bond for his appearance in Court. Even if the trial has commenced the Court may release such person on his executing a bond unless the Court has good and sufficient reasons to be recorded that should not be so released.

In most developing countries many remand prisoners spend time in jail due to their utter ignorance and their inability to retain counsel. Educating the remand prisoner about his right to bail, etc. is a necessity in such instances. Facilities for legal aid must be arranged for these categories. A properly organised well conducted Legal Aid System could help to reduce the remand population in Prisons.

Reducing the Overcrowding of Convicted Prisoners

Diversion from the Criminal Justice System and Modification of Penal Sanctions

It is an accepted fact that the existing system has failed to achieve reformation in a large number of cases. It is discriminatory in nature and it is costly in relation to outcome. Community interest, cost and personal values also contribute to the argument of diversion.

Action should be taken to divert the mentally ill, alcoholics, drug addicts and victimless sex offenders from prisons to hospitals and treatment centres. Sociologists have argued that many countries carry prison sentences for far too many offences. There is strong pressure from certain segments of the society to decriminalize abortion, homosexuality, vagrancy, drunkenness, etc. They argue that the Penal Codes must be revised in order to remove prison sentences for certain offences and to introduce other measures in keeping with the changing times.

In Sri Lanka I have been vehemently arguing against the imprisonment of drug addicts, alcohol offenders and fine defaulters.

Until 1984 imprisonment of drug offenders (most of them addicts) did not cause any problem to the prison authorities in Sri Lanka. In that year only 13.7 percent of the total convicted prisoners were drug offenders. This figure steadily increased and reached 47.1 percent in 1990. An analysis done about the convicted drug offenders revealed that about 95 percent of them were convicted for

possession of very small quantities of drugs and that the majority of them were victims of the drug habit needing help to overcome the problem. I have argued that this majority should have been found other alternatives such as treatment and rehabilitation centres. If this is done prison population would drop by substantial numbers.

One other significant character we observe in our statistics is the large number of fine defaulters sentenced to prison. Those are offenders whom the courts had decided as not deserving prison sentences according to the nature of their offences and ordered fines. But later they have been sentenced to prison owing to their inability to pay the fine. It is admitted that there should be a threat of a punishment to the fine defaulter but why should it be invariably a prison sentence? Why couldn't it be another alternative?

It was pointed out to the government in Sri Lanka that more than 80 percent of those convicted prisoners in recent years were fine defaulters, and that when compared with other nations in the world this was an abnormal situation. We argued that millions of rupees were lost to the government revenue when fines are not paid and more millions were spent to maintain them in prison when they are sent to prison. It was shown that these were not offenders who would pose a serious threat to the society and that even after spending millions of rupees nothing substantial could be done towards their reformation and the majority of them are sentenced for short terms. We are glad that at least some attention has been paid by the government to our reasoning. In 1991 (last year) the government made regulations under the Public Security Ordinance to grant time and other facilities for those offenders on whom fines are imposed.

Under these regulations the following reliefs have been granted.

- (a) Time allowed for the payment of fine.
- (b) Opportunity granted to pay the fine in instalments.

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(c) The person liable to pay the fine given opportunity to give a bond with or without sureties to the satisfaction of the Court for the payment of the fine or the instalment thereof.

These regulations which have come into force this January (1992) are expected to reduce the short-term convicted population by substantial numbers.

Many countries including Sri Lanka do not give the convicted offender credit for period spent on remand. Some prisoners spend more time in remand than the length of the sentence for the offence. If the laws in these countries are changed to give credit for the period spent in remand and set off against the sentence, it would reduce the period offenders have to serve in prisons. It would also mean that some prisoners receiving short sentences of a few weeks or few months would have served sufficient time in remand that they could be released after conviction. Those offenders sentenced to short terms would not benefit by any further imprisonment. They have already been sufficiently punished by having been imprisoned on remand. In any event, there is little or no possibility for the prisons to develop any constructive rehabilitation programme for such short term offenders.

Alternative Sentencing and Community Acceptance

Alternative sentencing or intermediate sanctions is seen as the most effective measure to be developed and utilised to reduce overcrowding of prisons. While utilising the existing alternative sentences criminal justice systems must create and develop a wider range of alternatives to imprisonment. The United Nations Congress on the Prevention of Crime and Treatment of Offenders at its 7th meeting by resolution advocated the wider use of non-custodial sanctions in order to achieve a reduction in the prison population. This resolution emphasised that im-

prisonment should be imposed only as a sanction of last resort taking into account the nature and gravity of the offences and the legally relevant social conditions and other personal circumstance of the offender.

Many nations already have in their statutes provisions for several alternatives to imprisonment such as probation, community service and suspended sentences, etc. However, studies in several countries including Sri Lanka have revealed that these alternatives to imprisonment have not had any substantially effective impact on the imprisonment rates. Several reasons could be attributed to this situation. Lack of community acceptance and the resulting reluctance of the sentencers to utilise these measures could be described as the main reason.

People expect government to protect them. They do not want programmes that put unrehabilitated criminals back in their communities. People very often assume that public protection means prison, and that anything less than complete incarceration for all criminals will endanger public safety.

There is always the public outcry in the mass media about the increasing crime rates. There will be criticism that lenient sanctions are the primary cause for the increase in crime. Sentencers respond quickly to such criticism and prison sentences are passed on offenders even in instances where alternative sanctions could have been used.

Therefore community acceptance is of vital importance for the implementation of non-custodial measures or intermediate sanctions. The average person in society is quite unaware of the overcrowding situations in prisons and the difficulties in handling large increase in the prison population. They are even not aware of the construction costs of prisons. According to a report by the American National Conference of State Legislators 1987, the construction cost averaged \$42,000 per bed in the United States. In some states it was as high as \$110,000 per bed. Consider the problem the developing countries that are trying to balance their budget deficits

would face if they were to embark on an extensive prison building programme to accommodate the increasing numbers. Criminal Justice Administrators and policy makers must convince the public that criminal justice does not mean prisons and only prisons. It is our obligation to help people abandon the demand for the imprisonment of every convicted offender by educating the public about the alternatives.

With proper education and understanding the public will not only permit but will also support intermediate sanctions. In a study conducted by the Edna McConnel Clark Foundation in Alabama, U.S.A. hundreds of residents were asked how they would sentence 20 convicted offenders. Virtually all wanted them sent to prison. After they were informed about the costs involved and the other alternatives available the same people wanted intermediate sanction for most of these cases. This is a good example to show that an educated public will support alternative sanctions.

The public must be convinced that there are different alternatives available with different degrees of control. They must be assured that their personal safety is not in jeopardy due to the use of these alternatives. In fact people must be made to understand that better security and rehabilitation programmes for the violent and habitual criminals could be provided only when the minor offenders are kept out of prisons by using other alternatives.

The public must be told that criminals who pose a danger to the society will still be put in prisons. They must be convinced that non-custodial or intermediate sanctions are necessary for the reintegration of the offender to the society. People must be made to realise that burden of reform does not lie only on the shoulders of the Correctional System, that society too must bear a good part of its burden.

The most important strategy for the wider use of non-custodial measures is the public acceptance. It is not only the ordinary citi-

zen but the Police, Prosecutors and Judges too who have to be convinced that non-custodial measures could work. Some countries have not only successfully implemented already existing alternative programmes such as probation, community service, suspended sentences, etc., but also have developed highly successful innovative programmes. People in these countries have been convinced in these programmes that they have abandoned their cry for "prison only" concept. Some of these new programmes such as electronic monitoring, home detention, intensive probation, etc. have been highly effective in reducing prison population.

For example, in the United States there had been a dramatic expansion of the use of electronic monitoring. Presently there are approximately 7,500 pre-trial detainees who are living in their own residences. These are persons who would otherwise have been occupying cell space. Most of these electronically monitored house arrestees are employed and paying taxes rather than consuming them. These offenders are persons who could not have been released legally in other ways.

If these offenders were not released under electronic monitoring they would have needed 10 prisons with 750 capacity.

The placement of convicted offenders under electronic monitoring programmes too is on the increase in the United States. Last year there had been over 2,300 offenders under such programmes and the trend is fast catching up. These programmes permit low risk convicted offenders such as those convicted of drunken driving, drunken disorderly behaviour in public, petty theft, etc. to serve their sentences while retaining their jobs and maintaining their families. The success of the programmes are mainly due to the increasing public acceptance. The law abiding citizen feels safe from the offender as the offender is always under supervision. The responsibility of the criminal justice system to punish and control the offender is

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met. Further, the cost of accomplishing this responsibility is kept under control with relief to the tax payer.

It has been established that a well conducted intensive supervision programme provides better interaction between the supervisor and the offender than imprisonment could accomplish. This is mainly due to the fact that the supervisory personnel do not have to spend their time resolving the conflicts that occur when large numbers of social deviants are clustered in the close confine of a prison.

The Federal Parole Commissioner of the United States, Vince Fitchel stated at a recent conference that a probation or parole officer just starting on a career would be wise to "hitch his wagon to the rising star of electronically monitored house arrest." The wave of the future in corrections is house arrest he said.

It is a fact that the development of criminal corrections in the latter half of the 20th century is marked by an increasing trend towards community corrections. Sentencing practices in many countries today require that confinement in an institution be treated as a sentence to be imposed only if no other alternative will serve. However, for a variety of reasons the impact of these developments have still not been felt in many criminal jurisdictions in the world.

Sri Lanka has taken several steps in the last two decades to reduce prison overcrowding. These include introduction of community service of the offender, wider use of parole or release on Licence. New laws too have been introduced to reduce the numbers kept on remand. But all have not been successful. For example, though the legislation had been introduced for the sentencing of offenders to community service in 1985 very few such orders have been made by Judges. There appears to be a reluctance on the part of Judges to pass such sentences and the prosecutor does not seem to accept them as a satisfactory means of punishing the offender. There are also the administrative

problems that had prevented the wider use of community service orders. It is now evident that when introducing new sanctions, it is necessary not only to educate the public but also the Judges and Prosecutors. Only then successful utilisation of such measures could be expected.

Release of prisoners on parole or on licence has been successfully implemented in Sri Lanka since 1970. This scheme has helped thousands of prisoners to be released from prison under supervision before their sentences were over. Sri Lanka is presently considering to revise its parole laws to enable more prisoners to be released on the programme.

Conclusion

In conclusion it can be said that solutions to the problem of overcrowding of prisons have to be sought in a variety of ways with the involvement of a variety of agencies involved in the criminal justice process. Though construction costs are prohibitive for many nations, new additions, renovations and updating accomodating facilities cannot be completely forgotten. Admittedly many countries seek prison sentence for far too many offenders. Introduction and implementation of alternative sentences is the only way out for them. Of vital importance is the acceptance of the alternatives by the Judges, Prosecutors, Police and above all the community. Community acceptance is not something that is automatically achieved. We as responsible persons in the Criminal Justice Administration have a compelling obligation to help reduce the demand for more prisons, more and longer prison sentences for every convicted offender by educating the public about the alternatives. It is necessary to convince the public that alternatives are available that can protect their personal safety and at the same time punish and reform the offender at a much lower social and economic cost to the community.

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Criminal Prosecution in the Federal Republic of Germany

by Thomas Hutt*

I. Introduction

The following topics will be covered in my paper:

- Developments in crime,
- The position of the police, in particular the legal limitations on their actions,
- The rôle of the public prosecution service,
- The use of investigation custody,
- The imposition of sanctions by the courts,
- Conditions in prisons,
- Alternative sanctions ("non-custodial measures") and, finally
- Legislative and administrative measures already introduced or being planned.

II. Developments in Crime

In speaking about developments in crime, I shall initially have to restrict myself to developments in the old Federal Republic of Germany and move on to the completely different patterns in the eastern part of Germany.

In the old Federal Republic of Germany and West Berlin, which for simplicity's sake I shall term West Germany, following a slight decline in 1988 and stagnation in 1989, 1990 saw a return to the long-term upward trend in the number of reported offences.¹ Compared to figures for 1988, there was an increase of 2.2%, bringing the total number of reported offences to almost 4.5 million. However, since at the same time the population increased to approximately 62.7 million, the increase in reported offences per

one hundred thousand of population is slightly lower at 1.1% or 7,108 offences per hundred thousand, road traffic offences not counted. As in previous years, recorded thefts again dominated the figures at sixty per cent of all recorded offences, followed by damage to property at 8.9% and fraud with 8.2% of reported crime. Increases in the numbers of reported armed robbery and narcotics offences were relatively large.

Police detection quotas again declined slightly and now rest at forty-seven per cent². That fall and the relatively low detection quotas for all offences can, however, easily be explained by the high proportion of and continued increase in the incidence of theft and damage to property which account for more than ninety-two per cent of unsolved crime. By comparison, the detection rate for murder and manslaughter remains unchanged at 94.6%, for rape it increased slightly to approximately seventy per cent, and for offences involving robbery it has been maintained at just under forty-four per cent. Drug-related offences again increased by nine per cent; the detection rate, at ninety-five per cent, is proportionately high. That must not, however, hide the fact that the police is aware only of a fraction of actual offences.

After this purely statistical survey, allow me now to deal in greater detail with certain areas showing particularly worrying developments: terrorism, organised crime, drug-related crime, economic crime and environmental crime.

The threat posed by left-wing terrorism no longer seems as acute as in the 1970s and 80s when the RAF (the Red Army Faction) disseminated terror and fear with their assassinations, kidnappings and hijackings. A

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decisive factor in weakening the RAF's grip came when numerous former members of the organisation previously protected by the authorities of the former GDR were able to be arrested after the German-German border was lifted. At that time the chief witness arrangement³ proved useful, causing several of the arrested persons to turn state's evidence. In this way it was finally possible to clear up a range of earlier offences and to attribute them to particular offenders. Similarly, the activities of the so-called Revolutionary Cells have recently also abated. It would appear that the failure and collapse of socialism right across Europe has caused left-wing extremist groups to lose not only their organisational form and the opportunity for action, but their ideological basis also seems to have been shattered.

By comparison, the current growth in right-wing extremism, emanating from the territory of the former GDR, is worrying. Whilst it is true that the threshold of terrorism has not (yet?) been crossed, there is nevertheless no end to the violence, particularly against foreigners. If anything, it would seem to be a hostility towards foreigners that is drawing together all right-wing radicals in my country which otherwise welcomes citizens from abroad.

Organised crime, which previously appeared restricted to Italy and the USA, has become a challenge for both the German state and society, but also for Europe as a whole. "The existence of organised crime means," to quote the Italian sociologist Pino Arlacchi, "the collapse of *rechtstaat* structures and of moral values, and ultimately leads to society taking a retrograde step." Organised crime is most prevalent in activities guaranteeing high criminal profits. It is carried out on a businesslike basis and undertaken because of the potential profits and the positions of power which can be obtained. Legal and illegal business transactions are efficiently linked. The acts are generally planned precisely, account being taken of market requirements. Offences are carried out and the

spoils utilized professionally and divided up according to the principle of the division of labour. Exceptionally high profits are "laundered" and invested, also in legal businesses, thus stabilising "criminal power."

Of course it is not possible to state the true (quantitative) extent of organised crime and to assess accurately the extent to which it is damaging to society. Prosecution authorities' findings do, however, confirm that its structures have become more fixed and that links exist with all areas of society. In this context, it is deeply worrying for me to recognise that in the German public service, which has always been regarded as an upstanding and vital pillar of the democratic state based on the rule of law, corruption is on the increase. Corrupt public servants do, however, represent a starting line for the accelerated spread of organised crime.

Up until now, attempts at finding a generally accepted and precise definition of organised crime have always failed due to the latter's intricate and complex nature. However, since new legislative measures will, *inter alia*, be needed if we are to combat organised crime effectively, it does appear necessary to find a definition which describes both as comprehensively yet also as precisely as possible the forms of criminality which experience has shown come under the heading of organised crime. Taking characteristics established in criminal practice as typical for organised crime, and having examined definitions in certain agreements and other countries' legislation (Switzerland, the USA, Italy), a working group of German experts has—at least as far as forms of organised crime prevalent in the Federal Republic are concerned—proposed the following definition:

"Organised crime is the commission, according to a plan, for profit or to gain power, of offences which jointly and severally are of considerable importance, where in the long term or indefinitely more than two individuals act together employing:

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- commercial or pseudo commercial structures, or
- violence or other means liable to intimidate others, or
- by influencing political life, the media, public administration, the judiciary or the economy.”

I should now like to describe briefly the forms of organised crime prevalent in the Federal Republic of Germany since they reveal parallels with developments in many other European countries and across the world.

There are two basic forms of organised crime in the Federal Republic of Germany, i.e.:

1. networks of offenders concentrated in conurbations, and
2. independent groupings whose membership remains relatively stable, which exert their influence on the Federal Republic partly from abroad.

Cohesion within these organisations is founded on common interests and benefits. It almost goes without saying that affluent clients and financiers are given positions from which they can dominate and lead, according to the maxim “money is power.” As yet, there are no specific pointers to suggest that omnipotent Mafia-style leaders exist in Germany. Internal sanctions play a vital rôle in securing and reinforcing criminal structures. They cover all forms of physical and psychological violence, divestment of monies and assistance and the exclusion of individuals from criminal markets.

Although violence against competitors, victims or individuals thought to pose certain dangers is not a central feature, the willingness to engage in violence can generally be assumed. The use of violence is, therefore, a means to an end. A characteristic of criminal power is the victim's—justified—fear that violence will be used if he does not comply with the perpetrator's desires. Thus,

even hidden threats or the mere mention of a wish is sufficient to bring victims to heel.

We are experiencing a situation in which offenders are increasingly adapting their own conduct to official prosecution strategies. That conduct is often extremely conspiratorial; prosecution measures are staved off with appropriate counter-measures; prosecution witnesses are often pressurised. Increasingly, efforts have been identified—and we know that in a number of cases they have been successful—systematically to corrupt and gain the assistance of individuals in public office, the public prosecution authorities being no exception.

Criminal detection work has revealed the following to be typical activities undertaken by individuals with influential positions in the world of organised crime:

- they give orders as to which offences are to be carried out by whom, where and when;
- they receive all monies obtained from crime;
- they determine what share of the proceeds active members of the gang receive;
- they appoint lawyers and put up bail for gang members in detention;
- they provide financial support for the families of gang members in detention;
- they instruct gang members on how to testify before the prosecuting authorities;
- they disseminate fear and terror by threatening gang members willing to testify;
- they arrange for certain acts to be covered up;
- they physically abuse gang members;
- they pay others to take responsibility (even by serving prison sentences) for their own acts;
- they operate to corrupt employees of the authorities.

Alongside these forms of organised crime seen in Germany, we are increasingly finding evidence of groups of foreign offenders operating in the Federal Republic. Abroad,

organised crime exists in the form of so-called traditional groups, e.g. the Mafia, Cosa Nostra, and non-traditional groups such as the Medellin Cartel and Cali. In some instances, these groups have already made contact with the leading figures on the German domestic organised crime scene, for example:

- the production and wholesale trade in heroin, cocaine and cannabis are in the hands of Asiatic, Near East, Turkish and South American drugs cartels. Trade lines are set up in some instances involving the European and North American organised crime scene.
- Cosa Nostra, the North American group active in all areas of crime, has for some years now been linked in its organisation of illegal lotteries with leading lights in the brothel and pimp scene in German cities and agglomerations.
- the illegal sale of luxury motor vehicles by groups from the European organised crime scene has links with receivers of stolen goods in the Near Eastern, North African and South American countries where they are sold.
- in the production and distribution of counterfeit money, a large share of the leading figures often come from the Italian organised crime scene.

In contrast with German offenders, a stronger feeling of solidarity exists in foreign organisations due to patriotic and family ties. Moreover, foreign offenders have proved to be less willing to compromise and more willing to engage in violence.

So how should one assess future developments?

Organised crime will increase in significance in both quantity and quality terms. As society, the economy and the state of technology advances, so new methods of committing crime will emerge—take for example computer-related crime—and be refined. The inter-linking of currencies, worldwide finan-

cial transactions, the cross-frontier exchange of goods and the freedom of movement of individuals have made it easier for organised crime to become established and to spread in Germany and in Europe. Moreover, these factors will lead to this form of crime becoming more international and professional in character.

Within the specific context of the Federal Republic of Germany, the pattern of organised crime will continue to be reinforced; being multi-faceted and flexible it is particularly dangerous, for it can take advantage of the freedoms and opportunities offered by society in the same way as is possible—and desired—for the legitimate business world.

The aversion to control and monitoring processes also prevalent in the public service, together with senior officials lacking an awareness of problems can prepare the ground for corruption, thus—and I repeat—improving the chances for organised crime to develop and making it more difficult to combat. In this respect, mastering organised crime is not only one of the greatest challenges facing prosecution authorities at the end of this century, but is instead a task for society as a whole which can only be solved by co-ordinating all available forces.

Alongside the factors already mentioned which influence developments in organised crime, the opening up of the states of central and eastern Europe and the large-scale collapse of the prevailing order in those states has created new factors whose full effects on organised crime cannot yet be calculated.⁴ It can, however, already be seen—and I hope that here you will allow me a short excursion into the territory of the former GDR—that in the eastern part of Germany, members of the Soviet army and citizens from formerly socialist states, particularly Poland, are setting up new networks for organised crime at alarming speeds. Merely by way of example one could mention at this point arms trading, the theft of works of art, the illegal sale of stolen motor vehicles to eastern Europe and commercially-based

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smuggling. The situation is being eased by current work to set up a new police service and system of justice in eastern Germany, a subject to which I shall be returning.

One of the main areas of activity for organised crime, and probably the most lucrative, is international drug trafficking. Please permit me, therefore, to turn now to the question of drug-related crime. The sharp rise in the seizure of certain types of drugs provides a clearer indicator of the true extent of illegal drug trafficking than the number of drugs offences actually detected. Thus, in 1990 the quantity of cannabis and heroin seized rose by between ten and twenty per cent compared with the previous year. At almost 2,500 kg, the quantity of cocaine seized was almost twice that in the previous year, five times the 1989 figure and nine times that seized in 1988. One further indicator makes the dramatic developments quite clear: the number of deaths from drugs, which in 1989 rose by almost fifty per cent compared with 1988, again rocketed by fifty per cent in 1990 to reach approximately 1,500. Even considering that the death rate is of course linked to the amount of active ingredient in the illegally-trafficked drugs, i.e. is influenced by the highly pure form of heroin available in the drugs trade, these figures still point to a very worrying development which is apparently continuing unchecked by a sustained upgrading of police work in this area, by a tightening of the law and high penalties imposed on drug traffickers.

In the area of economic crime, despite a continued retuning of legislation, early specialisation by criminal investigation bodies and the courts plus an improvement in personnel and specialist resources, e.g. by deploying economics and computer technology specialists in the offices of the public prosecution service, it has not yet been possible to reverse the long-term upward trend in the damage caused by this form of crime. The high profits white collar offenders can earn illegally enable them not least to invest

comfortably in state-of-the-art technology, thus making detection more difficult and enabling offenders always to be one step ahead of the prosecuting authorities. Complicated networks and inter-relationships between groups of firms make it yet more difficult to uncover illegal transactions and are so personnel-intensive for prosecuting authorities that it is increasingly difficult to convince political bodies of the necessity for sustained personnel expansion in the relevant agencies. For example, in the so-called "Coop Complex," the processing of criminal activities by individuals in positions of power in the formerly trades union owned firm will command the attention of several public prosecutors and of more than ten highly-qualified members of the criminal police in Frankfurt am Main for a number of years to come.

A particular form of crime—environmental crime—is of special significance since it not only causes material damage but also irreversibly damages the fundamental bases of our existence and that of future generations. Since the vital interests of humanity are at stake, international co-operation and the pooling of energies is more essential here than in other areas. For example, it will not be possible to avoid the feared climate catastrophe if only a few highly-industrialised nations such as the USA, Japan and Germany continue to improve air purity measures whilst in eastern Europe out-dated power stations and industrial plants continue to release enormous quantities of toxic emissions, and developing countries, e.g. in South America, burn down forests to provide a basis for their populations' existence. And it is of little use for Germany, for example, to forbid the dumping of dilute acid in the North Sea if other states do not stop ships transporting far more toxic waste out to sea from their own territory and then dumping it.

Please excuse me for deviating from the real subject of my talk—criminal prosecution—to illustrate the international significance of this truly fundamental problem. In my

own country, alongside the provisions under administrative law for the protection of the environment, back in 1980 a first Act to Combat Environmental Crime⁵ was passed to fight that threat. The draft second Act to Combat Environmental Crime⁶, which is currently being debated in parliament will, *inter alia*, introduce statutory definitions of air and soil pollution.

Perhaps at this point you will permit me a short excursion into the territory of the former German Democratic Republic which has been part of the Federal Republic of Germany only since 3 October 1990. The reason for having to restrict my previous comments to West Germany is primarily that crime statistics published in the former GDR were manipulated and did not portray an accurate picture of the genuine crime situation there. For this and other reasons, they are not comparable with the Federal Republic of Germany's crime statistics⁷. A common system of collecting data on crime making it possible to comment on the statistics and draw comparisons has existed for the entire territory of the Federal Republic of Germany only since the beginning of 1991.

Bearing all that in mind, and despite the difficulties involved in statistical assessments, the figures suggest a strong upward tendency in reported violent crime and property offences⁸. Cases of threatened violence and robbery or blackmail have increased by several hundred per cent, and theft and embezzlement have risen by more than fifty per cent, too. This development, which has been met with fear and consternation⁹ by east Germany's population, a people previously accustomed to living in a police state with institutionalised surveillance, is happily contrasted by a considerable decline in the number of reported sex and some other offences. It can, though, come as no surprise that the aggregate detection rate has fallen by seventeen per cent to sixty-six per cent, considering the increase in property offences—which are always more difficult to solve—and the situation facing the police in

east Germany. Nevertheless, the detection rate is still clearly above that for West Germany. One further burden on east Germany's prosecuting authorities seems to me worthy of mention here: they have to conclude forty years of operating under an unjust communist system. In specific terms, that means that currently about sixty thousand citizens have already applied for rehabilitation, i.e. are demanding that unjust criminal judgments handed down by the criminal justice system of the former German Democratic Republic be set aside. Specific provision has been made for rehabilitation proceedings or for proceedings to quash former judgments in cases of this type. In each individual case, the office of public prosecution must obtain and examine on the basis of earlier court files whether the applicant was, for example, condemned merely for exercising fundamental rights—a large number of judgments were passed simply because citizens in the Communist part of Germany asserted their right to freedom of expression or wished to leave the country. In other cases, for purely political reasons judgments were even handed down in breach of the law applicable at the time.

Moreover, the prosecuting authorities are now also expected to pursue under criminal law all those responsible for acts of injustice committed in the past. My own opinion is that the criminal law is not a suitable and appropriate instrument with which to set to rights the actions of a system of injustice committed over forty years. Too much injustice, involving too many people, was committed in that time. One author described very accurately the present situation in the eastern part of Germany with the following sentence:

“Sixteen million victims are pursuing sixteen million offenders.”

III. The Position of the Police

The personnel situation in West Germa-

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ny's police force can be described as adequate. However, with sustained economic prosperity, particularly in built-up areas, it is becoming ever more difficult to fill all permanent positions within the force. That is because salaries paid by the public service, when contrasted with police officers' working conditions, do not appear to be attractive enough.

The staffing situation in the eastern part of Germany is yet more difficult. Although in comparative terms the former GDR had twice as many police officers as the Federal Republic of Germany—in keeping with the former's reputation as a police and surveillance state—since reunification about half have, for various reasons—usually because of politically-motivated activities during the Communist period—now left the force. It is not unrealistic to assume that one in three of the remaining officers will still have to be dismissed due to some earlier activity for the GDR's (secret) state security agencies.

In that case the police force would be little more than half the size apparently necessary by West German standards. Moreover, further difficulties result from a continued mistrust in the police harboured by citizens of the former GDR. For, whilst at time of unification more than half the West Germans surveyed claimed their opinion of the police was "very good" or "good," the figure for the eastern part of Germany was only about twenty-five per cent. Thus, what results is the unfortunate juxtaposition of understaffing and a lack of acceptance on the one hand and, on the other, a rise in crime.

Within the Federal Republic's police force, it is widely felt that the German legislator accords the police too little scope under the law to make interventions when fighting crime, and that the restrictions placed on police action—particularly in collecting information—are too tight¹⁰. In this context, it is often said that "data protection" is more like "perpetrator protection." And it is quite true that on both the public and political level the debate held in the Federal Republic of Germa-

ny over the last few years—particularly relating to criminal prosecution—have often accorded data protection a significance which makes it more difficult to find a balance between the two tasks. My own very personal view, speaking as a public employee whose job it is to fight crime and prosecute offenders, tends to be that the collection and assessment of personal information by the police should not be subjected to the ever-tightening net of restrictions under data protection law. The police, just like entire public administration, is permitted to act in the Federal Republic of Germany only in observance of the Constitution and of individual statutes; violations of laws attract sanctions. To date, no case has come to light in which a citizen has suffered any tangible harm as a result of the police misusing information.

The second point is that due to a decision of the Federal Constitutional Court¹¹ from 1983, public authorities may only collect and assess personal data if they have a special statutory basis on which to do so. In the field of criminal prosecution, that also applies to modern investigation methods, e.g. the use of undercover agents, observation, systematic search, i.e. the automated sorting of stored data according to specific characteristics, and the use of technical resources by the police, e.g. bugging or recording devices. Since the legislator has yet to create specific legal bases in this respect, widespread doubt exists as to whether they may still be used by the police. Thus, the criticism that the necessary statutory instruments enabling them to be used are lacking, is certainly justified.

In listing the specific problems facing police work in the Federal Republic of Germany, the increase in trans-border movements of individuals and goods, and the increased mobility of offenders which these factors bring, cannot go unmentioned. The extent of the problem becomes clear when seen in the context of the forthcoming abolition of internal border controls in Western Europe, which have already been considerably

relaxed. As a result, deficits in criminal prosecution arise which unfortunately can usually only be redressed later, at least in part, by suitable countermeasures. In this connection, my own view is that we particularly need to improve and de-bureaucratize transfrontier police co-operation and searches plus we must greatly simplify and accelerate international mutual judicial assistance¹². I am pleased to be able to note that an understanding has been reached in negotiations on the so-called Schengen Agreement on the dismantling of border controls between the Federal Republic of Germany and four neighbouring states that this step should only be taken once the necessary equalisation measures I have just described can enter into force.

The image imparted by these developments in police crime-detection would, however, be too negative if the significant advances in police technical resources and particularly those in the field of criminal science, were to go unmentioned. I feel that Germany's Federal Criminal Police Office has become something of an—even international—symbol for modern crime-fighting with its use and constant refinement of specially-developed hi-tech equipment.

"Genetic fingerprinting" offers us new ways of solving the most serious offences. Conditions for its use have now been fulfilled by a number of the Federal Republic's criminal police offices, and in court decisions¹³ it has been held that genetic fingerprinting is an admissible source of evidence for the defence or to prove the guilt of an accused person in criminal proceedings, so long as it is performed under carefully-controlled laboratory conditions.

IV. The Role of the Public Prosecution Service

Excepting a few offences (e.g. libel or personal injury) giving the injured party a right of private prosecution in criminal courts, the public prosecution service—and it alone—has

the wide-ranging power under German law to instigate, shape and conclude investigation proceedings. For that reason it is dubbed the "master investigator." As a result, the public prosecution service also has the authority to head investigations and takes responsibility for them. All other criminal investigation authorities have either derived or partial powers only. The public prosecution service can require all other public authorities to provide information and conduct investigations of any type itself or instruct police authorities and officers to carry them out on its behalf¹⁴. Police authorities and officers are obliged to comply with the requests or applications by the public prosecution service¹⁵. For this reason, they are described as the public prosecution service's "assisting officers"—a term often considered derogatory and old-fashioned. Although the police also has its own power to conduct investigations and must, in particular, take responsibility for any necessary immediate measures¹⁶, in this respect they are still subject to instructions from the public prosecution service which may intervene in investigations at any time.

If summonsed by the public prosecution service, witnesses and experts are obliged to appear and testify or to prepare expert reports¹⁷. Only examinations under oath remain the exclusive domain of the judges. The public prosecution service has certain means at its disposal to enforce these powers.

A fundamental principle of German criminal procedural law—quite in contrast to Japanese law, for example—is that the public prosecution service must observe the principle of mandatory prosecution. Where any initial suspicion exists that a punishable act has been committed, the public prosecution service is obliged to look into the facts and, if sufficient cause exists, to prefer charges¹⁸.

Since this principle must also be respected by authorities superior to the public prosecution service, including the minister of justice, it represents a significant safeguard

against extraneous outside interferences, particularly from the world of politics, in the service's investigations; most of my colleagues consider it a vital prerequisite to enable them to carry out their work on the basis of the law only.

Certainly there are important instances where the principle of mandatory prosecution has lawfully been disregarded, and which I cannot list in their entirety here. Special emphasis should though be placed on the option of discontinuing proceedings, either with or without the court's consent, on the ground of insignificance where the subject of the proceedings is not a serious crime [Verbrechen]¹⁹. With the consent of the court and of the defendant, discontinuance of proceedings may also be linked with certain conditions²⁰. The defendant can, for example, be required to make reparation for damage caused by the offence or to pay a sum of money to a charitable organisation or to the state treasury.

Moreover, two options exist to enable the public prosecution service to work more efficiently: first, where a number of offences are being pursued, prosecution may be restricted to—the most serious—parts thereof; second, in pursuing a single offence, certain constituent parts of that offence or elements of the law which are ultimately less significant, may be disregarded²¹. The practical importance of refraining from bringing charges against foreign nationals if they are extradited or expelled from the territory of the Federal Republic of Germany is growing constantly²².

Even though in practice more than thirty per cent of proceedings are discontinued by the public prosecution service according to such discretionary principles, that nevertheless does not call the principle of mandatory prosecution into question. Instead, one must remember that where the legislator has not expressly provided the public prosecutor with a clearly delineated margin of appreciation for discretionary discontinuation of proceedings, the latter is bound by the princi-

ple of mandatory prosecution and must, therefore, carry out requisite investigations and prefer charges if the statutory conditions are met. In Germany, the public prosecutor does not perform a quasi-judicial function—as in Japan, for example—with the authority also to discontinue proceedings for capital offences and even to do so without consulting a judge.

A further important principle which renders the job of a German public prosecutor similar to that of a judge, and without which I would not have wished to enter the profession, is that the public prosecutor is not merely authorised but is in fact required to investigate *ex-officio* both the incriminating and the exonerating circumstances of an offence²³. Here, one refers to the duty to investigate the substantive truth, which contrasts quite clearly, for example, with the main oral hearing under Anglo-American criminal procedural law in which the public prosecutor does not appear as a "party." This legal set-up has meant that Germany's public prosecution service has now come to be described as the "most objective authority in the world"; we are proud of that and always ensure we live up to this claim.

V. Investigation Custody

Since an accused person is considered innocent until sentenced *res judicata*, investigation custody may on principle be ordered only to safeguard criminal proceedings. Account is taken of this in setting down flight or the risk of flight²⁴, or the risk that evidence will be suppressed, as reasons for confinement, and ninety-seven per cent of all arrest warrants in the Federal Republic of Germany are based on these factors. With particularly serious offences, though, investigation custody may also be ordered where none of the above-mentioned reasons exists²⁵. This option, which is now ironically referred to as "confinement to placate the communal soul" and which relates back merely to the fact that it would not be gen-

erally acceptable for individuals suspected of such serious offences to remain at large, is used for only about one per cent of detentions. Approximately two per cent are effected due to a risk of repetition²⁶, for which a suspect may be detained only under very strict conditions; this form of detention is not effected for safeguarding criminal procedure, but instead for preventive reasons.

In 1982, the number of prisoners in investigation custody peaked in the Federal Republic of Germany at 16,500²⁷; for every one hundred thousand of population, approximately twenty-seven thousand people were on remand. This situation provoked a lively discussion as to whether and why so many people were being detained for so long. The criticisms voiced covered both the courts' practice in ordering detention and the statutory provisions on which the latter was based. The large number of remand prisoners also led to prisons becoming severely over-populated and contributed to the Federal Republic of Germany having—after Austria—the highest ratio of prisoners to population in Europe, with one hundred prisoners per hundred thousand of population. Since then, a number of draft laws aimed at restricting the preconditions for ordering investigation custody have been presented and debated. In the end, the law has not yet been changed. However, the debate on prison over-crowding and the frequency and duration of investigation custody did lead to a reduction of approximately thirty per cent in its application by 1989 despite a considerable increase in reported crime over the same period. The number of remand prisoners at that time fell to around twelve thousand, giving a ratio of twenty prisoners for every one hundred thousand of population.

By comparison with punitive imprisonment, which has been regulated, since 1976, under the Prison Act²⁸ similar efforts to codify comprehensively the enforcement of investigation custody have never gone beyond a first working draft produced in 1986. The rather dubious situation still then exists

whereby investigation custody is regulated conclusively by a single section of the Code of Criminal Procedure²⁹. Nevertheless, that provision does still contain the fundamental principles derived from the presumption of innocence, in particular that:

- the prisoner has a right to be accommodated in a single cell,
- only such restrictions may be imposed upon him as are required for the purpose of investigation custody or are necessary in the confinement facility,
- he may provide for comfort and activities at his own expense insofar as is consistent with the purpose of confinement and does not disturb discipline in the confinement facility.

All restrictive measures must be set out in a judicial order. Where in urgent cases orders are issued by the public prosecutor, the institution head or an institution employee, they require the approval of a judge.

VI. The Imposition of Sanctions by the Courts

The most striking observation in an analysis of outcomes of criminal proceedings³⁰ is that for a number of decades now the proportion of prison sentences handed down has been falling; and the trend is continuing. Thus, whereas the proportion of fines imposed as a share of all court judgments has increased over the past century from approximately thirty per cent to over eighty per cent, at the same time, the proportion of measures imposed on adults involving a deprivation of liberty has fallen to below eighteen per cent, of which a further two-thirds are suspended on probation.

To comprehend these figures fully, it is important to locate them within an overall framework of all measures imposed upon individuals old enough to have criminal responsibility, who were suspected of any offence and investigated by the police:

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Of approximately 1.2 million sets of proceedings instituted against suspected offenders investigated by the police, about two hundred thousand concerned individuals subject to the juvenile law. Of the remaining 1 million or so, more than forty per cent or approximately four hundred thousand sets were terminated with informal sanctions, i.e. in approximately three hundred thousand cases the public prosecutor terminated proceedings by invoking available discretionary powers either with or without imposing conditions; a further eighty thousand were analogously discontinued by the courts. In about five hundred thousand of the six hundred thousand cases remaining, fines were imposed, in approximately seventy thousand cases suspended sentences were handed down and in only about thirty thousand cases, i.e. about three per cent of all criminal proceedings were prison sentences imposed which were not suspended on probation.

Where the juvenile law is applied, the results are pretty much the same. In the Federal Republic of Germany, juvenile law is applied without exception to individuals between fourteen and eighteen years of age and, in addition, to those in the eighteen to twenty-one age range where their physical and moral maturity are comparable with those of a juvenile, or where the offence is a typical juvenile misdemeanour. Children under fourteen years of age are not liable to prosecution in the Federal Republic of Germany.

Where measures are taken under the juvenile criminal law, the situation is again such that the public prosecutor terminates approximately thirty per cent of cases with informal sanctions, and the courts do so in a further twenty per cent. In the remaining fifty per cent of cases, formal sanctions are imposed, which can be broken down as follows: in three out of four cases, a sentence not involving a deprivation of liberty is imposed. This type of sanction under juvenile

law includes the imposition of conditions, official educational care and supervision, warnings, and the suspension of a juvenile sentence on probation. In about twenty per cent of cases, youth detention is imposed. This exists under German juvenile law in the form of free-time detention (covering between one and four periods of weekly free time), short-term detention of a maximum of six days' duration and as long-term detention lasting between one and four weeks maximum. For the remaining five per cent of convictions, youth penalties are imposed without probationary suspension, i.e. juveniles are deprived of their liberty in youth detention centres.

It would be wholly incorrect to try and conclude from this portrayal of the economical use of absolute prison sentences that prisons in the Federal Republic of Germany were becoming ever emptier. At least this is not so in West Germany, the area I have been referring to in speaking about remand custody and imprisonment. On the contrary, the duration of prison sentences actually imposed has increased considerably over the last few years. That does not apply though to life sentences, which can be imposed only for unlawful homicide, and which have long remained steady at about eighty cases per annum. However, it is true of determinate sentences of between five and fifteen years: in 1970 such sentences were imposed in only about four hundred cases, whereas by 1989 that figure had risen to 1,150 cases. Sentences of two to five years doubled from approximately three thousand to six thousand, as did sentences of one to two years from six thousand to twelve thousand. This then explains how over that period the proportion of absolute sentences dropped from forty-seven to thirty-two per cent of all sentences imposed but that the number of prisoners in custody nevertheless rose by approximately thirty per cent.

VII. Conditions in Prisons

That brings us to conditions in prison service. By contrast with many other states, this is an area regulated by the judicial authorities and not by authorities responsible for internal affairs. Since the administration of justice lies within the remit of the Länder, the prison service comes under the purview of the Land ministries of justice. Following a long period of preparation, in 1977 the German Prison Act entered into force³¹. It regulates in detail the organisation of the prison service, allocates responsibilities, lays down prisoners' rights and measures to be undertaken in prison. Moreover, it provides that prisoners may have recourse to the courts in respect of all measures imposed upon them³². Such litigation is assigned to special court divisions responsible for enforcing prison sentences, whose decisions may under certain circumstances be challenged before the higher regional courts. And now a few words to the organisation of the German prison service: the principle of separation sets out that remand prisoners and convicted prisoners must be accommodated separately, as must women and men prisoners, adult and juvenile prisoners. It is the task of the prisons³³ to enable prisoners in future to lead a life in social responsibility without committing further criminal offences. However, the enforcement of prison sentences also protects the general public from further offences being committed. Life in penal institutions is to be approximated as far as possible to general living conditions in order to counteract any detrimental effects of imprisonment³⁴.

The German legislator has proceeded on the premiss that prisoners should generally be accommodated in so-called open prisons³⁵ as they represent the form of imprisonment least liable to separate the prisoner from society and are therefore best able to facilitate post-release re-integration. Open prisons are establishments which do not take special precautions to stop escapes, e.g. they are not

protected with high perimeter fences and observation towers. In the Federal Republic of Germany, they are merely separated off by a fence. In such prisons, attempts are made to ensure that as many prisoners as possible leave the establishment at daytime to pursue outside work and then return at evenings and on free days. Prisoners in these establishments are able to take holiday from prison above and beyond the general annual twenty-one day allocation. Where they are employed freely outside prison, they must pay for their bed and board. Remaining income is administered by the prison to pay maintenance to family dependents, to pay off debts and build up savings for when they are released. Of course, they are also given part as pocket money.

Although it is intended that accommodation in open prisons be the norm, that does not mean that the majority of prisoners are placed in such establishments; instead, only prisoners considered suitable for such accommodation may be housed there. Considering I have already told you that the proportion and duration of absolute sentences has dropped, you will not be surprised to hear that the percentage of recidivists, violent offenders, drug dealers and other serious offenders, whose sentences must at least in part be served in closed institutions, is now far higher than in former times. Although the ratio of prisoners in open and closed establishments varies considerably according to the judicial policy of the individual Länder, it nevertheless is, on average, one to four.

In the late 1970s and early 1980s, prison over-crowding was an urgent problem which attracted great public attention. At the time, in some Länder the enforcement of sentences even had to be postponed temporarily to satisfy certain minimum standards for accommodating prisoners in humane conditions. The impression created due to the over-crowding brought about a radical rethink on cell capacities. At the same time, the number of adult, juvenile and—in particular—remand prisoners was falling

with the effect that the total number of prisoners held declined from about fifty-two thousand to about forty-four thousand whilst the number of available prison places rose concurrently to about sixty thousand. As a result, these days humane prison conditions are guaranteed across the whole of West Germany. By the way, only four per cent of the prisoners are women.

At this point, it is, however, appropriate to pass a few further comments on the situation in eastern Germany. Until just a few years ago, the GDR's prisons housed forty thousand inmates; with a total population of about seventeen million, that meant that the GDR had three times the number of prisoners as the Federal Republic. Numerous amnesties—most recently connected with the liberalisation and the so-called "Wende" (the turnabout) in the GDR and with the reunification—resulted in the number of prisoners in eastern Germany falling by Unification Day to about four thousand. As a consequence, the majority of prisons in that part of Germany are almost completely empty, and many have been closed. Anyway, the majority of prisons there are completely outdated. The buildings are in such poor condition that the requirements of modern-day imprisonment cannot be met without large-scale renovation and conversion work being carried out. And the security measures designed to prevent dangerous offenders escaping are completely inadequate; that didn't used matter as there was no point in escaping and attempts were, therefore, seldom. In the GDR police state, every escaped prisoner had to count on soon being recaptured; and moreover they had practically no chance of leaving a country hermetically sealed at its borders. At the very latest, they would be recaptured at the border. These days, however, specular attempts to escape from eastern Germany's prisons are almost a daily occurrence and are a considerable headache for the security forces. Thus, we are faced with the paradoxical situation whereby it is the liberally-oriented Federal

Republic of Germany which is experiencing problems with inadequate security installations bequeathed by a dictatorial system.

VIII. Alternatives to Prison

The benefit of enforcing measures involving a deprivation of liberty has no basis in science, nor can it have; in the fields of penology and, in particular, criminology, its use has for some time now been questioned. And it is a continuing debate, following the gradual replacement over the last few decades of custodial imprisonment, in which the notion of conciliation, deterrent and the secure incarceration of the convicted person were stressed, by treatment-oriented imprisonment in which an attempt is made to focus on the convicted person's individual character and on guiding him towards a crime-free life.

This scientific debate has not left the German Criminal Code of 1871 completely untouched. The latter's history is instead one of a constant search for alternatives to measures which deprive individuals of their liberty, i.e. for more humane, meaningful and effective formal sanctions. I mention merely by name the increased use of fines, the creation in the 1920s of a special Youth Court Act and the introduction of probationary suspension of sentence in 1953. Moreover, mention should be made of the criminal law reform of 1969³⁶. In particular, the latter brought about:

- the introduction of unified prison sentences to replace the four different types of sentence formerly in existence,
- a greater orientation towards fines as the main form of punishment for more minor offences,
- significant restrictions in the admissibility of short prison sentences, their minimum duration being raised to one month,
- increasing the options available for probationary suspension of sentence to cover prison sentences of up to one year and, in

- certain cases, up to two years,
- the introduction of a new sanction of refraining from punishment making it possible for a judge to find a defendant guilty without imposing punishment if the perpetrator is himself caused great suffering as a result of the offence,
- the introduction of warnings whilst withholding punishment which, applied to the imposition of fines, corresponds with the institution of probationary suspension of imprisonment.

Since 1969, penal law reforms have centred on suppressing the use of short-term imprisonment. Once it became established prison policy that in modern times prison should serve only to re-socialise offenders and to protect the general public from further offences, short-term sentencing was no longer considered meaningful. That was because the relevant offenders did not represent a danger to society, and because a successful course of treatment could not be completed in prison in under six months. Today, and even increasingly, a large number of judges and public prosecutors consider the legislator's decision dubious since a category of offender also exists who admittedly may not need detaining for preventive reasons or require treatment, but upon whom the—albeit very short—deprivation of liberty could produce a lasting effect. That applies in particular to offenders who repeatedly commit road traffic offences or misdemeanours but upon whom fines make no impression because they are either penniless and cannot, therefore, pay them, or because they are so affluent that it does not "hurt" them to pay the fines.

A special type of short-term prison sentence are the so-called "substitute sentences" which are served if a court-imposed fine is not paid. This is a particularly dubious punishment: it is often of a few days' duration only, affects a group of offenders the law did not envisage sending to prison, and upon whom the judge imposed a fine because

he, too, considered such punishment neither necessary nor meaningful. The difficulty is that of course hardly anyone would pay their fines if otherwise they did not risk being locked away. However, in order to curtail use of substitute sentences, in 1986³⁷ the German legislator did create the possibility of working off fines in so-called community service, i.e. of avoiding serving a substitute sentence by working unpaid for a specific number of hours for a public facility, i.e. in sports grounds or parks, or for charitable institutions, such as aid organisations.

Finally, it should be mentioned that in 1981 it was also made possible for life prisoners to have their sentences suspended on probation³⁸, i.e. once at least fifteen years of the sentence have been served. Furthermore, in 1986 the availability of probationary suspension of service was further extended for prisoners serving determinate sentences³⁹.

Similar developments have also occurred in juvenile criminal law. I have already listed the informal and formal sanctions not involving imprisonment which have existed since 1969. In addition, one should remember the options available for the public prosecutor or judge to terminate proceedings informally which I have already mentioned and which are used in particular for offences whose wrongfulness is slight.

These days, when we in Germany speak about alternative sanctions, we are not generally referring to those already mentioned which the legislator has provided to avoid enforcement of prison sentences. Instead, we mean new, precisely "alternative" reactions to criminal behaviour. Inspiration is often gained from beyond our own borders by examining other countries' sanctioning practice and from criminological writings. At times, some of the Federal Republic's most progressive judicial administrations then act zealously to try and introduce as many of the measures proposed in the literature as they can and, as far as possible, to be first to do so. Of course insofar as no express provision

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is made for the measures concerned, they must nevertheless be admissible within the framework of prevailing German penal law. Usually they are tested in so-called "criminological projects" and I feel it would be useful at this point to describe a few of these.

These projects or models for avoiding imprisonment are often applied to juvenile criminal law first⁴⁰ as can be explained by the fact that this is the area where the federal legislator has allowed greater leeway for such projects and, on the other, by the central position given to the notion of education. It is easy to see that depriving young offenders of their liberty, putting them in a situation where they often come into contact with other juveniles whose criminal guilt is greater, is a very dubious course of action; the result is that the alternative models are more readily supported in juvenile proceedings than elsewhere in the rather conservative judicial system. The legal basis for the deliberations is provided by the provisions of the Youth Court Act, which permit the public prosecutor and the judge to stay proceedings if a corrective measure has already been undertaken or instigated. Accordingly, the alternative models concentrate on developing and supporting specific corrective measures which are invoked as soon as the police have established the facts, wherever possible before the public prosecutor has examined the case. However, it is also possible for the public prosecutor to take the initiative, and in suitable cases he will consult with the organiser of such an alternative project.

One of the best known model projects, even internationally, is the one run by Cologne's "Brücke" association. It aims at not only extending the range of judicial instructions by setting up community service programmes and offering assistance, but primarily at avoiding judicial proceedings at all. Here, instead of preferring charges, the public prosecution service informs the adolescent offender and his parents that, once community service has been completed, i.e. once

a specific number of hours have been served in accordance with the "Brücke" group's instructions, it will refrain from pursuing the offence further. The juvenile court welfare office and "Köln Brücke" are also informed of the decision at the same time. Should the adolescent concerned agree to his case being handled in this way, he goes to the "Brücke" and performs his community service. Thereafter, proceedings are stayed.

Other projects deal only with young people who have committed particular offences, for example with juvenile shoplifters or youngsters who take and drive motor vehicles without a licence. In the latter instance, courses of road traffic instruction are offered and discontinuance of proceedings is made conditional on attendance.

In one Land⁴¹, a model has been developed whereby the police can offer alternatives to prison. Where they see fit, they can reprimand adolescents and, in addition, either suggest or arrange for compensation, an apology, or participation in road traffic instruction. The police then examine whether and to what extent the suggested or arranged measure has been carried out. If they are convinced that the reprimand is an adequate corrective measure, they inform the public prosecution service of what action has been taken and suggest proceedings be stayed. It is a model which has been—and still is—highly criticised since the police-lead sanctions run contrary to both the principle of the separation of state powers and the presumption of innocence. It is claimed that inadmissible pressure is put upon the adolescents concerned, and that in practice it is not possible for the public prosecution service to reverse measures begun by the police where it assesses the case differently.

In another project, which has now been terminated due to a lack of interest by the public prosecution service, adolescents and young adults who were the subject of investigation proceedings were assigned a voluntary helper. The project aimed at using the widespread willingness in the community to

help offenders, particularly young ones, on a voluntary basis. The reason for the project's failure was, not least, a lack of professionalism on the part of the volunteers.

Projects run under the title of "victim-offender mediation," which emanated from juvenile criminal law but which have long since been extended to cover adult criminal law, are increasingly being seen as a meaningful alternative to criminal proceedings. This alternative—for which specific provision is made in juvenile criminal proceedings—is often considered an opportunity to resolve appropriately and successfully the conflict between the offender and the victim arising out of the offence. By bringing the offender face-to-face with the victim and attempting to make good the harm done by the offence, an opportunity is seen to have a long-term preventive influence on the offender. This model can only be considered in cases where the victim has suffered a personal loss; it presupposes that the accused person and the victim are willing to come to a voluntary solution. Often it falls to the justice system's social services or to organisers of offender assistance programmes to organise offender-victim mediation. In addition to the non-material settlement (offender's contrition, understanding, possible reconciliation), an attempt is made to arrive at a material settlement in which consideration is also given to the payment of instalments and the possibility of foregoing compensation. Should the offender have no money for a material settlement, the agency concerned examines the possibility of involving an anti-debt fund. Where the mediation process is successful, the public prosecution service stays criminal proceedings. It is not, however, always possible to assess whether this measure has been "successful"; in the final analysis, a decision must be taken according to formal criteria.

A further project worthy of mention are group therapy sessions with recidivist road traffic offenders. The project's aim is to establish whether prison sentences can be sus-

pending on probation for recidivist drunk drivers, on condition that they attend a therapy group for a period of six months. Another very successful project aims at avoiding revocations of probation by involving court assistants in cases where a convicted person has not complied with the court's conditions and the court wishes, as a result, to revoke probation⁴². Here, court assistants have been able to avoid about eighty per cent of threatened revocations and instead to have the probation period lengthened, the condition amended or even lifted completely.

The project "imprisonment decision assistance" aims at avoiding investigation custody by ensuring the judge with responsibility for custody matters obtains better information on the accused person's personal and financial circumstances from the judicial authorities' social services; it also ensures that those circumstances are improved, e.g. by finding the accused accommodation, in such a way that enforcement of an arrest warrant for fear of flight becomes unnecessary. The list of interesting criminological projects and models for avoiding custody goes on and on. However, I should like to leave that subject behind me now and turn to my final theme.

IX. Legislative and Administrative Measures

Since as far back as the Federal Constitutional Court's December 1983 judgment, the necessity has been felt to regulate by statute particular methods of obtaining information in criminal proceedings and of handling the personal data so collected. Nevertheless, preparatory work on a corresponding revision of criminal proceedings has not yet proceeded beyond an internal Federal Ministry of Justice draft. Each year, the federal government has put off presenting a corresponding legislative bill. However, faced with advances in organised crime and the importance which the latter had gained in public debate, the Länder felt there was no justification in waiting any longer. As a result the

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Bundesrat, the representative body of the Länder, extracted the provisions relevant to organised crime from the draft, combined them with other proposals and presented them almost unanimously to the German Bundestag in 1990 as a Draft Act to Combat Illegal Drugs Trafficking and Other Forms of Organised Crime⁴³. The Draft works on the basis that to be effective in the fight against organised crime one must begin by skimming off its proceeds. Moreover, for relevant offences it considers stiffer penalties necessary to increase the deterrent effect and to ensure punishments are appropriate. Finally, it makes provision for the improvement of prosecution authorities' investigation instruments and for the protection of witnesses at risk. In part, that entailed including government bills which had not yet been promulgated in order to ensure that regulation of that area is comprehensive. The Draft proposes, *inter alia*:

- the introduction of a property fine (not just a pecuniary penalty) for organised criminal activities;
- the extension of the forfeiture of property for organised criminal activities;
- the stiffening of penalties for commercial fencing, gang fencing and gang theft;
- the introduction of a minimum prison term of ten years for members of drugs gangs;
- the re-classification of particularly serious cases of narcotics crime from misdemeanours (*Vergehen*) to serious crimes (*Verbrechen*);
- the extension of provisions dealing with criminal associations to foreign criminal associations whose purpose it is to traffic in narcotics;
- the introduction of "money laundering" as an offence within the Criminal Code;
- the statutory regulation of the use of undercover investigation officers;
- the statutory regulation of the use of acoustic and optical observation devices;
- the statutory regulation of systematic search and police observation;

—the use of various measures to improve witness protection making it possible to keep secret the identity and location of an endangered witness, including during court proceedings.

Individual parts of the Draft met with reservations from either the federal government or the Bundestag making it uncertain when the Act will finally be promulgated.

A further draft governmental bill to reduce pressure on the administration of justice, *inter alia*, by simplifying and accelerating proceedings, including criminal proceedings, finds its justification in the effects of German reunification, by which it has been prompted.⁴⁴ Since it is unthinkable for a considerable proportion of judges and public prosecutors from the former GDR to be employed in a judicial system based on the rule of law and, moreover, as a completely different system of law has been applied to the eastern part of Germany since reunification, a very large number of judges and public prosecutors had to be sent from the West to work in eastern Germany's judicial service. With West Germany's judicial system already being under considerable pressure, that has caused additional shortages which the new Draft tries to take into account. The Draft takes up numerous existing proposals for accelerating criminal proceedings upon which it was not previously possible to achieve a consensus. Although it falls far short of what many Länder consider necessary to reduce the pressure of their judicial administrations, it nevertheless does make provision for extending summary proceedings also to cover short-term prison sentences, instead of just fines as up to present, and for considerable amendments to the law on applications for evidence, the form of which provides a special burden on and draws out court proceedings in Germany. This Draft is also being debated in the German Bundestag. It is doubtful whether the judicial system would have seen its workload considerably reduced if the whole package of measures had been passed;

nevertheless, it is already becoming clear that that will not be true of the remainder of the package after it has been debated in parliament.

Whilst, as the above shows, the German legislator has for a number of years now failed in its task of providing the prosecuting authorities with the instrumentation to combat new forms of crime, particularly organised crime, more speedily and effectively, the Land justice administrations have, at least, acted within the limits of their own constitutional powers. They have convened a working group of interior affairs and justice administrations which, alongside proposals for statutory regulations, has elaborated administrative provisions for co-operation in combating organised crime and for protecting witnesses at risk in criminal proceedings. In a number of Länder, these administrative provisions have already entered into force. They guarantee close co-operation and a permanent exchange of information at all levels between the judicial authorities and the police in the form of general joint discussions and conferences aimed at combatting organised crime more effectively. In addition, they set out the basis for close co-operation with prison, customs and fiscal authorities.

The witness protection guidelines provide the police and judicial authorities with hints for admissible and necessary measures in this area and also set out the relevant responsibilities and forms of co-operation. The protection of witnesses at risk is of increasing importance especially where organised crime is concerned, for it helps to tear down the wall of silence created by threats and reprisals directed at witnesses, with which prosecuting authorities are often confronted.

To conclude, I should merely like to mention a few amendments to statutes over the last few years which may not facilitate the fight against organised crime but which, nevertheless, are still significant. The statutory provisions for combatting terrorism have been improved by, for example, introducing the chief witness arrangement for terrorist

offences I mentioned at the beginning (by comparison, such an arrangement is otherwise largely anathema to German law and was only provided for under narcotics law). Of particular importance is, moreover, the so-called Victim Protection Act of 1986, in which for the first time in German criminal proceedings the injured party—who is generally also a witness in proceedings—is freed from his former status as a mere object in proceedings and as a means of establishing the truth, and elevated to the position of an independent subject with considerably greater influence on proceedings. These arrangements, which time unfortunately prevents me from dealing with in detail now, are not least—along with the provisions to protect witnesses at risk—also for the future an important contribution in gaining the help of our citizens in solving crime.

As you can see, the reunification of Germany and certain dangerous and ever-increasing forms of crime are creating for us in the Federal Republic of Germany a whole range of problems. And if it is your impression that we currently lack sufficient means to face up to those problems, then you find yourself in agreement with the consensus held by Germany's police, public prosecution services and criminal courts. But even if the correct means are not yet available to us, we nevertheless believe we know what those means should be. For this reason, I strongly believe that the detailed analyses and discussions of the last few years have provided us with a wide range of suggestions and proposals for solutions which we can bring with us into the discussion. Perhaps in our discussions later we will have the opportunity of looking at and discussing one or two of the proposals in more detail. In the meantime, I should like to thank you for your very great patience and kind attention.

Notes

1. *Polizeiliche Kriminalstatistik 1990*, publisher Federal Criminal Police Office, Wiesbaden,

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- July 1991.
2. *Bulletin*, dated 7 May 1991, Press and Information Office of the Government of the Federal Republic of Germany.
 3. Act to Amend the Criminal Code, the Code of Criminal Procedure and the Act Regulating Public Meetings and Introducing the Chief Witness Arrangement dated 9 June 1989 (Federal Law Gazette I, page 1059).
 4. cf. also Schattenberg, *Entwicklung der Kriminalität in den neuen Bundesländern*, Schriftenreihe der Polizeiführungsakademie No. 1/91, page 54ff.
 5. Federal Law Gazette I, page 373.
 6. Bundestag Publication.
 7. Baier and Borning, *Mysterium DDR—Kriminalstatistik*, Kriminalistik 1991, page 273ff.
 8. Lehnert und Schumacher, *Kriminalitätsentwicklung in den fünf neuen Bundesländern*, Kriminalstatistik 1991, page 339ff.
 9. cf. *Pressinformation*, PRI G 1/91 published by the Max-Planck-Gesellschaft, 22 February 1991.
 10. cf. most recently Lenhard, *Kriminalistik 1991*, page 223ff.
 11. Federal Constitutional Court 65, page 1ff.
 12. cf. the Resolution of the Sixty-First Conference of Ministers and Senators of Justice (28—31 May 1990) on Topic 18, and the Report of the Working Group "Simplification of Mutual Judicial Assistance in Criminal Matters" in this respect.
 13. Judgment of the Federal Court of Justice of 21 August 1990—reference 5 StR 145/90.
 14. section 161, Code of Criminal Procedure (Strafprozeß-ordnung (StPO)).
 15. section 152, subsection 1, Organisation of the Courts Act (Gerichtsverfassungsgesetz (GVG)).
 16. section 163, StPO.
 17. section 161a, StPO.
 18. section 160, para 1, StPO.
 19. section 153, StPO.
 20. section 153a, StPO.
 21. sections 154, 154a, StPO.
 22. section 154, StPO.
 23. section 160, para 2, StPO.
 24. section 112, para 2, StPO.
 25. section 112, para 3, StPO.
 26. section 112a, StPO.
 27. Gebauer, *Die Rechtswirklichkeit der Untersuchungshaft in der Bundesrepublik Deutschland*, 1987, page 49ff.
 28. Prison Act (Strafvollzugsgesetz (StVollzG)) of 16 March 1976, Federal Law Gazette I, page 581.
 29. section 119, StPO.
 30. Sources: Federal Statistical Office (publisher), *Statistisches Jahrbuch 1989*, Series 10, Rechtspflege, Strafverfolgung 1989.
 31. cf. note 28.
 32. sections 109ff, StVollzG.
 33. section 2 StVollzG.
 34. section 3 StVollzG.
 35. section 10 StVollzG.
 36. First Penal Law Reform Act of 25 June 1969 (Federal Law Gazette I, page 645).
 37. Article 293 of the Introductory Law to the Criminal Code (EGStGB) in the version of Article 4, No. 1 of the Twenty-Third Penal Law Amendment Act (StrÄndG) of 13 April 1986 (Federal Law Gazette I, page 393).
 38. Twentieth Penal Law Amendment Act of 8 December 1981 (Federal Law Gazette I, page 1329).
 39. Twenty-Third Penal Law Amendment Act of 13 April 1986 (op. cit.).
 40. cf. here for example the survey in: Hering, Eike and Sessar, Klaus, *Praktizierte Diversion*, Pfaffenweiler 1990.
 41. Schleswig-Holstein.
 42. here Groß/Schädler (publisher), *Kriminalder politischer Bericht für den Hessischen Minister der Justiz*, Wiesbaden 1989.
 43. Bundestag Publication 11/7663.
 44. Draft Act to Remove the Pressure of Work on the Administration of Justice, Bundesrat Publication 314/91.

SECTION 2: PARTICIPANTS' PAPERS

Criminal Justice Administration in Malaysia

*by HJ Kamaruddin Bin Hamzah**

Introduction

The police and the processes of criminal justice are part of the main body of orderly society—the community. A basic difficulty in understanding police-community relations is defining the concept. Police officers themselves have different conceptions of it. To some, police-community relations simply means public relations, i.e. activities directed at creating and maintaining favourable impression of a product, a firm, or an institution.

The fact is that what a police department views as good for the department may not necessarily be good for the community; or it may be good only for that part of the community to whom the police are particularly responsive and not for other parts. Frequently, some part of the community are not adequately consulted in matters that ultimately affect all members of the community. Police relations communications have a tendency to go one-way.

Good public relations are important for any police agency. This area has been neglected in the past, apparently on the grounds that it is something of a luxury for a tax-supported service. Some police agencies may have preferred privacy.

Crime-Prevention

Often today, when one mentions police and community relations, the reaction suggests

something that has become "old hat." While it is not difficult to locate places still ten years or more behind time, where community relations are only now being discovered, most police agencies take their extensive community relations activities for granted. In present-day time, the nomenclature has changed: activities once called community relations are now called "community-based crime-prevention."

In Malaysia, since the establishment of the police force, various forms of programmes have been implemented to strengthen the relationship between the police and public in the area of crime prevention and cooperation. But increased sophistication of criminal activities has made the police role more difficult. Investigation, prosecution and collection of intelligence and evidence are becoming more difficult and can only be properly carried out by securing public trust and improving the investigative competence of the police.

One of the main reasons that have soured police-public relations is the wide "discretionary" powers given to the police. With the wide power conferred on the police, it is sometimes quite impossible to determine the extent and limitations of such powers. More often than not, such legal powers become abused powers and on the other hand, there has been a decline in the competency of police investigations. The multitude of discretions conferred on the police have caused dissatisfaction among the public who often questioned police procedures when applying these powers. Departmental directives to overcome the shortcomings have not been effective but instead impose extra burden on

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police officers conducting investigations.

Another factor that contributes towards incompetency of police investigations is the shortage of manpower so much so the standard of investigation has declined due to the extra workload in investigating too many crimes by few investigators.

Public Prosecution

In Malaysia, the Attorney-General is also the public prosecutor and is not vested with the powers of investigations because he is also expected to perform the role of supervising investigations conducted by the police. The police prosecutor is vested with the discretionary powers to institute, conduct or discontinue any proceedings except of the syariah court, native court or a court-martial.

The Federal Constitution confers on the public prosecutor the power to make a choice between various courses of actions. He has a choice as to how a specific end may be reached. This discretionary power should be exercised in an impartial manner. It is not arbitrary power and thus the public prosecutor is expected to use this power in the public interest.

Discretionary power is self-explanatory and hard to rebut. Discretionary powers are conferred on certain individuals for the purpose of bringing welfare to the society. If such powers are misused, as a result of their being uncontrolled, the purpose of their conferment would certainly be defeated. The public prosecutor's discretion ought to be subjected to judicial control. The "discretion" as stipulated in the Federal Constitution cannot be construed as "absolute" discretion.

It is recommended that the powers of the Attorney-General to prosecute be withdrawn from him. The public prosecutor should be a distinct person who is free from pressure from all sectors of society, particularly from the politicians. It is also recommended that the public prosecutor be given security of tenure in order to avoid his being in the

clutches of politicians.

The appointment of the public prosecutor should be made by a commission consisting of representatives of the various groups that contribute to the administration of justice, including the Prime Minister. It is further recommended that a tribunal be set up to look into the complaint against the public prosecutor's misconduct to determine if his dismissal should be made by the same commission that is responsible for his appointment.

The police has the duty of conducting prosecutions also. Prosecution of offenders is one of the general duties of the police as embodied in section 20 (3) of the Malaysian Police Act, 1976. The effectiveness of police as a law enforcement agency demands that the officers conducting prosecution must reach a certain standard of prosecution. It is imperative that in a criminal trial, the prosecuting officer should be aware of and fully understand the objectives of a criminal prosecution, *inter alia*, the protection of society, fundamental liberties of a citizen, adherence to government policy, ascertain guilt or innocence of an accused person within the law and punishment of offenders for infringing the law. The prosecutor has an interest in the acquittal of innocent people as much as in the conviction of a guilty man.

A prosecutor is expected to have a reputation for absolute integrity and fairness, courteousness and preparedness. Insofar as police prosecutors are concerned, there is a dire need that they be exposed to case-law type of studies as the laws develop very fast and become more complicated. The exposure brought through experience is not sufficient for him to confront a lawyer who is trained in the law schools. To this, it is suggested that all police prosecutors must be trained in the various law schools and be of the minimum rank of Assistant Superintendent of Police. The minimum rank stipulated is to give police prosecutors the incentive to remain in the force much longer as those with law degrees will find the private sectors more lucrative to work with.

Generally speaking, so long as discretionary powers exist, there is always the case of abuse of powers. To minimise this problem, it must be subjected to judicial control.

Fair and Expeditious Trials

"Justice delayed is justice denied." These words have been repeatedly uttered over the years not only in this country but all over the world. In fact, delays have become synonymous with the administration of justice. Sometimes delay is inevitable and at other times even justified. Speedy justice has often led to injustice. Generally, however, delays in trials in the courts can be minimised if not avoided altogether to a great extent, it requires the cooperation of the various agencies related to the administration of criminal justice.

Among the reasons for the delays is postponement of cases and this arises for a variety of reasons. A witness is absent because he has either forgotten the date of the new trial or because of a prior appointment and personal emergency. Investigation not completed is one of the common causes of delays. This problem arises because of too many cases of arrest first and investigate later. Police should complete investigations first and charge the accused later after taking into consideration the evidence. If there is a need to investigate further, then the accused person must be given bail. This point is best illustrated on TV when the American police who cannot complete investigations within 24 hours is forced to release the suspects with the words, "Do not leave town."

Another reason that leads to delays is that cases are postponed because *further directions* are needed from the public prosecutor. Application for postponement from defence counsels, courts, and accused persons are also the reasons why trials cannot be expedited.

The effect of postponement on the administration of criminal justice creates havoc in court administration and dissatisfaction

among the public. The situation becomes worse where witnesses are not told the true reason why cases have been postponed.

A speedy trial is one of the fundamental principles in the administration of justice enhancing the integrity of judicial process. A speedy trial guards against oppressive conduct by corrupt officials who may take advantage of delays for improper notices.

Prison Overcrowding and Non-Custodial Measures

These two issues are synonymous in nature and represent one of the pressing problems facing criminal justice administration.

Insofar as Malaysia is concerned, the deterioration of prison regime and security are obvious from the fact that all prisons/institutions in Malaysia are overcrowded and forcing cutbacks on accommodation, training facilities and rehabilitation programmes for prisoners. Categories of prisoners often land in institutions that were not intended for them. At the rate the prisoners are increasing, the situation of overcrowding can only worsen with time. The main issue is whether more prisons should be built to accommodate the number of prisoners or whether we should consider countermeasures to overcome overcrowding in prisons.

Unless immediate steps are taken to find countermeasures to overcrowding in prisons, the system which administers justice in Malaysia will continue to stand accused of using outmoded methods to deal with present day complexities.

The expansion and amendments to legislation over the years, principally through statutory provisions has imposed such burden on the current method of administering justice as it is unable to bear without sacrificing the quality of justice.

In Malaysia, no new innovative sanction has been recommended as an alternative to imprisonment. Every sentence carries a term of imprisonment, from one day to death. The reason why imprisonment is looked upon as

an inevitable criminal sanction is the belief that it is possible to train and educate at least a certain percentage of prisoners to change their criminal habits and the belief that for security reasons, they should be kept away from society for a longer period. Perhaps the main reason is that there is no other choice or alternative which Malaysian law can use in trying to reduce or avoid imprisonment.

Presently, the law in Malaysia provides for non-custodial sentences in many forms. Fines are generally used in cases where the aim is to deter rather than to punish. Another form is by way of compensation orders. Other forms include discharge, binding over and probation orders in the case of juveniles.

It is recommended that parole schemes be introduced, i.e. the conditional release of certain selected prisoners before the expiry of their terms usually on the condition that they remain under the supervision of a parole officer. Another recommendation is to introduce suspended sentences of imprisonment. It works on the basis that the convicted offender is sentenced to a term of imprisonment but execution of the sentence is suspended for a specific period of time. The suspended sentence is applied in the case of an offender of previous good character who has committed an offence of a relatively serious nature under circumstances of substantial mitigation.

Community service is another form of alternative to imprisonment which is widely used in the United States. But it is not without a disadvantage. The amount of manpower

which has to be utilised in finding and supervising the community service jobs is tremendous and may be more costly. But in cases of default to pay fines, community service can be implemented by doing service in old folks homes, hospitals, orphanages, town councils and city councils. Offenders (those in default of fines) should be assigned to these homes under the supervision of the respective home superintendents or relevant heads.

We cannot "build" our way out of our current prison crisis, but we can manage and control our prison growth and maintain the integrity of the criminal justice system. By carefully developing sensible sentencing policies, implementing an aggressive public education initiative, we have held offenders accountable to the public and the legal system and have held ourselves accountable to the public.

Conclusion

In the quest for solutions of the pressing problems of contemporary criminal justice administration, criminal justice agencies, e.g. the legislators, judiciaries, police, prisons and other law enforcement agencies must come together to solve the problems in a concerted effort and cannot be solved through the isolated effort of any one agency.

The various agencies must analyse the prevailing situations and problems and explore practical and appropriate means to solve the problem.

Administration of Criminal Justice in Pakistan

*by Akhtar Ahsan**

The Colonial Heritage

Pakistan came into being as a sovereign independent state on 14th August 1947, when British rule ended and India was divided into Pakistan and Bharat. The founders were committed to create a state wherein the Muslims would be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam. At the time of independence, the criminal administration system in vogue in the country, reflected the dictates of administrative necessity of the colonial ruler. The criminal law had been codified into Indian Penal Code 1860, and criminal procedure into Code of Criminal Procedure 1898. This provided a legal framework for the administration of criminal justice in India. Similarly the police set-up was organised and administered under the Police Act, 1861 and rules framed thereunder. In this system the basic unit of administration was the District and the head of the district criminal administration was the "District Magistrate." He was vested with the vast administrative and judicial powers. He symbolised the royal authority in the area. He was assisted by magistrates and a police force headed by the Superintendent of Police for maintenance of law and order. The system, most suited for a colonial rule, was not in many things responsive to the requirements of a free nation. The police force was symbolic of domination and intimidation and therefore the public attitude towards the force was that of fear and subjugation instead of trust and par-

ticipation. The prosecutors in the Magisterial Courts were part of the police organisation, administratively under the Superintendent of Police. The district was divided into police units called "police stations" headed by a "Station House Office" and each police station was allocated to a Magistrate called "Ilaqa Magistrate" who tried almost all the criminal cases of the police station and was also responsible for crime control and maintenance of law and order in the area. A Prosecuting Sub-Inspector (PSI) or Prosecuting Inspector (PI) was deputed to conduct prosecution in the Court of the Magistrate.

A parallel system of judiciary set up under the High Courts and comprising the District and Sessions Judges was existing but that was by and large appellate structure in criminal cases. Although the Sessions Courts had original jurisdiction in offences like murder, etc. the magistracy still had their role to play in the shape of commitment proceedings. The public prosecutors who conducted prosecution in the Sessions Court were administratively under the District Magistrate.

The position with respect to the fourth side of the quadrangle of criminal justice i.e. prison, was not different. The prisons, controlled by the jail superintendents, were under the supervisory control of the District Magistrate. Moreover the British government in India regarded the prisons as places where a society sends its outlaws and law breakers and also political opponents for terms either specified by the judges or determined by the administrators under preventive detention laws. During the British regime, the stress was therefore only on ensuring a safe and unhampered detention of the jail inmates. The provisions for release on proba-

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tion were provided in the laws but were used not for rehabilitation of the prisoner in the society but to ensure to make him a loyal subject. This bureaucratic system of criminal administration was ideal for authoritative rule. It was committed not necessarily to the dispensation of justice but for enforcement of royal writ.

Pakistan inherited this system on her independence and adopted it as a necessary evil. This was the time to reform the society, and reframe the administrative structures to suit the new environment of civil liberties and Islamic principles of social justice. Unfortunately the country suffered from political instability and military rule. The dictatorial regimes during the period believed in controlled democracy or no democracy. The British legacy of bureaucratic rule suited their requirements and thus the system continued unchanged.

The system left by the British is still in practice. The Pakistan Law Reforms Commission constituted during 1967—70 suggested that "the real need appeared to be to further improve the existing system to meet the modern requirements and not to replace it by an inadequate system which we left behind long ago." Under the existing constitutional framework, law and order is the provincial subject and thus the different agencies of the administration of criminal justice fall within the provincial orbit. The police, the prosecutors, the trial courts and the prisons are provincial subjects. However, every government has felt the need to re-define the perimeters of administrative structure and administration of justice. People's trust and cooperation with the law enforcement agencies has further deteriorated. The courts are over-burdened and jails are overcrowded. Like all over the world, the crime situation has continued to worsen both in terms of quantum of crimes and the forms in which it reflects itself. Socio-economic changes, a shift from rural agrarian to an industrial urban society, have brought about a new crime profile with criminals using new techniques

and sophisticated weaponry. The Afghan war has further aggravated the situation by making available in abundance the modern weaponry at cheaper rates and right at the doorstep.

However the issues are multidimensional and inter-linked. The pressing problems of criminal justice administration, with reference to Pakistan and its magnitude and possible solutions are explained in the succeeding paragraphs.

Effective and Fair Investigation

Police are the main investigation agency except investigation of certain offences committed in connection with matters concerning the federal government and for matters connected therewith. For such offences, a federal force, called the Federal Investigation Agency, has been set up, which has by this time succeeded to develop expertise to investigate the white collar crime. After Independence, the police which were initially meant for policing a rural agrarian society were to develop themselves into a force well-equipped to face the increased urban crime. Unfortunately they did not undergo the strengthening and modernisation in techniques and equipment necessary to cope with the changing pattern of crime. Different police commissions were constituted to suggest improvements. All such commissions failed to change the very culture and the outlook of the force. The force remained repulsive to the public cooperation and devoid of mutual trust. The subject of criminality remained to be treated as non-developmental, and thus remained deliberately and continuously short-funded by the successive governments. This led to under-strength police force lacking both training and equipment and resultant no expertise to investigate and control the crime. The police have to change their outlook, their culture and their behaviour towards the public. There is a need to inculcate a sense of mutual trust and make the individual realise his duty towards the state

and the society. The present government appears committed to introduce some fundamental changes in the police force. The prime minister while addressing the Joint Session of the Parliament announced that the police system will be re-organised and reformed to make it an effective instrument for protection of lives and liberties of all citizens. A high-powered committee is on the job.

Expeditious Trial

The ordinary criminal courts are overburdened and flooded with large numbers of cases which linger on for years before finalization. The basic reasons for such delay could *inter alia* be as follows:

- (a) Insufficient number of courts.
- (b) Indifferent attitude of the witnesses to depose against the accused.
- (c) Courts are not bound to dispose of any case, within any specified period of time and also are immune to any criticism or accountability on this account.
- (d) More than one appeal against conviction.
- (e) The Magistrate devote more time to their executive functions rather than judicial duties.

Conscious of the above reasons, the present government has taken certain fundamental steps for fair and speedy trial. Even the Constitution has been amended to provide for a system of special courts for trial of heinous offences which are gruesome, brutal, and sensational in character or shocking to public morality. A time limit has been provided to dispose of the case and right of only one appeal against the conviction has been provided. In the light of the constitutional amendment, "Special Courts for Speedy Trial Ordinance 1991" has been enacted. Under the provisions of this ordinance after taking cognizance of a case the Special Court shall proceed speedily with the trial from day to day and shall decide the case within thirty

days and for any delay sufficient reasons shall be recorded. The Special Courts shall not adjourn any trial for any purpose unless such adjournment is necessary in the interest of justice and no adjournment shall in any case be granted for more than two working days. To provide fairness to the investigation and prosecution, in section 9 of this ordinance, it has been provided that on pronouncement of the judgement the Special Courts shall have jurisdiction and powers to take cognizance of an offence committed in course of investigation of trial of a case tried under this ordinance by a police officer, officer in charge of a police station, a witness including an expert who has tendered false opinion in a case and summarily try and award punishment provided for the offence under the law. Eleven Special Courts have so far been established under this ordinance along with the four Supreme Appellate Courts. The cases are being disposed of expeditiously which has a deterrent effect on the general law and order situation. The public has appreciated the Government step for speedy justice.

Another measure to cut down the burden on the criminal courts is by the introduction of Islamic provisions of Qisas and Diyat Law. Ordinance No. XLII of 1991 has been enacted to make all the offences involving bodily injury cases as compoundable. Under the Islamic provision it is the prerogative of the victim or heirs of the victim to waive the offence or compound on the mutually agreed terms. The criminal laws have been amended under this ordinance to provide that in case of Qatl-i-amd (murder) an adult sane wali (heirs) may at any time and without any compensation waive his right of Qisas; (Qisas means punishment of causing similar hurt on the same part of the body of the convict or causing his death if he has committed Qatl-i-amd (murder) in exercise of the right of the victim or a wali). Moreover in case of Qatl-i-amd an adult sane wali may at any time on accepting badal-i-sulh (compensation money), compound his right of Qisas.

The provision of waiver and composition apply to all bodily injury cases mentioned in Chapter XVI of the Pakistan Penal Code. By the introduction of these provisions the people are out to negotiate for the offences and submit compromise deed in most of such cases.

The institution of Conciliation Courts under the Conciliation Courts Ordinance can also decrease load of cases in the Criminal Courts. The government is taking measures to reactivate the Conciliation Courts institution and make full use of it. Under the ordinance, the Conciliation Court shall be a body consisting of a chairman and two representatives to be nominated in the prescribed manner by each of the parties to the dispute. The chairman is an elected member of the local bodies institution i.e. Union Council/Town Committee. These Conciliation Courts shall have no power to pass an order for imprisonment or fine but if it holds a person guilty of offence it may order the accused to pay to the aggrieved persons compensation. Normally the cases are referred to the Conciliation Courts by mutual agreement of the parties. The government is considering a proposal to enhance the scope and jurisdiction of these courts so that inexpensive and speedy justice right at the doorstep could be made available to the general public.

Criminal Prosecution

Two parallel hierarchies of prosecution exist since pre-independence days. The Magisterial Courts are manned by the prosecutors of the police organisation, whereas in the Court of District and Sessions Judge, the public prosecutor conducts the prosecution. The police prosecutors are recruited as junior police officers and they receive police training along with their counterparts in the Executive Police. The Prosecuting Deputy Superintendent of Police who heads the Prosecution Branch of Police in a district is under over-all control of the Superintendent

of Police. The Prosecution Branch also renders legal advice to investigating officers and also supervises the service of summons and warrants. They are actually a link between the police and the Magisterial Courts for administration of criminal justice. The public prosecutors are administratively under the control of District Magistrate. They conduct prosecution in the Court of District and Sessions Judge and also advise the District Administration on the legal matters.

The Police Commission 1969—70 *inter alia* recommended that the prosecution work should be taken away from the police and a separate Prosecution Agency should be established independent of police. The Commission was of the view that the prosecution was not a police function and there will be more objective appraisal of the Policemen's investigation and detection of crimes and its prevention if the prosecution is not administratively supervised by the police department. Moreover, a prosecutor being a part of the police organisation is more interested in the conviction of the accused rather than in administration of justice. The recommendations of the Police Commission have been adopted and executed by the Punjab Province of the country. In that province prosecution has completely been separated from the investigation. The prosecution staff has been re-designated as Assistant District Attorney, Deputy District Attorney and District Attorney. The Prosecution Branch has been placed under the direct administrative control of the Law Department of the Province instead of the District Police or District Magistrate. The success or the failure of the system is yet to be assessed. However, at least the role of the public prosecutor has been changed. Now he is not a protagonist of any party. He stands for the State in whose name all prosecutions are conducted and he is now more close to his object i.e. to assist the court in discovering the truth.

Prisons & Prisoners

Pakistan inherited a rigid brutal system of prisons from the British who used the institution to detain the political opponents and criminal outlaws to motivate them to become loyal subjects. Jail administration and prisons were regulated under the Prisons Act, 1889 and Prisoners Act 1900. After Independence, with a view to reform the jails and to give a better treatment to the inmates, a Jail Reforms Committee was constituted in 1950. On their recommendation a Revised Jail Manual was drafted to provide reforms in diet, clothing and general administration, etc. Subsequently the Pakistan Prison Rules were drafted in 1978 on the lines of the Standard Minimum Rules for Treatment of Prisoners passed by the Geneva Convention 1954. In 1983, a high-powered committee of the Cabinet was appointed under the Chairmanship of Mr. Mahmood Ali, the then Minister of State and Chairman of National Council for Social Welfare, to review the entire Prison system of the country. This Committee reported overcrowding and unsatisfactory conditions of the prisons and prisoners. The Committee *inter alia* reported:

“For all practical purposes the prisoner is at the mercy of the low paid staff who has a constant and direct touch with the ordinary jail inmate. The underpaid and overworked staff of the ill-manned and overcrowded prisons treats the prisoners in accordance with its very own standards and choices.”

The recommendations made by this Committee to improve the situation were by and

large implemented.

Regarding non-custodial measures the following enactments for release on probation and parole exist:

1. Good Conduct Prisoners Probational Release Act, 1926.
2. Probation of Offenders Ordinance, 1960.

A directorate for the purpose of probation works under the supervision of the Provincial Home Department. The Directorate recommends for licenced and conditional release of parolee from prison. The courts have also full power to allow first offender and non serious causal offenders release on probation. The probation and parole organisations are still in their infancy despite overpopulated prisons in the country. The institution is yet to develop for which public education and motivation is required.

Conclusion

The above lines indicate the criminal justice system as it was inherited and as it exists at present. Like other developing countries, in Pakistan as well, the system is yet to go far to be rated as satisfactory. Measures have to be taken to enhance its effect, efficiency and fairness. Crime being social phenomena, the crime prevention is the responsibility of every part of the society. The whole society is to be mobilised to achieve the desired results. The economic prosperity, respect for the human rights and political will are as much needed as the efficient, effective and fair performance of the agencies involved in the administration of criminal justice.

Non-Custodial Measures for Dealing with Offenders in the Philippines Criminal Justice System

by Emetri J. Amoroso*

I. Introduction

The Philippines is a country of about 7,103 islands set in Southeast Asia, with a total land area of around 300,000 sq. kilometers. Its population of over 60 million people live in the major islands of Luzon in the north, Mindanao in the south, and some medium-sized islands in between which compose the Visayas. The Filipinos come from Malay stock, seafaring people who settled in various parts of the archipelago and whose adaptations to the different terrains and environments in the islands produced 128 major ethno-linguistic groups. Today the Filipino nation is a heterogeneous group whose social structure has Indonesian roots, infused with predominantly Chinese blood and attitudes, and with a cultural heritage partly Spanish and partly Anglo-Saxon. It is a blending of Eastern and Western influences, with its form of government and legal system based on Western patterns and its principal religious faiths, Christianity and Islam, originating from the West.

The seat of the national government is in Metro Manila. For administrative purposes, the country is divided into fourteen (14) geographical regions with each region consisting of several provinces, and each province containing cities and municipalities. The cities and municipalities are further divided into "barangays" or villages.

II. Overview of the Correctional System in the Philippines

The criminal justice system in the Philippines is composed of five (5) pillars, namely: *law enforcement, prosecution, courts, corrections, and the community.*

The *corrections pillar* consists of custodial and non-custodial institutions or agencies which carry out the task of correction and rehabilitation of offenders.

The custodial correctional system operates at three (3) levels:

1. *National level*—There are seven (7) national prisons and penal farms for offenders serving sentences of more than three (3) years. These are under the Bureau of Corrections of the Department of Justice.
2. *Provincial level*—There are 72 provincial jails administered by the provincial governments under the supervision of the Department of Interior and Local Government.
3. *City and Municipal level*—There are 65 city and 1,467 municipal jails under the supervision and control of the Bureau of Jail Management and Penology which is under the direct administrative and operational supervision and control of the Chief of the Philippine National Police which is in turn under the Department of Interior and Local Government.

In addition, there are ten (10) Regional Rehabilitation Centers operated by the Department of Social Welfare and Development which house juvenile offenders.

For offenders who are found to be drug dependents, there is the Treatment and Reha-

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Table 1: Prison Population (As of June 30, 1991)

Institution	Total Jail Population	Sentenced Prisoners	Prisoners Awaiting/with Ongoing Trial	On Protective Custody
National Prisons and Penal Farms	14,559	14,559 (100%)	—	—
Provincial Jails	9,611	894 (9.3%)	8,503 (88.47%)	127 (1.32%)
City/Municipal Jails	13,700	2,124 (15%)	11,576 (85%)	—
Total	37,870	17,577 (46.41%)	20,079 (53.02%)	127 (0.33%)

Rehabilitation Center for Drug Dependents operated by the National Bureau of Investigation, an agency under the Department of Justice, and other centers operated by private groups in coordination with some provincial and city governments.

As can be seen from the preceding, the correctional system is fragmented. This has resulted in frequent lack of coordination among the agencies concerned, a problem that continues to plague the country's criminal justice administration. Furthermore, since imprisonment is still the most common measure for dealing with persons accused and/or convicted of crimes, the correctional institutions, particularly many local jails, continue to be generally overcrowded and characterized by poor and inadequate facilities.

Consequently, there has been a persistent movement from various sectors in the criminal justice system for the enactment of legislation that will increase and broaden the scope of non-custodial alternatives in dealing with criminal offenders both before and after conviction. Several such legislations have been passed and a few others are pending in the Philippine Congress.

III. Non-Custodial Measures Before or During Trial

The following non-custodial measures are

Table 2: Disputes Submitted to the Barangay Courts (January 1, 1986 to December 31, 1990)

Nature	Criminal	Civil	Others	Total
Number	418,766	305,617	133,971	858,354
%	49%	36%	15%	100%

Table 3: Disputes Settled by Barangay Courts (January 1, 1986 to December 31, 1990)

Action Taken	Settled Disputes	Forwarded to the Courts	Pending
Number	759,911	61,244	37,199
%	89%	7%	4%

available under Philippine laws for dealing with persons accused of criminal offenses prior to trial:

1. *Amicable Settlement of Disputes at the "Barangay" Level*—this is provided for under Presidential Decree No. 1508, popularly known as the "Katarungay Pambarangay Law" (Barangay Justice Law) which took effect on December 11, 1978. The law provides for a mediation and conciliation process at the "barangay" level as a pre-condition to the filing in court of a criminal case wherein the offense

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charged is punishable by imprisonment of not more than 30 days or a fine of not more than two hundred pesos.

The application of the "Katarungay Pambarangay" law has resulted in a savings in government expenditures for the given period amounting to 2,204,166,500.00 pesos.

2. *Release on Bail*—this is available in non-capital offenses or in capital offenses where evidence of guilt is not strong.
3. *Release on Recognizance (ROR)*—this allows the accused who is unable to post bail to be placed under the custody and subject to the authority of a responsible person in the community who is willing to accept this responsibility. This is presently limited to cases where the offense charged is punishable by imprisonment of one month and one day to six months and/or a fine of not more than two thousand pesos or both.
4. *Release of Detention Prisoners* who have been detained for a period equal to or more than the maximum penalty which may be imposed for the offense charged.
5. *Submission of Sworn Statements* of the complainant, the accused and their witnesses to expedite preliminary investigations and allow the immediate release of a detention prisoner if there is no prima facie evidence against him.
6. *Warning of a Youthful Offender* by the Barangay official or the police, and his release from detention upon the recommendation of the social worker.

IV. Non-Custodial Alternatives of the Correction and Rehabilitation of Offenders

1. *Suspended Sentence for Youthful Offenders* (this may be either custodial or non-custodial in nature)

Suspension of sentence for youthful or juvenile offenders came into being in the Philippines on December 3, 1924 when Act No. 3203 or the Juvenile Delinquency Law

was passed. The provision of this law on suspended sentence for juvenile offenders was subsequently embodied in Article 80 of Act No. 3815, the Revised Penal Code, which took effect on January 1, 1932. This article was superseded by Presidential Decree No. 603, otherwise known as the Child and Youth Welfare Code, which was enacted on December 10, 1974. This law has since been amended twice.

Under the Child and Youth Welfare Code a youthful offender is defined as "a child, minor or youth, including one who is emancipated in accordance with law, who is over nine years but under eighteen years of age at the time of the commission of the offense."

Article 192 of the Code provides that after hearing the evidence in the proper proceedings and finding that the youthful offender has committed the crime charged, the court shall determine the imposeable penalty and may subsequently suspend all further proceedings and commit the said offender to the custody of the Department of Social Welfare and Development or any training institution operated by the government of any other responsible person until he reaches 21 years of age or for a shorter period as the court may deem proper.

Suspended sentence as above-cited can be availed of only upon application of the youthful offender and upon a finding by the court that such suspension will secure the best interest both of the public and of the offender.

This privilege cannot be availed of by a youthful offender under the following circumstances:

- a. He had once been granted suspension of sentence under the Code.
 - b. He is convicted of an offense punishable by death or life imprisonment, or convicted for an offense by a military tribunal.
2. *Suspended Sentence for the First Offense of a Minor in a Drug Offense*
Republic Act No. 6425 or the Dangerous

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Drugs Law of 1972 provide suspension of sentence of a minor who is under 18 years of age at the time of the commission of the offense but not more than 21 years at the time when judgment should have been promulgated, is found guilty for the first time of illegal or unauthorized possession or use of prohibited or regulated drugs, *provided* that he has not been previously convicted of violating any provision of the Act or of the Revised Penal Code or previously granted probation (suspension of sentence) under this Act.

In such case, the court may defer sentence and place the youthful offender on probation under the supervision of the Board or its agents under such conditions as the court may impose for a period ranging from six months to one year.

3. *Probation for Adult Offenders*

The concept of probation for adult offenders was born in the Philippines on August 7, 1935 when Act No. 4221 was enacted by the Philippine Legislature. This provided probation for first offenders who were 18 years of age or more who were convicted of certain crimes. Unfortunately, the law had some defects in its procedural framework and was declared by the Supreme Court as unconstitutional on November 16, 1937.

Thereafter, several attempts were made to establish an adult probation system in the country but were not successful due to certain circumstances. Finally, after much perseverance and a concerted effort of various authorities from the five pillars of the criminal justice system, including 18 technical hearings conducted by the Inter-Disciplinary Committee on Crime Prevention of the National Police Commission, a draft of the decree was presented at a seminar attended by 369 jurists, penologists, social and behavioral scientists, prosecutors, law enforcement officers and civic leaders. They overwhelmingly endorsed the proposed adult probation system. Subsequently, the final draft

of the decree was prepared, reviewed by the then Minister of Justice, Minister of National Defense and Chief Justice of the Supreme Court, and endorsed by the President. The law was signed on July 24, 1976 at the closing ceremonies of the First National Conference on a Strategy to Reduce Crime. Thus, Presidential Decree No. 968, otherwise known as the Probation Law of 1976, finally established an adult probation system in the Philippines

Despite its landmark significance, the Probation Law was not perfect and has been amended three times since its enactment. Today there are moves to further amend some of its provisions to suit the changing circumstances. At present, this law contains the following salient features:

- a) *Scope of Probation*—probation under PD No. 968 is defined as a "disposition under which a defendant, after conviction and sentence, is released subject to conditions imposed by the court and to the supervision of a probation officer." As a rule, it is granted only to offenders who are 18 years of age and above. However, there are certain cases when youthful offenders, i.e., those below 18 years, are granted probation under this law.
- b) *Privilege, Not a Right*—probation is considered a privilege, not a demandable right. Its grant lies, therefore, within the sound discretion of the court, taking into consideration the criteria and requirements of the law.
- c) *Number of Times Probation May Be Granted*—in the Philippines this privilege can be availed of only once in a lifetime.
- d) *Filing of Application*—the convicted offender must file an application for probation if he desires to avail of the benefit of the law. This application must be filed after conviction and sentence, within the period for perfecting an appeal and before the offender starts to serve his sentence. Thus, after conviction and sentence, the offender must choose whether to apply for

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probation or to appeal the judgment of conviction. If he chooses to appeal, his application for probation shall not be entertained anymore.

- e) *Post-Sentence Investigation Report*—no person may be placed under probation except upon prior investigation by a probation officer. This report usually contains the findings of an extensive investigation into the personal and social history of the offender, including the circumstances surrounding the commission of the offense, his upbringing, family background, education, employment history, marital situation, relationships at home and in the community, physical and mental condition, attitudes and all other aspects of his life and personality. The report ends with an Analysis and Evaluation portion and with the Probation Officer's recommendation for grant or denial of probation. This recommendation is only persuasive in nature and the final decision to grant or deny probation rests on the Court.
- f) *Disqualified Offenders*—not all sentenced offenders can apply for probation under PD 968. The following are disqualified:
- (1) Those sentenced to a maximum term of imprisonment of more than 6 years;
 - (2) Those convicted of subversion or any crime against national security or the public order;
 - (3) Those previously convicted by final judgment of an offense punished by imprisonment of not less than one month and one day and/or a fine of not less than two hundred pesos;
 - (4) Those who have once been granted probation under this law;
 - (5) Those already serving sentence at the time the substantive provisions of this law took effect.
- g) *Criteria*—even if an offender is legally qualified to apply for probation, he may not be granted the same if it is found that:
- (1) He is in need of correctional treatment that can be provided more effectively by his commitment to an institution;
 - (2) There is undue risk that during the period of probation he will commit another crime; or
 - (3) The grant of probation will depreciate the seriousness of the offense committed.
- h) *Release on Bail or Recognizance Pending Investigation*—pending the submission of the investigation report, a petitioner for probation may be allowed temporary liberty under his bail filed in the criminal case, or under a new bail. If he is unable to post bail, he may apply for release on recognizance (ROR) and be placed under the custody of a responsible member of the community.
- i) *Individualized and Personalized Rehabilitation Programs*—the program for the treatment and rehabilitation of a probationer is based on his individual needs and circumstances. This may include individual counseling, reality therapy, group dynamics sessions, medical assistance, income-generating projects, job referrals, skills training, adult education, spiritual-renewal activities, family or marital counseling, legalizaion of common-law relationship, psychological or psychiatric examination and treatment, social-development activities, involvement in community projects and national programs, and many others. The probationer's conduct and compliance with the conditions of his probation are monitored by his supervising officer through home visits, coordination with the community officials particularly in the Barangay as well as with the local police. In addition, the probationer is required to report to the probation officer from one time to four times a month, according to his classification (minimum, medium or maximum supervision). In all of these, there is much personal contact between the client and his supervising probation officer.
- j) *Networking and Utilization of Community Resources*—because of limited agency funds, the probation officer must establish

linkages or networks in his area of jurisdiction so as to tap additional resources for the rehabilitation of clients. In addition, the involvement of the community is necessary in order to successfully accomplish the reintegration of the offender into society. This involvement includes the use of Volunteer Probation Aides who are residents of the community and who assist in the supervision of clients.

k) *Restoration of Civil Rights*—once a probationer has successfully complied with the conditions of his probation and he is finally discharged at the end of the probation period, the civil rights that were lost or suspended as a result of his conviction are automatically restored. Such discharge will also fully discharge his liability for any fine imposed as to the offense for which probation was granted.

4. *Parole and Conditional Pardon*

Under the Indeterminate Sentence Law or Act No. 4103, a prisoner may be granted parole after he has served the minimum period of his sentence of imprisonment and is found fit for release. However, the following are disqualified:

- a) Those convicted of offenses punished with death or life imprisonment;
- b) Those convicted of treason, conspiracy or proposal to commit treason;
- c) Those convicted of misprision or treason, rebellion, sedition or espionage;
- d) Those convicted of piracy;
- e) Those who are habitual delinquents;
- f) Those who shall have escaped from confinement or evaded sentence;
- g) Those whose maximum term of imprisonment does not exceed one year.

Subject to certain conditions, sentenced prisoners, including those punished with life imprisonment, may be released before the expiration of the maximum sentence by virtue of a conditional pardon from the President of the Philippines.

5. *Implementing Agencies*

The non-custodial rehabilitation programs just presented are administered by different agencies of the government, as follows:

- a) Suspended Sentence for Minor Offenders under the Child & Youth Welfare Code—the suspension is ordered by the Court while supervision is usually done by the Department of Social Welfare and Development.
- b) Suspended Sentence for Minor Offenders in a Drug Offense—supervision is conducted by agents of the Dangerous Drugs Board or others as ordered by the Court.
- c) Probation for Adult Offenders—the orders to investigate and supervise clients are issued by the Court. The investigation and supervision are conducted by the Parole and Probation Administration under the Department of Justice.
- d) Parole and Conditional Pardon—the order granting parole is issued by the Board of Pardons and Parole, a unit directly under the Secretary of Justice. The order of conditional pardon, on the other hand, is granted by the Chief Executive of the land, usually upon recommendation of the Board of Pardons and Parole.

In the past, the supervision of parolees and conditional pardonees was conducted by the municipal court judge. When Executive Order No. 292, known as the Administrative Code of 1987 took effect in November 1989, the supervision of these persons was transferred to the Probation Administration, now known as the Parole and Probation Administration. In 1991 the Board of Pardons and Parole issued a resolution authorizing Probation Officers, now known as Probation and Parole Officers, to conduct the investigation of jail inmates who may be qualified for parole, conditional pardon or other forms of executive clemency.

V. Areas for Improvement

The implementation of the non-custodial measures for dealing with criminal offenders can be further improved in the following operational areas: inter-agency coordination, establishment of an integrated national crime information system with a more extensive coverage than is currently existing, more intensive and continuing public information programs to enhance the understanding and support of the people, continuing development of the professional skills of implementing officers, improvement of existing performance evaluation systems, and the allocation of adequate logistics. There is also the widely recognized need to further improve the laws, rules and policies that now govern the implementation of these measures so that the required services can be carried out more

effectively.

VI. Conclusion

The non-custodial measures currently implemented in dealing with offenders under the Philippine Criminal Justice System can be said to be fairly successful. However, there remains much room for improvement. In response to this need to further improve the systems, officials and representatives of the different pillars conduct continuing evaluations to come up with solutions to existing problems. Many of the country's politicians are also supportive in this regard by sponsoring the appropriate legislations. It is hoped that the passage of the proposed bills now pending in Congress will produce the desired improvements.

SECTION 3: REPORT OF THE SEMINAR

Summary Reports of the Rapporteurs

Session 1: Effective and Appropriate Means for the Police to Obtain the Public's Trust and Co-operation towards the Police Activities and to Further Improve the Ability of Investigation and Strategies of Crime Prevention

Chairperson: Mr. HJ Kamaruddin Bin Hamzah (Malaysia)

Rapporteur: Mr. Poon Jee-chung (Hong Kong)

Advisers: Mr. Philip B. Heymann

Mr. R.J. Chronnell

Mr. R.J. Green

Mr. Hiroshi Nakajima

Mr. Katsuyuki Nishikawa

Mr. Yutaka Nagashima

Introduction

The rationale for including this subject matter for discussion in the 90th International Seminar for Crime Prevention (UNAFEI) is fully covered in Mr. Hiroyasu Sugihara's (Director of UNAFEI) welcoming speech to the participants which reads "Urbanization and migration of people to large cities tend to cause the public to become more indifferent and less co-operative towards police activities. Increased sophistication of criminal activities has made the police work more difficult. Indeed, the police are experiencing increasing difficulties in the detection and investigation of the offences and in collecting evidence. These difficulties must be overcome by securing co-operation of the public and by improving the investigative competence of the police. Insufficient and incomplete investigation by the police in turn would increase the difficulties of prosecution

and the judiciary. It is therefore significant for criminal justice administrators to discuss and explore the means for the police to obtain the public's trust and co-operation, and to further improve their competence of investigation and the strategies of crime prevention under these difficult and changing circumstances."

Mode of Discussion

The discussion took place in two half-day sessions, and was conducted with a brainstorming approach involving all participants. They were first asked to suggest problems which had been experienced or might surface when attempting to secure support from the public. Causes of these problems were then analyzed after which recommendations for practical solutions were discussed and identified.

It is a consensus amongst all participants that a corrupt, bureaucratic, and incompetent police force will never gain any trust and support from the public. It is also agreed that police/public community relations play a vital role in obtaining help from the public in the prevention and detection of crime.

For the above reason, this report will first lay out the problems (and their causes) and suggest solutions thereof in securing public response. It will then go on to list what police/public community relations activities are being conducted by some participant countries for the purpose of securing public assistance to the police.

Problems

Police Corruption

Police corruption is observable in a number of ways, for example: accepting finan-

cial implications or other advantages as a reward for either not taking action on a person, or taking action against an innocent person; abuse of power in either refraining from taking action against friends, clansmen; or framing up evidence to secure a conviction, etc. There is no doubt that the presence of any of the above will adversely affect the good image of the police, thus resulting in members of the public losing faith in them. Some of the causes of corruption were discussed and are listed as follows:

Poor Conditions of Service

It is commonly acknowledged that a person cannot be properly motivated if his salary is not even sufficient to maintain his own or his family's living. It is also a fair comment to say that a person who is paid just enough to maintain the minimum standard of living is more vulnerable to corruption temptations. There are already instances that in countries where police officers are lowly paid, the corruption element is more active. It is proposed that as the first step, conditions of service of police officers should at least be kept at a reasonable level (if not a high level) in order that a corruption act becomes an unworthy risk. It is felt that a good package of conditions of service should include reasonable salary, pension, accumulated annual leave, quarters, and other fringe benefits such as free medical/dental treatments, etc.

Excessive Power

The scope of power for this discussion covers both legislative and discretionary. Whilst it is appreciated that an effective police force requires considerable legislative and discretionary power in order to maintain law and order, it must be emphasized that excessive power without clearly written limitations is a good breeding ground for corruption. It is the opinion of the participants that clearly written and balanced limitations of police powers should be considered when drafting legislations as well as internal or-

ders/instructions. In addition, supervisory officers at various levels of the police should devise sound systems to monitor areas where the abuse of power is likely to occur.

Society/Community's Traditional Concept of Accepting Corruption as Part of Life

There are societies/communities which still adopt a "traditional acceptance attitude" toward corrupt practice (e.g. sending presents to officials for approval of a contract, etc.) although in all countries corruption is an offence by law. This concept can be remedied by reiterating to the public that this is wrong. This should be done through education in schools as well as through regular campaigns. On the other hand, stricter enforcement actions should also be mounted on those who bribe, and not only those who receive bribes.

Strong Ethnic Influence/Inter-personal Favours

The different ethnic/racial group influence element can be found existing in a number of countries, on the other hand, inter-personal favouritism is also often present. Both of the above factors always result in officers not taking action against a clansman or friend. This is bad when there is no victim involved, and undoubtedly this is even worse when there is a victim and his/her right is denied. It is suggested that education should start from the primary school level, advocating that this is a corrupt act, and not a "harmless favour." Stricter supervision by senior officers at different levels will also help in minimizing the extent of this practice.

No Anti-corruption Agencies

From proven examples, it will be ideal if an agency independent of the police is vested with well-balanced authority to investigate corruptions (this agency can also deal with corruption involving other government departments and public service bodies). Whilst it is accepted that an anti-corruption branch within the police can also do the job,

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it is logical, however, that members of the public will take a sceptical view on the effectiveness and reliability of such an investigative body manned by police officers.

Bureaucracy

A bureaucratic police force may be effective in the short term; in the long run, however, the system will create non-motivated officers whose performance never improves. On the other hand, any organization to which the public has no access of information becomes a mystery to them. It is understandable that as a result this organization will not gain any support from the public. Causes of bureaucracy are:

Police Force—Lack of Transparency

Nothing can be worse than a person asking another person to do something without telling the other person who he is, and why he is asking for assistance. It can naturally be expected that response from the other, if any, will be negative. The same applies to a police force and the public, if the police chooses to operate behind closed doors without explaining its mechanism, objectives, and activities, then nothing much can be expected in return when it needs assistance. It is recommended that where possible the police should be more open to the public, for example, explaining to the public what it is doing to serve them and what they can do to assist in order to maintain law and order.

Complicated and Time Consuming Reporting/Investigation Procedures

Bureaucratic and time consuming reporting procedures will definitely discourage members of the public from either reporting a crime or supplying information. This extends to subsequent investigation and judicial proceedings. Efforts should be made to simplify procedures relating to the receiving of reports/information, as well as investigations. As far as judicial proceedings are concerned, this is a separate subject covered by another discussion paper and it will not be

elaborated further here. The objective of simplifying/speeding up procedures is to encourage the public to assist the police, hopefully they can find this to be an easy and time-saving civil duty, and not a painful experience.

Negative Police Attitude

It is not uncommon to find police officers having a wrong concept in that they are above the public, and not serving them. Police officers should be made aware that they are serving the public, and not ruling them. They should adopt a sympathetic, helpful, and tolerant attitude when dealing with members of the public. This will make the public feel that they are either seeking help from or helping a friendly force, and not looking for humiliation when contacting the police. It is proposed that a proper concept should be conveyed to the officers during basic and continuation trainings.

Rigid/Cumbersome Departmental Instructions

It is not surprising to find rigid and cumbersome departmental instructions will lead to frustration and the creation of a negative response from police officers, and this in turn will adversely affect their performance. Consequently, bad service is provided to members of the public. It is felt that clear and simple guidelines/directives with a suitable degree of flexibility be issued and that any suggestions from officers receiving such directives be seriously considered.

Poor Promotion System

A poor and unfair promotion system, without doubt, is one of the significant damaging factors as far as morale is concerned. Again this results in poor service to the public. It is suggested that a fair and well-structured promotion system be established in order that those best qualified are selected.

EFFECTIVE AND APPROPRIATE MEANS FOR THE POLICE

Lack of Appropriate Disciplinary Punishment

It has been mentioned in the previous paragraph that a fair promotion system helps in cultivating morale, whilst it is important to recognize those whose performance merits awards, it is also essential to punish those who commit deliberate acts against the disciplinary code, e.g. gross negligence and abuse of power. To leave these officers unpunished will again result in the public losing confidence in the police. It is recommended that proper disciplinary codes be used in suitable cases where it is confirmed that an officer has committed deliberate wrong acts.

Police Incompetence

A member of the public can hardly be blamed for adopting a negative attitude toward a police force who can rarely solve a crime nor provide him with efficient assistance when he wants it. There are a number of factors affecting the effectiveness and efficiency of the police, they are:

Lack of Resources

It is a consensus of all participants that a police force with limited resources can hardly provide an effective and efficient service. The lack of resources in this context covers a wide range. It includes shortages in: manpower, supporting logistics, equipment such as patrol cars, communication systems, and latest scientific/forensic technology facilities. All these will lead to a lot of problems which directly affect the public, for example, slow response time, lack of scientific resources to help detecting crime, etc. It is recommended that respective governments should carefully examine priorities and that financial allocations to the police be accorded a sensible priority as a stable society is an important element for further development.

Poor Recruitment Process

Poor recruitment process results in low quality officers being selected, and in the

longer term, these officers will not be able to cope with the developing society that they have to police. It is recommended that a careful and fair recruitment process should exist to select those with better academic qualifications and good personal qualities. As mentioned in the initial part of this report, a good package of conditions of service is necessary to attract better candidates.

Lack of Good Basic Training

The job of a police officer is a demanding one and he must receive adequate training before being put out onto the streets. It is recommended that all recruit police officers be subjected to full-time and carefully programmed training courses during which they should be taught on basic legislations and other relevant matters pertinent to the society they are to serve.

Lack of Investigation Skill

Whilst accepting that skill in the investigation of crime comes with experience, it was agreed during the discussion that, to begin with, full-time criminal investigation officers should receive good basic training. Inadequate basic training will result in the production of officers with poor quality of investigation technique. It is agreed by all participants that good quality officers should undergo a fair assessment selection exercise before they are nominated as full-time criminal investigators. They should then undergo full-time training with good instructors and practical syllabus. The training should aim at providing them with a sound basic knowledge with a view to equip them to work independently and professionally in the future.

No Guidance from Senior/Peer Officers

Officers who have just undergone basic trainings are often put on their own without any help or guidance from their senior officers, and this may result in their committing regular mistakes which then bring about a loss of confidence. Undoubtedly, this affects

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their professional performance. It is suggested that newly trained officers are, where possible, given less complicated jobs to start with or to work together with more experienced officers so as to build up their confidence.

Lack of Supervision

A lack of supervision regarding the monitoring of fair distribution of workload/manpower, performance, investigation standard, and progress will naturally bring about chaos in the investigation field, as morale will be low, investigation files may go untraceable, etc., and needless to say, it reflects adversely the quality of service provided to the public. It is suggested that supervisory officers at different levels should take an active role in monitoring the above.

Lack of Effective Administrative/Intelligence Support

Good administrative and criminal intelligence supports are essential to the ever-developing crime scene. Defective or inefficient administrative and criminal intelligence supports will hamper the speed and affect the quality of criminal investigations. It is recommended that a sound system of the above two back-up facilities are necessary.

No Refresher/Continuation Training

The crime scene is ever changing and investigation skills of officers will cease to develop if they are not updated regularly on the latest legislations, policies, new investigation technique, or crime trends, etc. It is suggested that properly organized refresher/continuation course should be held for investigation officers.

No Specialized Personal Training to Deal with Complicated Crimes

It is suggested that specialized units be set up at relevant levels to deal with sophisticated/complicated crimes. If necessary, specialists or accountants in commercial crime cases should be called in to assist investiga-

tion on an ad-hoc basis. Suitable training should be given to carefully selected officers and suitable equipment should also be made available.

Lack of Co-ordination with Other Countries

A lot of crime these days occurs on an international basis and a country working on its own will face an uphill battle, so it is suggested that an efficient communication network be set up between countries and that regular/constructive contacts be maintained.

Crime Prevention Strategies

A number of participating countries are already conducting some form of police/public relations activities with a view to improve relations between the police and the public. This in the long run may hopefully create a positive effect in obtaining the public's help in the prevention and detection of crime. Although different terminologies are used by various countries, the following is a summary of the activities categorized according to their natures:

Involving Youth in Police Activities

It is felt that more should be done for the youth in order to prevent them from entering the wrong track. The involving of young people in police activities takes different forms but the main objective is to generate friendly relations between them and the police. It will be most helpful if they feel that they are either part of or an extension of the police. To achieve this, accommodations in the form of clubhouses, association lodgings, etc. can be provided for them within a police station. On the other hand, they can be requested to assist in organizing police related activities such as fight crime carnival, summer camps, community services, etc. Engaging them in meaningful activities and providing them with places to go will minimize the chances of their mixing with undesirables.

EFFECTIVE AND APPROPRIATE MEANS FOR THE POLICE

Crime Prevention Committees

Local Crime Prevention Committees are comprised of either police and residents, or residents only, and can act as a bridge between the police and the public. Both parties can exchange views on problems/difficulties experienced and answers to a lot of problems can always be found during these informal sessions.

Police/Public Relations Visits

Trained police officers should organize regular visits to local institutions such as schools, etc. They can make use of the opportunities to brief the public on what the police can do for them. They can also advise them of crime prevention matters such as the adverse effects of taking drugs, and how they can help the police, etc.

Police Participation in Community/Charity Services

The police should, if possible, participate in community/charity services as this is one of the good methods to show the public that the police is serving the society.

Beat/Patrol Officers to Speak More to Residents

Beat and Patrol Officers should speak more to residents to look for potential problems as well as to offer advice/assistance to them when required.

Neighbourhood Police Post/Koban System

Where circumstances warrant, the setting up of police post or Koban (Japanese Police Box System) in local districts creates an easy access to police by local residents who will feel safer.

Police Open Days

The opening of police stations to organized visiting groups is a good opportunity to show the public how police officers work, as well as the problems they may encounter. This enables the public to appreciate the demanding nature of the job and that any public support is of great assistance.

Local Police Newspapers

Local police newspapers can be published and circulated to local residents, these newspapers may cover subjects like new police policy/procedures, latest crime trends, and cases where citizens have assisted the police, etc.

Neighbourhood Watch Scheme

Selected number of residents in a local area may join a Neighbourhood Watch Scheme in which they are provided with posters and stickers to advertise the fact that their units are participants in the scheme. They will keep an eye on houses where neighbours are out, etc., and any suspicious activities spotted will be reported to the police. This serves as a deterrent against criminals who intend to commit crime in the area.

Fight Crime Campaign/Carnival

Fight Crime Campaigns/Carnivals can be organized in conjunction with local private and other governmental institutions with a view to promote crime prevention messages, etc.

Good Citizen Awards

Good Citizen Awards in the form of cash or souvenirs may be presented to members of the public who have assisted the police in either preventing or detecting crime. The selection of recipients will exclude those who do not want their identities disclosed.

Police Hotline

Police Telephone Hotlines (free of charge) to be manned to receive calls from the public and provide crime information. The callers may remain anonymous if they choose to. Even if they provide their identities, they will not be used as witnesses in any subsequent process.

Media Assistance

Good relations should be maintained with the media as their assistance is most valuable in promoting police image and in appeal-

ing for information.

Conclusion

All participants are of the view that although the police has a major role to play in obtaining public trust and co-operation, the respective governments and related agencies in the criminal justice system also occupy vital roles, and that joint efforts should be made by all to uphold a sound criminal justice system in order to secure public faith and confidence.

Session 2: Appropriate Measures to Ensure Fair and Expeditious Trial

Chairperson: Mr. William John Maina (Tanzania)

Rapporteur: Mr. Paras Ram (Fiji)

Advisers: Mr. Ramon U. Mabutas, Jr.
Mr. Osamu Ito
Mr. Takeshi Koyanagi

Introduction

It is a well known principle that justice delayed is justice denied. A person charged with a criminal offence has the right to have the trial completed as soon as possible. This is more so when the accused person is detained to await trial. Delays in the disposition of cases cause unnecessary hardship to the persons concerned. Such delays are caused by many factors. Some of the reasons may be too much workload on the part of the investigators, the prosecutors or the courts. It may also be due to poor co-ordination between the different government agencies. Such delays further cause overcrowding in prisons which poses a serious problem in many countries. An accused person not only has a right to an expeditious trial but is also entitled to a fair trial. A fair trial calls for the

right to counsel.

I. Levels of Courts—Jurisdiction

The levels of courts and their respective jurisdictions vary from one country to another. In many countries, the serious cases, such as, murder, attempted murder, treason, rape, armed robbery and others are indictable offences and filed directly with the High or Supreme Courts depending upon their court procedures. Such cases, however, are summarily tackled by the lower courts to filter the evidence filed whether or not there exists a *prima facie* case to warrant the commitment of the accused person to the High Court for trial. Since the structures of courts vary from one country to another, their respective jurisdictions and systems certainly differ. Hence, to draw out a uniform structure of all courts in the different countries may create havoc and call for additional resources. Therefore, it was the consensus that there should be no interference in the countries' judicial systems, but it was seen that there is a need to iron out the jurisdictions of their respective courts. The group, therefore, recommended that indictable offences be tried/heard only by the trial courts (may be one level or two levels depending upon the nature of the offence or offences charged, while the appellate tribunals should confine themselves only to a review of the decisions) and the evidence adduced (per the records) elevated to them. This is to avoid delay in the disposal of a case or cases—in short, speedy dispensation of justice.

II. Competence and Independence of Judges—Their Qualifications for Appointment; Their Salary; and Other Incentives

The systems currently pursued in the appointment, promotion, compensation, retirement and other benefits of judges and magistrates differ from one country to another. In some countries, the judges and the mag-

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istrates are appointed or promoted through a political agency of the government; in others, by an independent judicial commission. Also, the assessment of qualifications, promotion, and retirement vary in different degrees. In order to have more competent and independent-minded judges and magistrates, it was felt that their appointments be effected by a politics-free judicial commission which should take into consideration the integrity and experience of the candidates for appointment. It was likewise recommended that a ten-year experience (in law practice) and a special training in criminal justice administration (for at least two years) should be made a prerequisite for appointment to the judiciary.

To entice efficiency on the part of the judges, they must be given good salary, satisfactory allowances and other fringe benefits, convenient working condition, and bright prospects for promotion. They must likewise enjoy a security of tenure and, in the discharge of their functions, they must be free from any form of intimidation, coercion or harassment. They and their families should be given the appropriate protection. And when they reach the retirement age (whether optional or mandatory), they should be given retirement pay—and life-time pension thereafter.

To keep them abreast with the trends in jurisprudence, they should undergo periodical training programmes (either in their respective countries or abroad). This is designed to make the judges more effective in the discharge of their duties—all for a speedy and fair dispensation/administration of justice.

III. Code of Legal and Judicial Ethics

In some countries, it was observed that codes of conduct for judicial officers as well as for private legal practitioners exist. To ensure impartiality, proper and ethical conduct of people involved in criminal justice administration, it was recommended that there

should be codes of conduct for judicial officers, public prosecutors, and legal practitioners in all countries. These codes will certainly ensure high standard of behaviour and performance in the judicial/legal profession.

IV. Initiation of Actions

The initiation of actions (the prosecution of criminal cases) in various countries differs from one country to another in view of several agencies involved in the investigation of the offence(s) purportedly committed. As far as the criminal cases are concerned, the participants of this seminar recommended that those initiated by police or public prosecutors be handled by said prosecutors or their duly authorized agents. On the other hand, in some jurisdictions private citizens also have the right to institute criminal actions but problems arise during the prosecution of said cases and during the trial, thereby necessitating the appearance of private prosecutors.

V. Evidence

As could be gleaned from the portrayals of the participants, there appears no conformity in the rules of the various countries represented regarding the admissibility of some evidence gathered by the police during the custodial interrogation/investigation.

(1) Illegally Seized Evidence

This refers to article(s)/item(s) seized by law-enforcement agents/police officers during a search—either there was no search warrant or that the warrant issued did not include the article(s)/item(s) seized. In some countries, such pieces of evidence are admissible in the courts; in others, they may be admitted, subject to the discretion of the court. But in other jurisdictions, they are absolutely banned as evidence and they are considered as “fruits” of a poisonous tree. It was, however, suggested that such evidence be admitted as evidence—depending upon the

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circumstances surrounding each case—in the interest of justice.

(2) Extra-Judicial Confessions

In some jurisdictions, a written statement or confession made by an accused (without the assistance of counsel) to an investigating police officer is not admissible as evidence in court. Reason: To ensure that the rights of the accused are upheld and respected—that there is no coercion, intimidation or violence employed by the police investigator. In other jurisdictions, a confession/statement is admissible as long as the same was made voluntarily.

(3) Right to Counsel

In some jurisdictions, it is a fundamental right of an accused to be assisted by counsel—from the time he/she is arrested by the police and his/her liberty restrained. If the accused waives such right, he/she must also be assisted by counsel in making such waiver. Otherwise, the waiver would have no effect—and the accused's statement would not be admissible in court as evidence. However, such right of an accused in other countries does not exist, and it was viewed by some participants as an obstruction to police investigations.

After lively discussion on this topic, the participants were unanimous that extra-judicial statements be admissible in evidence provided that it was made voluntarily, i.e., without threat, force or violence on the person being investigated. It was also suggested that such confession be corroborated by other evidence. It was further agreed that the rights of a person taken into custody to be strictly observed and that legal assistance be extended whenever necessary.

VI. Legal Aid/Assistance

Many developed countries have laws providing legal aid/assistance to accused persons for all types of crimes. As for the developing countries, such laws do not exist

cept in complex or serious offenses and when requested by the accused. Such legal aid/assistance, however, is provided by the government only during the trial.

The participants made an in-depth analysis of the set-up and tried to identify at which point of time such legal aid/assistance should be provided. It was felt that the surrounding circumstances of each crime should be considered, as such legal aid/assistance is not a fundamental absolute right of an accused person under the participants' jurisdictions.

In order to protect the individual right of an accused person, the participants recommended that legal aid/assistance be provided to those who request it during the trial. It was the consensus that every suspect should be formally advised of his/her rights and that assistance be given to the suspect to consult with a lawyer as soon as being taken into custody—at his/her own expense.

VII. Reconciliation of Disputants

Various forms of reconciliation between the disputants are applied in the different countries represented either before the cases are filed with the courts or even when they are already pending trial on the merits. In some countries, the reconciliatory steps are taken only in some offences before the cases are filed with the courts; in others, in all offences even when they are already pending trial—of course, with the courts' permission. It was, however, felt that such reconciliation(s) of the disputants/parties all lead toward an early disposition of cases—and, therefore, it/they should be encouraged, with the community taking a more active role. But measures should be adopted to prevent abuse.

Thereafter, it was recommended that every country should draw out a list of offences which can be the subject of amicable settlement—and the authorities concerned should strictly enforce the same, without abuse.

VIII. Pre-Trial

The connotation of the term pre-trial appears to differ in the countries represented. In some countries, it refers to the assessment of evidence before the lower courts to determine whether or not the cases should be elevated to higher courts for trial. In other jurisdictions, it refers to the production of evidence before the trial courts preparatory to the hearing on the merits—toward the abbreviation thereof, with the parties entering into stipulations. It was observed that in many countries, it is mandatory in serious cases, like murder, attempted murder, treason, manslaughter, etc., to hold a preliminary inquiry before the lower courts to determine whether or not there exists *prima facie* evidence. In this process, all the witnesses and exhibits are produced before the courts. Copies of the statements and documentary exhibits are given by the investigating officer(s) to the court and the defence counsel. With respect to object/real evidence, they are retained by the police, but a list thereof is also furnished to the court and the defence counsel. The prosecutor and the defence counsel will then agree on what evidence to admit/accept during the trial without the need of calling witnesses. In some instances, a meeting is held in chambers between the prosecutor, defence counsel and the magistrate or judge—and a memorandum of undisputed and disputed matters is made signed by all the parties and the magistrate or judge. Any agreement entered into will bind the parties during the trial—and the same will proceed as scheduled.

It was the consensus of the participants that the pre-trial courts should forward the cases to the appropriate trial courts for final disposition within the earliest possible time. It was thereby proposed that every country should have a law/rule on pre-trial to effect early disposal of cases and to expedite court proceedings.

IX. Trials

It was noted that in most countries, there is no time-limit within which trial should be completed and judgment delivered. The trial of some cases take too long from the time they are filed with the court until completion. In some countries, however, there are time-limits. It observed that time-limits should also be applied to investigations. It was thereby recommended that all countries set time-limits within which investigations by the police and public prosecutors should be completed and also for the termination of trials. This will ensure expeditious proceedings of trials. The cooperation of all concerned, however, will be a must.

At the same time, it was proposed that a continuous trial of cases, similar to the system existing in the Philippines, be adopted in all countries in order to expedite the termination/disposition of cases.

Toward the same direction, the system of having "night" or "shift" courts, courts functioning by shift, including night time, was viewed as an effective measure toward an early/speedy disposition of cases.

X. Sanctions against Delays

The problem of delay exists in almost all the countries represented during the seminar. It was traced that the delay is caused, among other things, by clogged dockets, indiscriminate filing of cases by public prosecutors, and delaying tactics employed by defence lawyers and the parties themselves. In this connection, it was observed that some countries empower courts to award costs against the prosecution for frivolous prosecutions and also against the defence for employing delaying tactics. Realizing that any delay adversely affects the rights (of speedy trial) of accused—aside from unnecessary expenses on the part of the government—it was recommended that sanctions (by way of fines, damages or costs) be imposed by the courts on the prosecution (for filing frivolous

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cases), as well as on the defence lawyers and the parties-disputants (victim[s] and/or accused) for delaying the proceedings. It was likewise recommended that the awards be made part of the judgment. However, any legislation on the matter should lay down measures to prevent abuses (in the imposition of the awards).

XI. Penalties

In some countries the death penalty is mandatory for certain types of crimes. It was observed, however, that the participants had different views on the death penalty. Some participants explained that the death penalty was abolished in their countries many years ago. It was, however, the consensus that every country has reasons for retaining the death penalty or for abolishing the same, depending upon the circumstances prevailing therein. Hence every country should have the discretion to determine whether or not the death penalty should be imposed. It was, however, recommended that if the offence charged is punishable by death, all agencies concerned should be cautious in the discharge of their respective duties.

XII. Appeals

In some countries, there are laws which allow the prosecution to appeal against an acquittal. Other countries, however, do not give such right to the prosecution. Still in some countries where the prosecution has no right of appeal against an acquittal, there can be an appeal only against sentence. Also, the prosecution may appeal on a point of law where it feels that there was a misapplication by the trial court.

It was the consensus, however, that there must be a time-limit within which the appellate courts/tribunals should dispose of the appealed cases in order to obviate delay.

Conclusion

The need for fair and expeditious trial cannot be overemphasized—it is fundamental in the administration of justice in any jurisdiction. All the agencies involved should ensure that a person suspected to have committed an offence receives a fair and expeditious trial. The recommendations which have been made in this report should be implemented as far as possible, depending, of course, on the circumstances and conditions prevailing in each country. The investigating officers, public prosecutors, defence counsels and the courts should do all their best to ensure that trial commences as soon as possible, and once it commences, every case should be disposed of impartially and without undue delay.

We wanted to take up other matters which we felt were necessary, but we refrained from doing so because the same was not tackled fully during the discussions due to the time constraints.

Session 3: Prison Overcrowding and Its Countermeasures and Strategies for a Wider and More Effective Use of Non-Custodial Measures

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Introduction

The 90th International Seminar conducted by UNAFEI focuses on the theme of "Quest for Solutions to the Pressing Problems of Contemporary Criminal Justice Ad-

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ministration." One of the problems rightly addressed by the seminar is prison overcrowding. This is an issue of increasing concern to most countries today, not only because of the consequent difficulties in the physical management of inmates but, more important, because of the resulting degradation of human beings which often negates their rehabilitation and lessens the chances of resuming crime-free and productive lives in lawful society. It is, therefore, imperative to look at the causes of prison overcrowding and to determine the practicable solutions to this urgent problem.

Corollary to the issue of prison overcrowding is the use of non-custodial measures. The latter is widely seen as a major instrument that can mitigate the problems of overcrowding in penal institutions. Still, the actual use of these measures leaves much to be desired in several countries. For this reason it is also important to examine the factors that obstruct the full and effective use of such measures and to explore the means by which they can be overcome.

Methodology

A preliminary survey on the above-mentioned topics was conducted among the participants, the results of which served as a basis for the two-hour general discussion. The survey tried to determine how many of the twenty-three countries represented in this seminar have the problem of prison overcrowding. It also elicited the participants' opinions on the factors behind prison overcrowding in their respective countries and the countermeasures they believe are needed to resolve the problem. The 29 participants in this seminar are high-ranking criminal justice officials in their respective jurisdictions. As such, their opinions are highly relevant and represent the viewpoints of different sectors of the criminal justice system, i.e., police, prosecution, courts and corrections.

In addition, the survey also gathered infor-

mation from the participants regarding the non-custodial measures existing in their countries.

The general discussion itself centered on the experiences related to the given topics, from which some practical measures were drawn to solve or minimize the identified problems.

Prison Overcrowding and Its Countermeasures

Nineteen countries represented in this seminar are found to have the problem of prison overcrowding in varying degrees of gravity. On the other hand, four countries were reported to have no such problem, namely Japan, Singapore, Botswana and Saudi Arabia.

Below is a summary of the participants' responses as to the causes of prison overcrowding in their countries.

1. Indiscriminate arrest of suspects	0
2. The investigation takes a long time to complete	13
3. There are too few/limited prison facilities	13
4. Non-custodial measures are not commonly or widely used	16
5. Poor coordination among the criminal justice agencies	7
6. Lack of defense counsel for the accused	4
7. Heavy caseload of police investigators	15
8. Heavy caseload of public prosecutors	13
9. Heavy caseload of the courts	16

It is noteworthy that none of the participants indicated the indiscriminate arrest of suspects, if it occurs at all in their countries, as a cause of prison overcrowding. Rather, they attribute the problem more to the limited use of non-custodial measures and to the frequent use of imprisonment both as a sanction to convicted offenders and as a meas-

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ure for dealing with persons awaiting or undergoing trial. Likewise, the participants cite the heavy caseloads of the police investigators, public prosecutors and the courts as major factors that delay the disposition of many criminal cases, particularly those of remand or detention prisoners.

In at least 4 countries, prison congestion was fostered by the lack of defense counsels for the accused many of whom are ignorant of the legal processes and unable to post bail. In 3 other countries public defense counsels are provided for indigent remand prisoners but their heavy workload prevents them from attending speedily to all cases.

Other defects in the criminal justice administrative system of some nations were mentioned such as: limited prison facilities, poor coordination among criminal justice agencies, lengthy criminal procedures, systems which allow delaying tactics by the defense counsel, and the use of imprisonment for offenders who can be better treated or rehabilitated by other means, e.g., drug addicts, illegal immigrants, offenders unable to pay their fine sentences, etc.

Rapid social changes, economic developments and technological progress have also increased the incidence of crime, particularly in heavily populated countries. These have aggravated the prison situation in nations already burdened by defects in the justice system as previously discussed. In several instances the effects of the internal developments of one nation have spilled over to other nations, as in the case of drug traffickers, illegal immigrants and refugees. Either unable to put up bail or not allowed to do so under the circumstances, they remain in prison pending the disposition of their cases or while awaiting deportation.

In summary, it can be stated that prison overcrowding today is caused on the one hand by the continuing and, in several instances, increasing crime trends and, on the other hand, by the reactions of criminal justice agencies that still rely heavily on imprisonment and by defects in the legal and

administrative machineries within the criminal justice systems.

A Look at Japan, Botswana, Singapore and Saudi Arabia

These four countries do not experience prison overcrowding today primarily because of their low crime rate. A look at each country's situation shows other contributing factors. Singapore has a small population and sufficient numbers of penal institutions to house its offenders. Botswana also has a small native population. It was previously beset by the problem of prison overcrowding caused by the influx of illegal immigrants coming from the racially troubled neighboring nations. With independence secured by these nations and their people returning to their homelands, Botswana's illegal immigrants have been considerably diminished and its prisons consequently decongested. Saudi Arabia, on the other hand, adopts a strict philosophy of deterrence which imposes severe corporal penalties upon the offender. Thus, fear of punishment is a strong factor in the maintenance of law and order in the country.

Japan, with its population of over 123 million, appears to be a unique case among the heavily-populated nations. Its congested prisons just after the Second World War now contain only 70%—80% of their total capacities. This change came about gradually in the five decades following the end of WWII, and is ascribed to the low crime rate which, in turn, was brought about by several factors. An economically stable society, better living and education standards, a generally smooth coordination among the criminal justice agencies and, not the least, the national characteristics of diligence, harmony and group consciousness have created in this country a social environment that works against crime. In addition, diversions from prosecution and the existing alternatives to incarceration are fully utilized in line with a correctional philosophy of deterrence through the rehabilitation of offenders.

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Recommended Countermeasures

The situations prevailing in the four above-mentioned countries are understandably different from those of other countries. As such, while Japan, for example, may serve as a model, each nation will have to work out practicable solutions to prison overcrowding within the context of the social, cultural, political and economic circumstances particular to it. Toward this end, the participants of this seminar have come up with the following recommended countermeasures:

1. Construction of more/larger prisons;
2. Wide use of non-custodial measures;
3. Better caseload management by the police, prosecution, courts and related agencies;
4. Depenalization of petty offenses;
5. Faster and more efficient investigation of cases.

Other recommendations for one or two countries include the creation of new courts to cope with the cases of remand or detention prisoners, the provision of discretionary powers to prosecutors to prosecute or not to prosecute cases, and the provision of powers to the police to caution the accused or to compound minor cases. The wider implementation of non-custodial measures in all stages of the criminal proceedings was favoured by most participants, with several emphasizing the use of compensation whenever applicable.

Necessarily, the above recommendations will entail other actions. The construction of more or larger prisons with adequate facilities will mean the allocation of funds for this purpose. Better caseload management and faster and more efficient investigation of cases may call for the hiring of additional personnel, improved monitoring of cases, intensified personnel training programs and better personnel selection procedures. On the other hand, the depenalization of petty offenses, establishment of new courts, expansion of the discretionary functions of the

police and public prosecutors, and the wider use of non-custodial measures may require the passage of appropriate legislations. All these mean that the solution to prison overcrowding does not lie in the hands of one criminal justice agency alone or only within a country's criminal justice system. The co-operation of the countries' lawmakers and political leaders is also necessary. Prison overcrowding can be resolved only if it is placed among the high priorities of the nations' agenda.

Strategies for a Wider and More Effective Use of Non-Custodial Measures

Non-custodial measures are recognized, at the very least, in principle in most nations as a means by which many offenders can be rehabilitated and reintegrated into society. With the increasing problem of overcrowding in the prisons and detention cells of many countries, these measures are now seen as important instruments for the diversion of reformable offenders from the criminal justice processes and from imprisonment.

All the countries represented in this seminar implement some form of non-custodial measure at one or more stages of the criminal proceedings. Bail, the most commonly used, exists in 18 countries and probation for juveniles in 17. Majority of the countries make use of their existing non-custodial measures after trial has commenced and after conviction. In at least 11 countries mediation and conciliation are employed after the offender is arrested but before the case is filed in court, while in 12 suspension of prosecution is exercised within the same stage.

Problems

Unfortunately, the use of non-custodial measures in dealing with criminal offenders is not as easy as it may seem. The obstacles to the wide and effective implementation of these measures range from those based in a

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people's own culture and traditions, to the existing social, political and economic conditions, and inadequate administrative machineries. Thus, in some countries the existing non-custodial measures are limited in number and/or scope under national laws. In others, despite the appropriate legislations, the implementing agencies—police, prosecutors and courts—opt not to use them because of lack of confidence in their effectiveness as deterrents to the further commission of offenses. In a number of countries, too, public acceptance of these measures is hindered by ignorance about the safeguards in their implementation and by a prevalent fear that the safety of people's lives and properties will be greatly endangered by offenders who are not imprisoned. At times, this fear is enhanced by the sensationalized reporting of an ignorant or hostile media. Traditional concepts of punishment also persist in a number of countries. In turn, the lack of community acceptance and support is "re-cycled" into further unwillingness of legislators to pass the needed enabling laws and into greater hesitations on the part of criminal justice authorities to implement such measures.

In addition, the effective implementation of non-custodial measures is often hindered by the lack of adequate funding for treatment and rehabilitation programs and other forms of logistics. Ineffective provisions of some laws, such as those that set excessive amounts of bail, as well as conflicting views among criminal justice agencies also contribute to the problem.

Strategies for a Wider and More Effective Use of Non-Custodial Measures

Majority of the participants in this seminar believe in the efficacy of non-custodial measures both as a solution to prison overcrowding and as tools for the rehabilitation of criminal offenders. They endorse the following strategies for a wider and more effective implementation of such measures:

1. Education of the public, including members of the mass media and lawmakers.
2. Enlightenment and education of police, prosecutors, judges and other officials of the criminal justice system where necessary.
3. Utilization of mass media to generate support for the use of non-custodial measures or for the enactment of appropriate legislation.
4. Lowering of the monetary requirements for bail so as to make this measure more accessible to more offenders.
5. Appropriation of sufficient funds in national budgets to strengthen administrative machineries and to promote the effective application of community-based rehabilitation programs.
6. Recruitment and training of additional manpower to carry out the supervision and rehabilitation of offenders under probation, parole and similar programs.
7. Implementation of an integrated approach for the use of non-custodial measures through regular coordination and consultation among the criminal justice agencies.

Conclusion

The resolution of the problems of prison overcrowding and those that hinder the wide and effective use of non-custodial measures can be best achieved if these issues are placed among the top priorities of the nations concerned. Such prioritization is paramount if the community of nations desire to secure a crimeless society where human resources are fully utilized for the benefit both of nations and individuals. In this regard, the participants in this seminar may, where necessary, take the initial steps to generate the momentum for official and public support for these issues. The UNAFEI Alumni Associations can contribute much to this effort. Likewise, the continuing activities and support of the UNAFEI Training Institute and of highly-committed organizations such as the Asia Crime Prevention Foundation as well as the United Nations General Assem-

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by itself will ensure that the proposals and recommendations of this seminar will be realized, albeit gradually, in all the countries concerned.

Inventory of Non-Custodial Measures Existing in Participants' Countries
(Based on participants' responses in a survey questionnaire)

Measure	Disposition Stage (Figures indicate number of countries)				Total No. of Countries with This Measure
	Before Arrest	After Arrest but Before Case is Filed in Court	Before Conviction	After Conviction	
1. Verbal Sanctions	7	6	—	2	11
2. Mediation and Conciliation	9	11	2	—	15
3. Economic Sanctions					
a. Compounding	6	6	4	1	8
b. Fine	3	4	3	7	14
c. Restitution	2	3	4	9	13
4. Confiscation or Expropriation	2	3	3	9	13
5. Bail	3	9	9	7	18
6. Release on Custody or Recognizance	1	4	5	8	14
7. Suspension of Prosecution	3	12	3	—	15
8. Discontinuance of Prosecution	1	8	5	—	12
9. Suspended or Deferred Sentence	—	—	8	9	16
10. Suspension of Execution of Sentence	—	—	3	12	15
11. Conditional Discharge	—	—	3	11	14
12. Probation for Juveniles	—	2	4	12	17
13. Probation for Adults	—	1	2	2	14
14. Parole	—	—	—	14	14
15. Conditional Pardon	1	—	1	9	11
16. Absolute Pardon	1	—	1	9	11
17. Commutation of Sentence	—	—	2	11	13
18. Remission of Sentence	—	—	—	14	14
19. Binding Over on Good Behavior	—	3	3	9	14
20. Community Service	—	—	8	8	15
21. Furlough or Halfway House	—	—	8	8	15
22. Work/Education Release	—	1	1	6	6
23. Home Detention/House Arrest	1	1	2	2	5
24. Referral to an Attendance Center	—	—	1	3	4

SECTION 4: REPORT OF THE SPECIAL WORKSHOP

Report on the Workshop on the Implementation of the United Nations Guidelines on the Role of Prosecutors

*Chairpersons: Mr. Mohd Ariff Bin Khamis
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Introduction

The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders adopted a set of Guidelines on the Role of Prosecutors and recommended that these guidelines be implemented by member states taking into account the political, economic, social and cultural circumstances and traditions of each country.

The 90th International Seminar on the Quest for Solutions of the Pressing Problems of Contemporary Criminal Justice Administration has participants from twenty-three countries. The Director of UNAFEI, after consultation with the United Nations Crime Prevention and Criminal Justice Branch at Vienna, has wisely incorporated into this seminar a two-day workshop on these guidelines involving all the participants. These guidelines, no doubt, are of great significance to prosecutors all over the world. However, their implementation is by no means without its difficulties in view of the different factors prevailing in each participating country. The workshop therefore affords the participants an opportunity to discuss and analyse the problems and difficulties faced in the implementation of these guidelines and, where possible, to find solutions and make recommendations.

Aim

Having regard for the diversity of the criminal justice systems represented in the work-

shop, the aim is to explore the extent to which these guidelines may be implemented in each participating country and to identify the problems and difficulties faced by each country in the implementation of these guidelines and if possible to come up with solutions and recommendations.

Definition of Terms

At the onset, the participants decided that the following definition be adopted:

“Prosecutor”: person designated or appointed as a public prosecutor or one who acts as such on an ad hoc basis and who performs one or more of the following powers or functions:

- a. the power to decide to initiate or not to initiate court proceedings;
- b. the power of control over the presentation of a case before the courts; and
- c. the power of control over the continuance or discontinuance of prosecution.

Qualification, Selections and Training

1. Qualification

Participants of this workshop unanimously agreed that all prosecutors, be they appointed or designated as such or exercising prosecutorial functions on an ad hoc basis, must be persons of utmost integrity and ability and be firm believers in the rule of law. They perform an important function in the administration of criminal justice in every country. As their roles are diversified and many, it was agreed that they must possess a minimum qualification for them to carry on their functions effectively. With respect to public prosecutors it is recommended that

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prosecutors must have at least a university degree in law or its equivalent. The requirement of experience in legal practice for a few years prior to appointment will be an advantage.

It is noted that in all countries represented in the workshop, all prosecutors in the High Court and courts of higher jurisdiction are legally qualified persons. In some countries there are "lay prosecutors" (ad hoc prosecutors) conducting criminal prosecution in the lower courts. It is further noted that in countries where there are lay prosecutors, the process of having them replaced by legally qualified prosecutors is gradually being implemented. The degree of implementation of the replacement programme varies from country to country, invariably affected by the economic means available to the respective countries.

In the interim, where lay prosecutors are necessary, it is agreed that whilst there are difficulties in defining a minimum qualification for them, they should at least be mature persons with vast experience in related agencies (e.g. police). It is also recommended that they prosecute only minor cases and be under the control and supervision of legally qualified prosecutors.

2. Selection

In so far as the implementation of the selection criteria for prosecution stated in Article 2(a) of the guidelines, participating countries have no serious problems in the implementation. A more detailed discussion on the appointment and dismissal aspect is discussed in the topic on the independence of the prosecutor.

3. Training

Training for prosecutors differs from country to country. Some countries have specialized institutional training for prosecutors for a number of years before appointment whilst others have in-house training and practical apprenticeship for prosecutors after appointment. Whatever form this training takes, it

is agreed that training is very important and essential for prosecutors, e.g. training courses aimed at the development of personal integrity, independence and the respect for the rule of law.

It is also recommended that there be continuing and development training programmes for prosecutors so as to enhance their knowledge and ability. In this respect the training courses provided by UNAFEI are extremely useful and it is hoped that a programme for the exchange or attachment of prosecutors among developing and developed countries be implemented with the help of the United Nations.

Status and Conditions of Service

This workshop recognizes that the prosecutor is one of the essential pillars in the criminal justice system. To be a successful prosecutor, he has to have skill in investigation, negotiation, supervision of investigations, to be able to make a variety of decisions and to be an able trial lawyer. In the eyes of the public he is perhaps the foremost law enforcer. His status therefore cannot be compromised.

The intimidation of prosecutors and their families is hopefully not a serious problem in any of the countries represented. However, where intimidation does exist (not only of prosecutors, but witnesses, victims, and Judges as well) in these countries, the main problem again is the lack of resources and expertise to combat them. It is therefore imperative that the United Nations should take an active role in this area and provide the necessary economic and expert assistance.

Prosecutors in the countries represented are generally adequately paid. Their remuneration is comparable to other government officials of equal rank in their respective countries. Other forms of benefits vary from country to country such as the retirement age and the amount of pensions available. It is noted, however, that with almost no exception in all the countries represented, the gap between the earnings of private practi-

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tioners and prosecutors of the same seniority is unfairly wide. Whilst the gap will always remain, it is recommended that member states must take steps to narrow this gap so that the able prosecutors can be retained and that other able persons be attracted to join the prosecution service. This will also discourage the prevailing practice of using the prosecution service as a training ground and stepping stone towards a lucrative private practice.

In so far as promotion is concerned, it is agreed that it should be based on merit, performance and integrity and if all things are equal, experience and maturity factors be favourably considered.

Independence of the Prosecutor

Participants of this workshop are cognizant of the fact that the prosecutor is part of the executive arm of the government. It will be impossible to create a totally independent prosecution arm such as in the judiciary. It is however, noted that whilst the appointment of the prosecutor cannot be independent of the day's government, the prosecutor in the performance of his or her duties as such must strive to be neutral and must uphold the rule of law and protect public interest.

In some countries, the tenure of a prosecutor is guaranteed in that he or she cannot be transferred without personal consent. In certain countries, however, a prosecutor is subject to transfer from one station to another.

The dismissal and removal of prosecutors, however, are in accordance with existing rules and regulations in each country. There are in place specialized independent bodies in most of the countries represented which look into the dismissal of prosecutors, and the general rule is that prosecutors can be dismissed from the service only for just cause.

There is however a serious problem in one or two countries where the prosecutors are appointed at the pleasure of the Head of

State and dismissed in a similar manner. In these countries the independence of the prosecutor is severely undermined.

Whilst their situation is most undesirable, there is indeed no short term solution to this problem. Hopefully the problem will be resolved as the countries mature in their concept of a fair and equitable administration of justice.

Participants unanimously accept that interference or obstruction with the duties of a prosecutor from whatever source (politicians, police, judges, etc.) is not acceptable. It is recommended that the following strategies be explored:

- (1) the cultivation of the support of the media to deter flagrant interference in the exercise of the prosecutor's functions;
- (2) the formation of a strong professional body such as an association of public prosecutors, either domestic or international, to give some measure of protection and support of the independence of prosecutors;
- (3) the creation of a set of ethics (code or regulation) for the public prosecutors to set up standards expected of prosecutors in the performance of their duties with the necessary sanctions for its implementation;
- (4) periodic interdepartmental consultation among the institutions in the criminal justice administration with the aim of developing policies and guidelines to minimize or eliminate interference or destruction, to monitor and evaluate the implementation of such policies and guidelines.

Ultimately each member state must find the best safeguards for its prosecutors' independence, having regard to the circumstances prevailing there.

It is also recommended that the United Nations promulgate clear guidelines on this subject of non-interference.

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The Role of Prosecutor in Criminal Proceedings

The role of a prosecutor in criminal proceedings differs from country to country. In some countries the prosecutor initiates prosecution whilst in others it is the prerogative of the police. Prosecutors in certain jurisdictions are vested with the power to investigate, direct and supervise police investigation whilst in some countries they are only vested with powers to direct and to supervise the police in their investigations. Still in some countries, prosecutors have neither the power to investigate nor to direct or supervise the police.

In the extreme case, the prosecutor is nothing more than a "bridge" between the investigation and the court with hardly any discretionary powers.

It is noted that where prosecutors are vested with investigative powers, there is, in reality little conflict with the police as prosecutors are only investigating specific serious offences and leaving the police to investigate the majority of the offences committed. In fact in some countries under circumstances where the image of the police with the public may be found wanting, investigation by a prosecutor is seen as a fairer means.

In countries where the prosecutor has control over police investigation either directly or indirectly, there appears to be no problem in the implementation of the United Nations guidelines on the role of prosecutors in criminal proceedings. In countries where the prosecutor is no more than a "bridge," the prosecutorial functions are exercised by other agencies on an ad hoc basis. The role of the prosecutor in such cases is diminished.

The most problematic area is in countries where the prosecutor has no power to investigate and has no power to direct or supervise police in their investigations. Also there are problems in countries where there is very limited power given to the prosecutor over police investigations particularly where the prosecutor may only request for police co-operation in an investigation but co-operation

is merely an option of the police.

These problems are by no means easy to resolve as there is a long history behind this power struggle and it is hoped that these countries will eventually find solutions, even though this may be difficult. Ultimately a balance of power between the police and the prosecutor needs to be found if co-operation between the two parties will be cultivated.

It was suggested by a group of participants that for a prosecutor to play a more effective role in the administration of criminal justice, he should be given the power to direct the police to conduct further investigations if the prosecutor feels that it is necessary in the interest of justice.

The execution of a court decision once finalized, is carried out without fail in each country by their respective agencies. In some countries the prosecutor plays an important role and in some countries the prosecutor plays no part, the execution being done by other agencies (e.g. the prisons department, courts' sheriffs).

In at least one country represented, there is no proper agency to supervise the execution of the court's decision and order. Hence certain orders by the courts are not carried out (e.g. the removal of forfeited properties from the offender's possession).

It is therefore recommended that the supervision of the execution of a court's decision must be given to a responsible agency or to the prosecutor in these countries which have this problem.

The admissibility of evidence obtained in violation of the guidelines differs from country to country. By and large, and in principle, prosecutors from participating countries will exclude such evidence in any proceedings. There is no problem expressed in the implementation of Article 16 of the guidelines.

Discretionary Functions

In countries where the prosecutor is vested with discretionary functions, the most important decision he has to make is without

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doubt the initial one—to prosecute or not to prosecute. A wrong decision either way will have dire consequences. Not only must he make a decision, but he must ensure that such decision is made fairly and with consistency in each case. Hence a code or a guideline which lays down the main criteria for the prosecutors to follow is necessary and desirable. In this regard, it is noted that most countries which have given their prosecutors this discretion have in place some codes or guidelines. Some countries have their established standards published while others do not, preferring to keep theirs for in-house reference. Nevertheless, prosecutors are guided by their respective country's guidelines and their vast experience in this area. In making decisions it is mandatory for prosecutors to give reasons for their decision so that it can be tested against the given guidelines or simply against common sense.

It is noted that in some countries prosecutors make decisions without attaching any reasons thereto. This has given rise to a serious problem of abuse. In so far as cases that have been brought to court, the problem, by and large does not arise because in most countries the court's leave and consent has to be sought with reasons before the prosecution discontinues a prosecution. This problem may be more prevalent at the pre-charging stage.

Participants therefore agreed that certain safeguards ought to be adopted by countries having this problem. One important safeguard is to require all decisions of prosecutors in non-prosecute cases to give the reasons. Another is to have decisions of junior prosecutors checked by senior prosecutors and if necessary, be referred to the person in charge of overall prosecutions. Victims may be given the right to institute private prosecution or appeal against the decision of the prosecutor.

Participants would like to emphasize that the best safeguard in this regard is to have persons of the highest caliber with integrity and respect for the rule of law be selected

as prosecutors.

Alternative to Prosecution

This workshop recognized the fact that alternative to prosecution is one of the methods of alleviating excessive court loads and delays in criminal proceedings and more importantly the avoidance of stigmatization of criminal proceedings on offenders.

Although there are already in place some alternatives to prosecution in each of the countries represented in this workshop, the main problem is that there are not enough alternatives available in each country for prosecutors to work on.

Alternatives which are currently in use are pre-trial referral of offenders to the probation agency, mediation and conciliation process, payment of compensation to victims, waiver of prosecution by victim, withdrawal of complaint by victim, cautioning of offender, administrative and regulative fines (e.g. traffic offences) and community service. Member states are urged to explore other effective alternatives to add to the existing ones and to adopt as many as is practicable.

Another problem raised by participants when their respective countries choose to adopt alternatives is the "resources" availability problem. Agencies required to cope with the alternatives adopted will have to be set up or capacities increased. Lack of trained manpower and finance are major obstacles. In this regard outside assistance may be required for developing countries to achieve this end.

Relations with Other Government Agencies or Institutions

This workshop is aware that the prosecutor does not work in isolation. It is also an undeniable fact that quite often other criminal justice agencies such as the police and related ones, are reluctant to co-operate with the prosecution, more often than not on the basis of the fear that co-operation will result in the diminution of the present power or au-

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thority exercised by the agencies. Be that as it may, participants agreed that co-operation among the agencies involved in the criminal justice system is necessary for the effective and efficient functioning not only of the prosecutor but the entire system. It is agreed that prosecutors must be candid and truthful in their dealings with all the institutions of the criminal justice administration, having in mind that each institution is deserving the respect due as a coequal and that the ultimate goal of all is to serve justice.

Conclusion

From the discussions, it was gathered that for any criminal justice system to succeed, each of the pillars of the system must work in harmony with the other pillars. Each is as important as the others and each is a vital component of the entire system. A failure in one will necessarily mean a failure of the entire system of criminal justice administration.

The guidelines for the Role of Prosecutors serves as a beacon to emphasize the importance of the prosecutor in the criminal justice system. It is a norm, adherence to which guarantees a prosecution service that is functioning in accordance to the rule of law and equity for all.

From the workshop, the final conclusion that we have arrived at, is the fact that member nations are endeavoring to implement the guidelines to the letter given the political, economic, social and administrative constraints obtaining in their respective jurisdictions. The continued effort along this line is a manifestation that we all share in the hope of attaining true justice for all.

We hope that the problems and recommendations recorded herein be given serious considerations by member states and the United Nations so that then we can truly all work towards a "prosperous world for all without crime."

PART II

**Materials Produced during
the 91st International Training Course on
“Further Use and Effectual Development of
Non-Custodial Measures for Offenders”**

147779

SECTION 1: EXPERTS' PAPERS

Alternatives to Incarceration for Drug Offenders in St. Joseph County, Indiana, United States—A Working Model

by Carol Ann Nix*

In the United States there is a keenly felt need to use and further develop non-custodial alternatives to incarceration. The fact is that in the United States we have more offenders sentenced to prison than we have prison space to accommodate in a humane manner. The public clamors for judges to impose harsher sentences on convicted criminals. Yet, in general, neither the public nor their elected officials have been willing to make the financial sacrifice necessary to pay the high cost of building and maintaining an adequate number of new prisons. Faced with prison overcrowding legislators, judges, and corrections officials have been forced to become progressively more creative in dealing with the large numbers of offenders convicted of serious and minor crimes every day in both federal and state courts in our fifty states. The intermediate sanctions which they have devised are intended to reduce overcrowding and satisfy public demand for punishment of offenders.

Since I am an active "hands-on" drug prosecutor, the focus of this paper is on practice, not on theory. Since I handle all of the major adult felony drug cases in St. Joseph County, Indiana, this paper primarily deals with the actual use of non-custodial alternatives to incarceration as they relate to adults suspected of, charged with, and convicted of felony drug crimes in St. Joseph County, Indiana. Many of the alternative measures discussed

in this paper are available to offenders convicted of crimes other than drug crimes. However, some measures are uniquely applicable to drug offenders.

Statutes

A. There has been considerable discussion about decriminalizing the possession and use of certain controlled substances, especially marijuana. This is not a solution to prison overcrowding that is popular now or is likely to become popular in the foreseeable future in the United States.

B. The federal government and all fifty states have laws prohibiting certain conduct with regard to illegal controlled substances. (I will often use the word drug(s) when referring to these illegal controlled substances.) The specifics vary by jurisdiction, but, generally, the same kind of conduct is prohibited everywhere.

In the state of Indiana it is a *felony* to do the following:

1. Knowingly or intentionally;
 - a. possess,
 - b. manufacture,
 - c. finance the manufacture,
 - d. deliver, or
 - e. finance the delivery of an illegal controlled substance.
2. Possess an illegal controlled substance with intent to do b. through e. above.

It is a *misdemeanor* if the drug is marijuana, hash oil, or hashish when the weight of the drug is thirty grams or less and this is

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the offender's first conviction of a crime involving marijuana, hash oil, or hashish.

There are four classifications of felonies in Indiana. Each has a maximum and minimum number of years of imprisonment associated with it along with a presumptive term, i.e., a number of years which the legislature says the judge should presume is the appropriate sentence before considering any mitigating or aggravating factors which may exist.

Felony	Maximum Sentence	Minimum Sentence	Presumptive
Class A Felony	50 years	20 years	30 years
Class B Felony	20 years	6 years	10 years
Class C Felony	8 years	2 years	4 years
Class D Felony	3 years	1/2 year	1 1/2 years

C. Judges must be given discretion to impose intermediate sanctions if the legislature is serious about reducing prison overcrowding. The judge usually may suspend all or part of a sentence he imposes. However, he cannot use alternatives to incarceration when he is specifically prohibited by statute from doing so. In Indiana a statute severely limits the judge's ability to employ the use of non-custodial measures by mandating imposition of imprisonment in certain cases. This statute (I.C. 35-50-2-2) requires the judge to impose at least the minimum sentence of incarceration for a given drug felony when any of the following circumstances exist:

1. The felony committed is dealing in cocaine or a narcotic drug as a class A felony.
2. The felony committed is dealing in a schedule I, II, or III controlled substance if the amount of controlled substance involved has an aggregate weight of three grams or more.
3. The drug felony committed was a class A or B felony and the offender has a prior felony conviction.
4. The drug felony committed was a class C felony and less than seven years have elapsed between the date the person was

discharged from probation, imprisonment, or parole (whichever is later) for a prior felony conviction and the date the offender committed the new class C felony.

5. The drug felony committed was a class D felony and less than three years have elapsed between the date the person was discharged from probation, imprisonment, or parole (whichever is later) for a prior felony conviction and the date the offender committed the new class D felony.

This statute must be repealed or drastically amended if legislators want to alleviate prison overcrowding in Indiana.

Role of Police and Prosecutor in Informal Diversion or Delay of Prosecution

St. Joseph County is a metropolitan area which has a total population of approximately 237,700. It has a narcotics division composed of police officers from the county and from two cities. This narcotics division is called MSOS (Metro Special Operations Section of the South Bend Police Department). MSOS has been conducting most drug investigations and undercover drug operations as well as executing most drug-related search warrants in St. Joseph County.

The police do not have any formal diversion program or policy. MSOS officers use their discretion in deciding when to arrest offenders who have committed drug crimes in their presence. For example, MSOS officers may wait several weeks or even several months until they have made two or more purchases of drugs from an offender before they arrest him. (Multiple drug sales make a stronger case against the offender and show a pre-disposition of the offender to sell drugs. Multiple drug sales help the prosecutor counter an offender's assertion of an "entrapment" defense at trial.)

MSOS may want to delay arrest of an offender who has sold drugs because a police officer is working with a confidential in-

formant (CI) who is assisting the officer in this and other cases. MSOS is careful not to reveal the identity of a CI either by verbally disclosing the CI's name or by making an arrest under circumstances where the offender would be able to easily determine the CI's identity. The police want to both maximize a CI's usefulness and help ensure his safety.

MSOS may refer a case to the drug prosecutor and wait until formal charges are filed before arresting an offender. This is common practice in the majority of drug cases in St. Joseph County because of the long delay between the time a suspected drug is sent to a regional police laboratory for analysis and the time a forensic drug chemist analyzes the substance and prepares a written report confirming or refuting the presence of an illegal controlled substance. This lag time has been approximately four months because of the large number of drug cases and the inadequate number of forensic drug chemists employed by the laboratory to process the cases. Most offenders benefit by not being formally charged or arrested for a drug crime until at least four months *after* they commit the crime. (In selected cases arrests are made sooner based on the positive result of a field test, and sometimes the laboratory is asked to do a "rush" on the analysis of a suspected drug to expedite prosecution of a special case.)

MSOS police officers work very closely with the drug prosecutor. MSOS may want to "flip" a drug offender. That is, the police may want the offender to cooperate and work with them in making cases against his drug suppliers in exchange for anticipated leniency for the offender. If the police want to do this, they obtain authority from the drug prosecutor to defer arrest and prosecution until the offender has done as much work as he can or is willing to do. At that time the drug prosecutor may decide not to file any charges against the cooperating offender, may decide to file fewer or less serious charges against him, or may decide to file all possible charges against him depend-

ing on what he has or has not "produced" during his period of cooperation with authorities. Again, this is a type of informal diversion or at least delay of prosecution where the offender is not taken into custody immediately after committing a drug crime.

The prosecutor has the ultimate power to enforce the drug laws through his charging decisions. The prosecutor reviews every drug case and decides what, if any, charge will be filed. For example, the prosecutor may file Dealing in Cocaine as a class A felony if the weight of the drug is three grams or more. If the offender is convicted of that class A felony, the judge *must* impose a mandatory minimum period of incarceration of twenty years with no possibility of probation or modification of sentence. On the other hand, under the same facts, the prosecutor may use discretion and file Dealing in Cocaine as a class B felony if the offender is young and has no prior felony conviction. In this scenario, if the offender is convicted of the class B felony, the judge may impose any of the alternatives to incarceration which he feels is appropriate, including suspension of any or all of the sentence. It is clear that the prosecutor exercises significant power in making charging decisions which ultimately affect the judge's ability to impose intermediate sanctions.

Prosecutor's Formal Pretrial Diversion

Indiana has a statute authorizing a prosecuting attorney to withhold prosecution against an offender charged with a misdemeanor if the person agrees to conditions of a pretrial diversion program. The person must sign a written agreement which is filed in court.

The St. Joseph County Prosecuting Attorney's Office instituted a pretrial diversion program in May of 1985. Goals of the program are to intervene as a positive force to modify criminal behavior, to benefit the community through community service work, and

to provide restitution to victims of crime. The existence of the program recognizes the fact that human beings are fallible. It recognizes that in some cases people who have committed crimes should be given a chance to redeem themselves and not carry the stigma of a criminal conviction for the rest of their lives.

The director of the program selects candidates by personally reviewing police reports. Candidates are also referred to the program by judges, police officers, and defense attorneys. The program lasts one year. If the offender successfully completes the program, the criminal charge is dismissed. If the person fails to complete the program, pretrial diversion is withdrawn, and prosecution is resumed.

The pretrial diversion statute gives wide discretion to the prosecutor's office to impose creative conditions which are reasonably related to rehabilitation. Community service is considered for all participants. If community service hours are assigned, it becomes the responsibility of the participant to seek, schedule, and provide verification of completion of the community service. The community service concept has been broadly construed to include services such as helping elderly neighbors. In one case a dentist in the program was ordered to provide free dental examinations to the poor at a local residential facility for the homeless. In another case a beautician in the program was ordered to provide free hairdressing services to poor women living in a facility for mentally or physically impaired adults.

Counseling is considered for all participants. A substance abuse evaluation is required where appropriate. If the professional evaluation shows that a participant has a substance abuse problem, the participant may be ordered to complete a substance abuse education program, receive substance abuse treatment as an out-patient in a qualified facility, or even receive treatment as an in-patient in a qualified facility.

There is a great need for publicly support-

ed facilities for detoxification and substance abuse counseling for the poor in St. Joseph County. In-patient substance abuse programs last approximately thirty days and are very expensive. Even if a participant is employed and has health insurance coverage, the insurance coverage does not usually pay the entire cost of the program. Most participants in the pretrial diversion program who desperately need in-patient substance abuse treatment have no job or money or insurance. Therefore, most of them are not able to obtain the extensive treatment they need to become and remain permanently drug and alcohol free. Out-patient counseling is obtained for participants through contracts with local private hospitals and other private substance abuse centers. While some in-patient and out-patient treatment is available for indigents, they are too few to provide adequate treatment for all participants in the pretrial diversion program. The vast majority of people who commit crimes are substance abusers. More attention and resources must be devoted to providing publicly supported facilities for detoxification and counseling for indigent substance abusers if the criminal justice system is serious about treatment to help a person avoid future criminal behavior.

Other miscellaneous conditions imposed on participants in the pretrial diversion program may include working faithfully at suitable employment, pursuing a course of study or vocational training that would equip the participant for suitable employment, attending a literacy program to learn to read, attending credit counseling to learn how to handle money, attending parenting counseling to learn better parenting skills, attending anger management counseling, supporting the person's dependents, making restitution to the victim of the crime, refraining from having any direct or indirect contact with the victim or a witness, reporting to the prosecuting attorney at reasonable times, and answering all reasonable inquiries by the prosecuting attorney.

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Although the pretrial diversion program targets first-time offenders charged with a misdemeanor, some first-time violators charged with a class D felony are considered for the program.

Statistics show that during the first five years of operation, 87% of the participants in the pretrial diversion program satisfactorily completed the program. Only 4% of those who satisfactorily completed the program have been charged with committing another crime.

Court's Formal Pretrial Diversion

The judge is authorized by statute to defer prosecution of a charge of Possession of Marijuana or Possession of Hashish as a class A misdemeanor if the person has no prior conviction of a drug offense. At the judge's discretion and with the person's consent, the judge may defer entering conviction upon a guilty plea and place an offender in the custody of the court under specified conditions. If the offender violates a court-imposed condition, the judge may enter a judgment of conviction. However, if the offender fulfills all conditions, the judge must dismiss the charge. A person is only eligible for dismissal under the statute one time.

Deferred Prosecution Where Chemical Abuse or Mental Illness Is a Contributing Factor to the Offense (I.C. 16-13-6.1-15.1)

An Indiana statute provides that where the use or abuse of alcohol or drugs is a contributing factor or a material element of a misdemeanor or where the defendant's mental illness is a contributing factor in the commission of a misdemeanor, the court may take judicial notice of the fact that proper early intervention, medical treatment, or rehabilitative treatment of the defendant is likely to decrease the defendant's tendency to engage in anti-social behavior. Before conviction, the judge may conditionally defer

prosecution of the misdemeanor for up to one year with the consent of both the defendant and the prosecuting attorney. If this happens, the judge may order the defendant to satisfactorily complete an alcohol or drug treatment program or order the defendant to undergo treatment for mental illness. The judge may also impose other appropriate conditions upon the defendant. If the defendant violates a condition imposed by the court, the court may order resumption of the prosecution. However, if the defendant successfully fulfills the conditions set forth by the court, the court must dismiss the misdemeanor.

Treatment as an Alternative to Prosecution Where Drug Abusers or Alcoholics Are Charged with a Felony (I.C. 16-13-6.1-16)

An Indiana statute provides that a drug abuser or an alcoholic charged with a felony may ask the court to be treated by the Department of Mental Health in lieu of prosecution of the felony.

If the court has reason to believe that a defendant charged with a felony is a drug abuser or alcoholic, or if the defendant states that he is a drug abuser or alcoholic, the court advises the defendant that prosecution of the felony may be continued if the defendant asks to undergo treatment and is accepted for treatment by the Department of Mental Health. If the defendant asks for the treatment and is accepted, he is placed under the supervision of the Department of Mental Health. During treatment he may be confined in an institution, or he may be released for treatment on an out-patient basis in the community. A request for treatment as a drug abuser or alcoholic constitutes a formal waiver of the rights to a speedy trial and to a jury trial. The judge will only grant such treatment if he determines that the defendant is a drug abuser or alcoholic and is likely to be rehabilitated through treatment. If the defendant successfully completes treat-

ment, the felony is dismissed. If the defendant does not successfully complete treatment, prosecution of the felony is resumed. The judge can only use this option if the prosecutor consents to the treatment in lieu of prosecution.

Treatment as an Alternative to Imprisonment Where a Drug Abuser or Alcoholic Is Convicted of a Felony (I.C. 16-13-6.1-16)

A similar statute provides that a drug abuser or alcoholic convicted of a felony may request treatment under the supervision of the Department of Mental Health instead of imprisonment.

If the court has reason to believe that a defendant convicted of a felony is a drug abuser or alcoholic, or if the defendant states that he is a drug abuser or alcoholic, and the court finds that he is eligible for such treatment, the court advises him that he may be placed on probation if he asks to undergo treatment and is accepted for treatment by the Department of Mental Health. The judge will only order this if he determines that the individual is a drug abuser or alcoholic and is likely to be rehabilitated through treatment. If the individual fails to observe the requirements set down by the Department of Mental Health, that failure constitutes a violation of probation. Such a failure is grounds for revoking the offender's probation.

Not all drug abusers or alcoholics charged with or convicted of a felony are eligible for treatment by the Department of Mental Health in lieu of prosecution or imprisonment. A person charged with a drug felony is not eligible if any of the following circumstances exist:

1. The felony alleges delivery of a controlled substance.
2. The defendant has a record which includes two or more prior convictions of forcible felonies or of a burglary classified as a class A or class B felony.

3. The defendant is charged with another unrelated felony.
4. The defendant is on probation or parole, and the probation or parole authority does not consent to his treatment as a drug abuser or alcoholic in lieu of prosecution or imprisonment.

Special Drug and Alcohol Court

St. Joseph County received a grant of federal funds to establish a special court devoted to handling all drug and alcohol-related cases. The program is referred to as TASC (Treatment Alternatives To Street Crimes). The mission of the TASC program is to address the problem of crime in St. Joseph County due to alcohol and drug abuse in the areas of prosecution, defense, adjudication, corrections, and treatment. Since it began on January 1, 1991 the focus of the specialized court has been on treatment. The total number of offenders in the TASC program in 1991 was 2,060.

A. Pretrial Supervision in the Drug and Alcohol Court

Before the new drug and alcohol court was established, there was a total lack of rehabilitative services for pretrial detainees. There was no provision for interviewing inmates, screening for bond reductions, or supervising persons free on bonds or recognizance.

The federal grant provided for one person to operate a pretrial supervision program. This program is discussed in detail later. The pretrial supervision program is an alternative to incarceration during the pretrial phase of a criminal case. It provides a method to reduce cash bond amounts, relieve jail overcrowding, and monitor drug and alcohol use of defendants participating in the program.

B. Sentencing in the Drug and Alcohol Court

The judge who presides over the drug and alcohol court has suspended many sentences and placed many drug and alcohol offenders

on probation. All offenders placed on probation are supervised by two probation officers hired under the federal grant. These two probation officers work exclusively with drug and alcohol offenders. Therefore, they are knowledgeable about drug and alcohol treatment facilities in the community.

Four counselors provide counseling to offenders placed on probation in the special drug and alcohol court. These qualified counselors provide substance abuse treatment for participants regardless of income. The treatment program lasts approximately eighteen weeks.

The total projected cost for the first year of operation of the special drug and alcohol court was \$443,377.00. The special court was funded by a second grant for a second year at a total projected cost of \$456,414.00. It is anticipated that the program will eventually be funded entirely by the collection of court costs imposed as part of a sentence. Everyone placed on probation is charged \$300.00 for a substance abuse evaluation. At sentencing the normal court cost of \$115.00 is assessed. In addition, the judge imposes a special court cost of between \$200.00 and \$1,000.00 which is used to defray operating costs of the program. By July of 1991 total assessments in the amount of \$223,381.00 were collected.

Alternatives to Pretrial Detention

A. Bail

In Indiana the court must order the amount in which a person charged with a criminal offense is held to bail. Bail may not be set higher than an amount reasonably required to assure the defendant's appearance in court. In setting bail, the judge must take into account all facts relevant to the risk of non-appearance.

The judge has discretion to impose conditions to assure the defendant's appearance at any stage of the criminal case. For example, the judge may impose any of the following as a condition of bail:

1. Require the person to execute a bail bond with sufficient solvent sureties or to deposit cash or securities in an amount equal to the bail.
2. Require the person to execute a bail bond by depositing cash or securities with the clerk of the court in the amount not less than ten percent of the bail.
3. Impose reasonable restrictions on the activities, movements, associations, and residence of the defendant during the period of release.
4. Require the person to refrain from any direct or indirect contact with an individual. (In a drug case, the prosecutor often asks the court to order the defendant to refrain from any direct or indirect contact with the confidential informant or other state witness.)
5. Place the person under the reasonable supervision of a probation officer or other appropriate public official.
6. Release the person into the care of some qualified person or organization responsible for supervising the person and assisting the person to appear in court.
7. Release the person on personal recognizance if he shows little risk of non-appearance.
8. Impose any other reasonable restrictions designed to assure the person's presence in court.

B. Pretrial Supervision in Drug and Alcohol Cases

If a person cannot post bail set by the court in a drug or alcohol case, the person may ask the judge to reduce bail. When this happens, the judge's office calls the director of the pretrial supervision program and makes a referral. The director goes to the jail and conducts an interview of the defendant. During the interview the director explains the program and the defendant's responsibilities under the program if he consents to participate. If the defendant chooses to participate, he signs a consent form and a release of information form. The primary requirements of

the program are that the participant make weekly visits to the director of the program and submit to random urine drops to test for the presence of drugs or alcohol. After the interview the director does a criminal history check on the defendant and submits a pretrial report to the court. The information in this report aids the judge in deciding whether or not to reduce bail. If the judge reduces bail and the defendant posts it, he must contact the director within twenty-four hours of his release from jail. At the first meeting, a baseline urine drop is obtained from the defendant, and he must pay the \$7.50 fee for the drug/alcohol test.

A person is considered to fail in the program if he has a positive urine drop, if he commits a new crime, or if he fails to keep appointments without a valid excuse. If the director reports a failure, the judge has a hearing and usually reinstates the original higher bond.

The program is beneficial as an alternative to pretrial detention in the following ways:

1. The community benefit because the person on bail is supervised.
2. The program provides incentive for the defendant to remain drug and alcohol free pending the disposition of his criminal case.
3. Efforts are made to make the defendant think about the consequences of his actions.
4. The director channels a participant into counseling and literacy programs where advisable.
5. The program introduces a participant to probation-like requirements of reporting at set times and submitting to urine drops.
6. If the defendant is ultimately convicted, a presentence investigation report will be prepared by the probation department and submitted to the judge. This report will contain information about the defendant's success or failure in the pretrial supervision program. This allows the judge to determine the likelihood of the defendant's

success if placed on regular probation. If the person has failed in the pretrial supervision program, it is unlikely the judge will consider him a good prospect for placement on regular probation. However, if the person has been successful in the pretrial supervision program, the judge will consider that person a likely candidate for placement on probation as an ultimate disposition of his case.

7. Participants often receive better medical care while in the program. A person must submit a written doctor's excuse for an absence. During an office visit, the doctor may diagnose a health problem which might otherwise go undetected.

C. Prosecutor's Request for Bond Reduction

A person charged with a felony drug crime may not be able to post bail or may choose not to participate in the pretrial supervision program. Sometimes a person in that situation will agree to cooperate with law enforcement authorities by assisting them to make cases against his drug suppliers. Obviously, the defendant cannot assist narcotics officers if he is in jail. Therefore, if the prosecutor and narcotics officers believe it would be beneficial to have the defendant released from jail to work, the prosecutor may ask the judge for a sizable reduction in bail. The judge usually honors this request. The defendant then posts that low bail, is released from custody, and proceeds to work with authorities as promised.

D. Discharge for Delay in Criminal Trials (Criminal Rule 4)

1. Criminal Rule 4 of the Rules Of Criminal Procedure limits the time a defendant may be detained in jail on a charge without trial to six months from the date the criminal charge was filed or from the date of the defendant's arrest on the charge (whichever is later). Any defendant so detained must be released on his own recognizance at the end of the six months.

2. If a defendant detained in jail on a crim-

inal charge moves for a speedy trial, he must be released from jail if not brought to trial within seventy days from the date of the motion for speedy trial.

3. The State has one year from the date the criminal charge against the defendant is filed or from the date of his arrest on the charge (whichever is later) to bring the defendant to trial. The criminal charge must be dismissed if the case is not brought to trial within one year.

4. The time limits set forth in paragraphs 1, 2, and 3 above do not include delays caused by a continuance on the defendant's motion, delays caused by the defendant's act, or where the judge cannot bring the defendant to trial because of congestion of the court's calendar.

Considerations in Imposing Sentence

In determining what sentence to impose for a crime, the judge must consider the following:

1. The risk that the person will commit another crime.
2. The nature and circumstances of the crime committed.
3. The defendant's prior criminal record, character, and condition.
4. Whether the victim of the crime was less than twelve years of age or at least sixty-five years of age.
5. Whether the defendant violated a protective order issued against him.
6. Any oral or written statement made by a victim of the crime.

A statute sets forth factors which the judge may consider as *aggravating circumstances* or as favoring imposing consecutive terms of imprisonment.

Similarly, a statute sets forth factors which the sentencing judge may consider as *mitigating circumstances* or as circumstances favoring suspending imprisonment and placing the defendant on probation. Mitigating

circumstances include any of the following:

1. The crime neither caused nor threatened serious harm to persons or property, or the defendant did not contemplate that it would do so.
2. The crime was the result of circumstances unlikely to recur.
3. The victim of the crime induced or facilitated the offense.
4. There are substantial grounds tending to excuse or justify the crime, although failing to establish a defense.
5. The defendant acted under strong provocation.
6. The defendant has no history of delinquency or criminal activity, or the defendant has led a law-abiding life for a substantial period before commission of the crime.
7. The defendant is likely to respond affirmatively to probation or to short term imprisonment.
8. The character and attitude of the defendant indicate he is unlikely to commit another crime.
9. The defendant has made or will make restitution to the victim of the crime for the injury, damage, or loss sustained.
10. Imprisonment of the defendant will result in undue hardship to the defendant or to the defendant's dependents.

Modification of Sentence

Unless a felony carries with it a mandatory minimum sentence of incarceration, the judge may modify an offender's sentence within one year from the time the offender begins serving his sentence. The judge may reduce or suspend the original sentence. The court must state his reasons for a modification on the record. Also, the judge must give notice of the modification to any victim of the crime.

If more than one year has gone by since the offender began serving his sentence, the judge may only modify a sentence if the

prosecuting attorney approves of the modification.

Reduction of Sentence

The Indiana legislature recently made an exception to its strict mandatory minimum sentence statute. The judge may now reduce an offender's sentence by up to two years without a hearing and without making any written findings or conclusions if the following conditions exist:

1. The offender has been sentenced to more than four years imprisonment. (This means he was originally convicted of a Class C, B, or A felony.)
2. The person is in credit class I. (An offender's sentence is reduced a day-for-a-day if he is an "ideal" prisoner.)
3. There are less than two years remaining until the offender's earliest possible release date.
4. The offender has successfully completed an educational, vocational, or substance abuse program that the Department of Corrections has determined to be appropriate.
5. The offender has demonstrated a pattern of behavior consistent with evidence of rehabilitation.

This statute is effective July 1, 1992. The fact that this statute was enacted attests to the growing pressure on state legislators to address the problem of overcrowded prisons.

Fines

A fine is a financial penalty. The judge may impose a fine instead of or in addition to a period of incarceration. An offender may be fined up to \$10,000.00 upon conviction of any of the four classes of felonies (class A, B, C, and D). A person convicted of a class A misdemeanor may be fined up to \$5,000.00. A person convicted of a class B misdemeanor may be fined up to \$10,000.00.

Finally, a person convicted of a class C misdemeanor may be fined up to \$500.00.

Suspension of Driving Privileges

Most Americans have a "love affair" with their automobiles. They want to drive their automobiles without restriction. The Indiana legislature recently passed a statute which provides a sanction short of incarceration for certain drug offenders. This sentence is mandatory. Basically, the judge must order that the drug offender's:

1. operator's license be suspended,
2. existing motor vehicle registration(s) be suspended, and
3. ability to register motor vehicles be suspended, for between one hundred eighty days and two years.

If the drug offender does not have a valid driver's license or learner's permit, he is prevented from obtaining one for a period of no less than one hundred eighty days.

Restitution

The judge has the option of ordering a convicted offender to make restitution to the victim of a crime. The judge may order restitution as a condition of probation, or he may order restitution without placing the offender on probation.

If an offender is ordered to make restitution to a victim as a condition of probation, the probation department collects the restitution from the offender and pays it to the victim.

A restitution order is a judgment lien which attaches to the property of the offender and may be enforced to satisfy any payment that is delinquent under the restitution order entered by the judge.

When an offender is convicted of selling drugs to an undercover police officer the police department is considered the victim since the officer used money of the police de-

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partment to make the drug purchase. Under these circumstances, the prosecuting attorney asks the judge to order the drug dealer to pay restitution to the police department in the amount which the police department spent in purchasing drugs from that offender. Often, as part of a written plea agreement, the prosecuting attorney takes away the discretion of the court to order restitution. Instead, as a term of the plea agreement, the prosecuting attorney may require a convicted offender to pay restitution to the police agency. This payment of restitution helps the police department replenish funds used to make undercover drug purchases.

Probation

Unless prohibited by statute, at the time the judge imposes sentence upon an offender, he may suspend all or part of it and place the offender on probation. When the judge places an offender on probation he must specify the conditions of probation and advise the offender that his probation may be revoked if he violates any condition. The court must order each offender convicted of a felony to pay an initial probation users fee of between \$25.00 and \$100.00. The court must also impose a monthly probation users fee of between \$5.00 and \$15.00. The money collected by the probation department is used in providing probation services to adults. Supervision of a person may be transferred to another county or state if both courts agree to the transfer. This allows an offender on probation to move out of St. Joseph County during the probationary period if he has good reason to do so. For example, his family may be in another state, or he may be able to find a good job in another state.

A. Conditions of Probation

When the judge places a person on probation, he may require the offender to do any combination of the following:

1. Work faithfully at suitable employment

or faithfully pursue a course of study or vocational training that will equip the offender for suitable employment.

2. Undergo medical or psychiatric treatment.
3. Attend or reside in a facility for persons on probation.
4. Support the offender's dependents and meet other family obligations.
5. Make restitution to the victim of the crime for damage or injury sustained by the victim.
6. Pay a fine.
7. Refrain from possessing a firearm or other deadly weapon.
8. Report to a probation officer at reasonable times.
9. Permit the probation officer to visit the offender at reasonable times at the offender's home or elsewhere.
10. Remain within St. Joseph County unless granted permission to leave by the court or by the probation officer.
11. Answer all reasonable questions asked by the court or the probation officer and promptly notify the court or probation officer of any change in address or employment.
12. Perform uncompensated work which benefits the community.
13. Satisfy other conditions reasonably related to the person's rehabilitation.
14. Undergo home detention.
15. Undergo a laboratory test to detect and confirm the presence of the human immunodeficiency virus (HIV) antigen or antibodies to the human immunodeficiency virus (HIV), if:
 - a. The offender was convicted of an offense related to a controlled substance and the offense involved conditions which created a risk of transmission of the HIV, or
 - b. The offender was convicted of a sex crime and the crime created an epidemiologically demonstrated risk of transmission of the HIV.
16. Refrain from any direct or indirect con-

tact with an individual such as a confidential informant or state witness.

17. Periodically undergo a laboratory chemical test to detect the presence of a controlled substance.
18. Serve a term of incarceration within the period of probation. (For example, the judge may order the offender to serve sixty days in the county jail or ten consecutive weekends in the county jail as a condition of probation.)

B. Violation of Conditions of Probation

The judge may revoke an offender's probation if the offender has violated a condition of release during the probationary period. The decision whether or not to file a petition to revoke probation is made by the prosecuting attorney. For example, if an offender convicted of Dealing in Cocaine has a laboratory chemical test which detects the presence of cocaine in the person's urine, the prosecuting attorney considers all circumstances and decides whether to file a petition to revoke probation. When a petition is filed, the court is asked to revoke the offender's probation and to reinstate the previously suspended term of imprisonment.

If the prosecuting attorney's office files a petition to revoke probation, the judge orders a summons to be issued to the person to appear in court or orders a warrant for the offender's arrest if there is risk of the person fleeing the jurisdiction or causing harm to others. When the offender first appears in court and is advised of the allegations against him, the court may admit the offender to bail pending an evidentiary hearing to determine the merits of the alleged violation. If the prosecuting attorney and defendant do not agree to a disposition of the case, an evidentiary hearing is held. At that hearing the state has the burden of proving by a preponderance of the evidence that the offender violated his probation.

If the person has violated a condition of probation during the probationary period, the court has discretion to do any of the follow-

ing:

1. Continue the person on probation with or without modifying the conditions of probation.
2. Extend the person's probationary period for up to one year beyond the original probationary period.
3. Revoke the person's probation and reinstate the original sentence which had been suspended at the initial sentencing.

In St. Joseph County there is regular probation and intensive supervision probation (ISP). An offender placed on ISP must report to his probation officer more frequently than an offender on regular probation. As the name suggests, ISP supervision is more intense.

The two most common conditions of probation placed on a drug offender are to submit to random urine tests for the detection of drugs in the system and to participate in and successfully complete a drug treatment program.

The judge usually places a person on "reporting" probation. That means the offender must report to a probation officer in person. However, the judge may impose a "non-reporting" probation. A person placed on non-reporting probation has no supervision during the probationary period.

C. Home Detention as a Condition of Probation

When the judge places an offender on probation, a condition of probation may be that he be confined to his home for a period of home detention lasting between sixty days and the minimum term of imprisonment authorized for the crime. The court may order supervision of the offender's home detention by the probation department or by a community corrections program. Home detention may be monitored by an electronic device.

"Home" means the actual living area or the temporary or permanent residence of an offender. "Monitoring device" means an electronic device that:

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1. Is limited in capability to the recording or transmitting of information regarding an offender's presence or absence from his home.
2. Is minimally intrusive upon the privacy of the offender or other persons residing in the offender's home.
3. With the written consent of the offender and with the written consent of other persons residing in the home at the time an order of home detention is entered, may record or transmit:
 - a. Visual images,
 - b. Oral or wire communication or any auditory sound, or
 - c. Information regarding the offender's activities while inside the offender's home.

It is important to note that the court has specific authority to place a person on home detention even when a mandatory minimum period of incarceration is ordered by I.C. 35-50-2-2 if the crime is a class D felony. This is a new amendment to the mandatory minimum sentence statute. The new provision allows the judge to substitute home detention for the otherwise mandatory minimum sentence of incarceration of six months for a class D felony.

When a judge orders home detention he must order the offender confined to his home at all times except when the offender is doing any of the following:

1. Working at employment approved by the court or traveling to or from approved employment.
2. Seeking employment approved by the court if the offender is unemployed.
3. Undergoing medical, psychiatric, or mental health treatment; counseling; or other treatment program approved by the court.
4. Attending an educational institution or educational program approved by the court.
5. Attending a regularly scheduled religious service at a place of worship.
6. Participating in a community work release

or community service program approved by the court.

The offender on home detention must maintain a working telephone in his home. The offender must have a monitoring device in his home or on his person or both if ordered by the court.

A person placed on home detention is ordered to pay a home detention fee and is ordered not to commit another crime during the period of home detention. Violation of the order for home detention subjects the offender to prosecution for the crime of Escape.

Home detention is a cost saving alternative to incarceration. While on home detention the offender's freedom is severely limited, as it would be in prison, yet the offender is totally responsible for supporting himself and maintaining his household.

Community Corrections Program

Placement in a community corrections program is another alternative to incarceration. All convicted drug offenders are eligible for placement in a community corrections program in lieu of a mandatory minimum term of incarceration otherwise required by I.C. 35-50-2-2 except drug offenders convicted of a class A or class B felony. This is another recent amendment to the mandatory minimum sentence statute.

DuComb Center— The Community Corrections Project of St. Joseph County

DuComb Center is the community based corrections project in St. Joseph County. The Center is an alternative to prison primarily for adults who are convicted of non-violent felonies. It gives the adult offender who would otherwise go to prison an opportunity to receive assistance he needs to become a productive member of society.

The program was conceived in 1976 and

has been in operation since 1982. DuComb Center consists of four main components: residential, out-client, home detention, and community service.

A. Residential Facility

DuComb Center has bed space for twenty-three people. The residential facility is only for men. It is funded by the state and has an advisory board which sets policy. There are twenty-two employees. Approximately half of these employees are part time.

When an offender is referred to DuComb Center as a potential client, the referral comes from either the judge, a probation officer, or a defense attorney. After a referral is made, two staff members from DuComb Center interview the offender. The interview is a screening process to determine the offender's propensity for violence, his psychological state, and his attitude. Letters are prepared and sent to the judge, prosecutor, and defense attorney stating whether the defendant is an appropriate candidate for the residential program. The judge usually follows DuComb Center's recommendation. When the judge sentences a person to be an in-client at DuComb Center it is generally for a six-, nine-, or twelve-month period. The judge usually gives DuComb Center discretion to release the offender early if his behavior warrants early release. The judge can sentence an offender to DuComb Center as a condition of probation or as a direct commitment.

When an offender first comes to DuComb Center as an in-client he goes through an intake process. Within one week of his arrival, the staff does an initial treatment plan. A master treatment plan is prepared within thirty days of the offender's arrival. This treatment plan includes a substance abuse treatment component, educational referrals, and plans for helping the offender find a job if he is unemployed. The master plan also includes a complete physical examination to detect health problems. Random urine tests are performed to detect use of alcohol or

drugs.

DuComb Center has a good working relationship with service agencies in the community. As a result, the Center has been successful in obtaining in-patient substance abuse treatment for approximately 71% of the residents. These in-patient treatment programs usually last thirty days and are for people who are in the middle and late stages of a drug problem. The Center has not been as successful in obtaining in-patient or out-patient psychiatric treatment for residents. An estimated 20% to 25% of the residents are in need of psychiatric treatment.

The master plan for each individual is monitored and updated as needed during the offender's stay in the facility. Monthly progress reports are prepared and sent to the judge, prosecutor, and probation department.

The structure of this residential program is responsible for much of its success. The structure provides residents with stability and discipline. The Center provides a safe place for residents, almost a cocoon environment, which is conducive to constructive behavior modification.

DuComb Center residents pay a "fair share" of living expenses from their earnings. Each resident and out-client must seek and maintain full time employment.

B. Out-Client Program

The out-client program is a supplement to the residential program. It allows the Center to serve a greater number of offenders. Out-clients are offenders who demonstrate measurable stability in their lives yet need the assistance of DuComb Center to successfully deal with their problems. Out-clients utilize the same services as residents, but they are able to live at home. As a result, more offenders in St. Joseph County are given the opportunity for rehabilitation without incarceration.

C. Home Detention

The home detention program in St. Joseph

County is operated by DuComb Center. A candidate is pre-screened for the program. Both men and women are eligible for placement on home detention. The judge can sentence an offender to home detention either by direct commitment or as a condition of probation. The program is fee-oriented.

Offenders in the home detention program are monitored by an active system which automatically detects non-compliance. This active system monitors the offender's presence at his home. The system detects a non-scheduled leave within one minute of the violation. A person who makes an unscheduled leave is considered AWOL and may be prosecuted for the crime of Escape.

Home detention works in St. Joseph County because the offender is provided services he needs in the areas of substance abuse treatment, education, and assistance in obtaining a job. Home detention is an intermediate sanction which restricts an offender's freedom in a significant way, yet cost to the taxpayer is low.

The active system is supplemented by a drive-by system. Using the drive-by system, a staff member can literally drive by a specific location and determine whether an offender is where he is scheduled to be, e.g., at work, in school, in a meeting.

D. Community Service Program

The community service program was established as another alternative to incarceration and is implemented by DuComb Center. Through this program felons and misdemeanants provide free service to a wide range of non-profit community agencies.

Alternative Sentencing Project

The Alternative Sentencing Project (ASP) began in August 1986 as a grant funded pilot project to assist attorneys who defend indigent defendants. Sentencing consultants employed by the Alternative Sentencing Project prepare comprehensive, individual-

ized punishment plans for offenders at the request of public defenders. The plans are submitted to the sentencing judge. The ASP's detailed, verified investigations result in maximum use of community resources and minimum use of expensive jail and prison beds. The Public Defender Counsel developed the Alternative Sentencing Project in response to the current crisis in prison crowding and projected increases in the inmate population.

The Alternative Sentencing Project works with non-violent public defender clients who face a high likelihood of receiving a sentence of imprisonment for a class C or class D felony. ASP targets these offenders because a substantial number of class C and D felony commitments are for non-violent crimes with sentences that are suspendible in whole or in part. Sentencing consultants identify specific treatment and punishment options in difficult cases and secure commitments from individuals and agencies willing to work with these offenders. ASP insures that community based human and correctional services receive appropriate referrals. ASP is a pivotal broker of information about the offender, the offense, and resources at the county level.

The ASP plan supplements the regular pre-sentence investigation report which is prepared by the probation department. The ASP plan provides a sentencing tool to judges who are looking for viable options to incarceration for non-violent offenders. The ASP plan makes innovative use of community resources for the purpose of rehabilitation of convicted felons in such a way as to serve the best interests of the particular offender and conserve government funds that would otherwise be spent on incarceration.

Drug Asset Forfeiture

One way to effectively penalize a drug offender without putting him in prison is to take all his property which is related to ille-

gal drug activity. This is called drug asset forfeiture. In Indiana a statute authorizes the seizure and forfeiture of a vehicle which is used or intended for use by the person in possession of it to transport or in any manner to facilitate the transportation of drugs for the purpose of committing, attempting to commit, or conspiring to commit most felony drug crimes. The same statute authorizes seizure and forfeiture of all money, weapons, and communication devices (including pagers and mobile telephones) which are used to facilitate a violation of the drug laws. Real estate and personal property purchased with drug proceeds are also subject to seizure and forfeiture. There is even a presumption that money, weapons, and communication devices are drug-related when they are found near or on a person who is committing, attempting to commit, or conspiring to commit most felony drug crimes.

The lawsuit which the prosecuting attorney must file in order to begin forfeiture proceedings is a civil lawsuit. It is not part of a criminal case. Therefore, the burden of proving that the property is drug-related is lighter than in a criminal case. If the case goes to hearing, the prosecuting attorney must show by a preponderance of the evidence that the property was within the definition of property subject to seizure and forfeiture. Experience has shown that most property is forfeited by default without the need for any formal court hearing because most offenders do not want to explain the source or use of suspected drug-related property. Therefore, most drug assets are legally taken from the offender with little expenditure of time or effort by the government.

Drug asset forfeiture helps law enforcement. When the property is forfeited, the cash and proceeds from the sale of the property are distributed to law enforcement authorities up to the amount of law enforcement costs expended in the case. Law enforcement authorities include police agencies and the prosecuting attorney's office. If there is any money in excess of law enforcement

costs, it is deposited in the state's common school fund to aid public education.

Many forfeited vehicles are used by MSOS as undercover police cars. In one case we were able to seize and forfeit \$64,000.00 in cash that was found in the house of a cocaine dealer. In another case we seized and forfeited approximately \$10,000.00 which was found in the athletic shoes of dealers of crack cocaine who had set up a "stash house" in a local motel. In a marijuana distribution ring, we recently seized approximately \$10,000.00 from the offender's house and another \$9,000.00, gold medallion, and two earrings in gold settings with twenty diamonds in each earring from his safety deposit box.

It seems eminently fair that drug offenders be punished by losing their drug-related cash and property to law enforcement authorities who then use that cash and property in the noble quest to rid American society of illegal drugs. Drug asset forfeiture is an effective way to penalize a drug offender without sending him to prison. Many drug offenders would rather go to prison than lose their money, cars, and real estate.

Eviction Ordinances

A few bold cities in the United States have recruited landlords in the war on drugs. South Bend, Indiana; Portland, Oregon; and York, Pennsylvania are three such cities. South Bend passed an ordinance requiring landlords to evict tenants who use or sell drugs on rental property or allow others to use or sell drugs on the premises. Eviction is a civil matter, not a criminal matter. Nevertheless, enforcement of these eviction statutes can be considered a form of alternative to incarceration for drug offenders.

Houses or apartments out of which crack cocaine is sold are called "crack houses." Almost all crack houses are rental units. Law enforcement and city officials work together in enforcing the eviction law. Police officers obtain intelligence information pinpointing a suspected drug house. Surveillance of

the suspected drug house is conducted by police. The police document, sometimes by photographs and videotape, the conduct of the tenant and his "guests" who may be drug customers or drug dealers. If the investigation establishes by a totality of the circumstances that the rental property is being used to sell or use drugs, the police so inform city officials. When the city notifies the owner of the house or apartment of the improper use of the leased premises, the landlord is required to evict the tenant. The end result is that the drug dealer is out of business at that location. These forced moves keep drug dealers from becoming entrenched in any one neighborhood.

These ordinances are good for the United States, for local communities, and more immediately and directly for neighbors of crack houses. Before these ordinances were enacted, long-suffering neighbors endured a constant stream of vehicles and unsavory characters coming and going from the area of a crack house twenty-four hours a day, seven days a week. Law-abiding citizens were hard pressed to cope with drug dealers living next door or in the upstairs apartment. Some citizens moved. Some virtually hid in their own homes. Others tried to ignore the dangerous activity around them.

The law builds in strong incentive for landlords to cooperate in evicting drug dealing tenants. If the landlord does not evict the tenant, the landlord must pay a fine of from \$50.00 to \$2,500.00 for each violation, per day. It is heartening that most landlords are conscientious and voluntarily accept the burden which the ordinance places upon them.

Plea Bargaining as It Relates to Imposition of Intermediate Sanctions

Statutes, sentencing propensities of judges, and decisions of prosecutors determine whether a given offender will go to prison or receive an intermediate sanction.

A prosecutor's charging decision may determine whether an offender goes to prison.

For example, if an offender has knowingly delivered three grams or more of cocaine, the drug prosecutor may file the charge of Dealing In Cocaine, Class A Felony. Since that is a mandatory minimum sentence crime by statute, the offender would go to prison for at least twenty years if convicted of that offense. (This situation arises frequently since many drug dealers deal in three grams or more of cocaine.)

Although this could be a nightmare for corrections officials to deal with, most offenders charged with Dealing In Cocaine, Class A Felony, in St. Joseph County, do not go to prison for twenty years. Rather, the prosecuting attorney usually engages in plea negotiations with the defense attorney which results in a plea of guilty to a lesser charge, a prison sentence of considerably less than twenty years, and maybe even probation for the offender. For example, if the offender is young and has never been convicted of a felony, the drug prosecutor may allow him to plead to a new charge of Dealing In Cocaine, Class B Felony, and allow the judge to use his discretion in imposing sentence, including probation. However, the drug prosecutor may use his position of strength in negotiating a split sentence. That is, the prosecutor, in the written plea agreement, might bind the judge to impose a sentence of ten years, order that six of the ten years be served in prison, and further order that after serving the six-year sentence, the remaining four years would be suspended with the offender being placed on probation for two years. The point is that the prosecuting attorney has considerable power in determining whether a large number of offenders will go to prison or will be eligible for intermediate sanctions. A mandatory minimum sentence statute enhances this power of the prosecutor. It empowers the prosecutor to plea bargain from a position of great strength.

Plea bargaining is a prosecutor's tool. It should be used to ensure that justice is done in every case. Sometimes that means extract-

ing prison time from an offender. Sometimes it means binding the court to grant probation. Sometimes it means allowing the court to exercise its discretion in imposing sentence. In any case, it is clear that prosecutors as well as legislators and judges play a significant role in ultimately determining whether a convicted offender will be placed on regular probation, be sent to prison, or receive some intermediate punishment between the two extremes.

Conclusion

Prison overcrowding in the United States has led to the development of a wide range of sentencing options called intermediate sanctions. These intermediate sanctions are non-custodial alternatives to prison for criminal offenders.

This paper has discussed the wide range of non-custodial measures used in St. Joseph County, Indiana at all stages of a drug offender's criminal case. The applicable laws were explained. A primary focus was the statute which mandates non-suspendible sentences of incarceration in many drug cases. This strict statute has recently been amended to give a judge discretion to impose intermediate sanctions such as home detention and in-client status in a community corrections facility instead of mandatory prison time. This strict statute was also amended to allow a judge to release certain offenders from prison up to two years early. These amendments were passed to alleviate prison overcrowding in Indiana.

The police and drug prosecutor make important informal and formal decisions which determine when a drug offender is arrested, what crime(s) he is charged with, and what plea bargaining there will be.

The prosecutor's office operates a formal pretrial diversion program which bypasses the normal processing of certain minor criminal offenses. The court is authorized by statute to defer prosecution in minor drug cases and in cases where the use of alcohol or

drugs is a contributing factor or material element of a misdemeanor or where the defendant's mental illness is a contributing factor in the commission of a misdemeanor. Statutes also allow a judge to have certain drug abusers or alcoholics treated by the Department of Mental Health in lieu of prosecution or imprisonment.

A special drug and alcohol court is expediting the processing of all drug and alcohol-related cases in St. Joseph County. This program provides pretrial supervision for offenders who participate in the program and are released from jail on a reduced bond.

The sentencing process was discussed. Intermediate sanctions used by courts in St. Joseph County include fines, suspension of driving privileges, restitution, regular probation, intensive supervision probation, residing in a community corrections facility, home detention, community service, and jail. The judge may impose these sanctions at the initial sentence, or he may send the offender to prison, return him to court within one year, and impose these intermediate sanctions as part of a modification of the sentence.

Indiana should have boot camp as an intermediate sanction in the near future. In 1990 and 1991 the Indiana legislature enacted laws authorizing a boot camp for young, non-violent offenders. Boot camp is modeled after military basic training and emphasizes strict discipline, hard work, physical training, and programming. However, the legislature did not appropriate money to fund the program. Consequently, no boot camp is operating in Indiana today. Hopefully, the legislature will fund the program soon so boot camp will be a reality and another viable sentencing option for drug offenders.

Finally, two civil procedures were discussed which penalize a drug offender in a non-custodial fashion. First, drug asset forfeiture allows law enforcement authorities to seize and forfeit drug-related property and use the proceeds to fight the war on drugs. Second, some city ordinances require land-

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lords to evict tenants from rental houses and apartments when the tenants use or sell drugs on the rental property or allow others to use or sell drugs on the premises.

Judges have a wide range of sentencing options to choose from. Intermediate sanctions

fill the gap between regular probation and prison for drug offenders in St. Joseph County. As alternatives to prison, intermediate sanctions can be used to alleviate prison overcrowding in a responsible way.

Current Status and Prospects for Non-Custodial Measures for Offenders in Korea

by Han, Youngsuk*

I. Introduction

Since the establishment of penal systems for systematic punishment of criminals, there have existed various forms of punishment in different time and culture. In the West, prior to the birth of the modern criminal law championed by the Classical School, the death penalty was the most important form of punishment. The classic school's emphasis on humanization of punishment to reduce cruel and unreasonable penalty, led to a drastic curtailment of the application of capital punishment. Currently, the death penalty is enforced only in limited cases. Under the modern criminal law, imprisonment has replaced the death penalty as the most important form of punishment. Imprisonment, which deprives freedom, tempers the harshness of the death penalty, a measure which deprives life. Further, imprisonment permits adjustment of severity of punishment commensurate with the seriousness of crimes.¹ For example, Beccaria, "the father of modern criminal law," stressed the need for proportion between crimes and their corresponding punishments.² The form of punishment most appropriate for achieving such proportion was imprisonment since short-term imprisonments may be imposed for minor offenses and long imprisonments may be imposed for major offenses. Initially, when imprisonment was first used as a form of punishment, the most strongly emphasized aspect was deprivation of freedom. However, not satisfied with only the "depriva-

tion" aspect of imprisonment, positivist theorists, who define the purpose of punishment as reformation, education and rehabilitation of offenders, emphasized the need for institutional or custodial treatment during imprisonment.³ From the beginning of the 20th century, most nations began placing greater emphasis on the institutional or custodial treatment aspect of imprisonment rather than on the deprivation aspect.⁴ Presently, the main purpose of imprisonment is now widely viewed as reformation, education and rehabilitation of criminals, and deprivation of freedom has become a mere function rather than the ultimate goal of imprisonment.

From the outset, however, the proposition that custodial treatment would achieve its goals aroused criticism, and recently these critiques have become increasingly severe. The principal criticisms are as follows: (i) custodial treatment is not conducive to reformation, education, or rehabilitation and, thus, does not reduce recidivism;⁵ (ii) through the so called crime-breeding and labelling effect of custodial treatment, criminals are greatly exposed to crimes and become socially branded, which only leads to recidivism;⁶ (iii) imprisonment is inhumane since it isolates criminals physically and psychologically from society as well as from constructive influences;⁷ (iv) custodial treatment is not economically efficient;⁸ and (v) custodial treatment is not appropriate for crimes of negligence and minor offenses which have increased sharply With industrialization and growing social complexity.

In response to the above criticisms and problems of custodial treatment, various non-custodial measures for offenders have been

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suggested as alternatives to custodial treatment. As a means of implementing these alternatives, procedural methods such as "diversion" are being introduced. Diversion can be defined as a "formally acknowledged and organized program to remove an offender from the traditional processing through the criminal or juvenile justice system."⁹

In the course of modernization, Korea followed German law system and partly has been influenced by Anglo-American law. Accordingly, the experiences of the West With custodial treatment may be directly applicable to Korea. In particular, custodial treatment is the central function of punishment and, while opinions differ on whether it worked well or not, the purposes of custodial treatment in Korea are also reformation, education, and rehabilitation. Korea's position regarding custodial treatment is evidenced clearly by the change in the name for prisons from "penal institutions" to "correctional institutions."

Over the years, like the nations of the West, Korea has been making efforts to find alternatives to or reduce imprisonment. Examples of such non-custodial measures for offenders in different stages are as follows: (i) during the stage of police investigation, in cases of minor offenses, especially juvenile delinquency cases, there is a procedure for rehabilitation through release after admonition or release to guardians rather than going through formal criminal justice proceedings; (ii) during the prosecution stage, through systems such as suspension of prosecution with or without supervision, even those believed to be guilty may be reintegrated into the society; (iii) during the trial stage, methods for rehabilitation or returning the individual to society include pecuniary penalty, suspension of sentence or suspension of execution; and (iv) finally, during the stage of execution of punishment, there are methods of releasing criminals through parole and early release from training school and, in addition, there are programs such as open cor-

rectional institution, home leave and work release which may be viewed as an intermediate treatment between custodial and non-custodial measures.

In the past, most of the above systems were understood and undertaken as measures mitigating imprisonment exceptionally for cases in which imprisonment was considered excessively severe. In Korea, it was in the 1980's that proponents of non-custodial measures pointed out the defects of imprisonment and stressed the need to incorporate into the criminal judicial process non-custodial measures for rehabilitation and reduction of recidivism and these views began to be adopted in legislation. Typical examples of such systems include suspensions of prosecution with supervision, probations for juveniles, community service orders, attendance center orders, open correctional institution, and work release.

The following is a general overview of current non-custodial measures for offenders and their overall effects in Korea, focusing on the systems established in 1980's.

II. Non-Custodial Measures for Offenders in the Criminal Justice Process of Korea

A. Adult Offenders

1. Custodial Measures for Adult Offenders

The criminal justice process of Korea consists of investigation, prosecution, trial-sentencing and execution of punishment. A public prosecutor has the authority to investigate and institute and continue prosecution. Police officials act as assistants in investigations. (Code of Criminal Procedure Arts. 195, 196, 246; Public Prosecutor's Office Act Art. 4). After a prosecutor institutes a public prosecution following an investigation, the court tries the case. If the court finds the defendant to be innocent, the court declares that the defendant is not guilty and acquits the defendant. In the event the court convicts the defendant, the court imposes a penalty.

The forms of punishment include death penalty, penal servitude, confinement, revocation of qualifications, suspension of qualifications, fine, detention, minor fine, and confiscation. (Criminal Code Art. 41). Among these forms of punishment, only penal servitude, confinement and detention are categorized as incarceration. Penal servitude may be differentiated from confinement and detention in that the former requires performance of prescribed work during imprisonment. (Criminal Code Art. 67, 68). Detention differs from penal servitude and confinement in the length of incarceration. In the case of detention, the length of incarceration ranges from a minimum of one day to a maximum of 29 days. (Criminal Code Art. 46). Penal servitude and confinement may span anywhere from one month to 15 years, and in aggravated cases, up to 25 years. In addition to the above, lockup at work-houses, imposed in the event of non-payment of fines or minor fines, also falls under incarceration. (Criminal Code Art. 70).

2. Non-Custodial Measures in Each Stage of Criminal Proceedings

Various non-custodial measures for reducing incarceration similar to those above exist in each stage of the criminal justice process. Typical examples include suspension of sentence, suspension of execution and parole. Non-custodial measures, however, are not limited to these examples. Another example that may qualify as non-custodial measure is the fine for the purpose of reducing imprisonment in ordinary or summary procedures. Various types of non-custodial measures such as those illustrated above and others exist in Korea.

a. Non-custodial measures in investigation

In Korea, the accused are presumed to be innocent until proven guilty. (The Constitution Art. 27, Par. 4). Consequently, in principle, investigations are carried out without physical detention. There is some difficulty in regarding this principle as a non-custodial

measure since its purpose is not to rehabilitate but to guarantee human rights. Nevertheless, as both pretrial incarceration and imprisonment are carried out in the same manner, (Penal Administration Law Art. 26), pretrial incarceration may have crime-breeding and labeling effects on the defendant. Such negative effects can be avoided through investigation without detention. Accordingly, investigation without detention may be viewed as having virtues of non-custodial measures.

Release after admonition by the police is one method of reducing imprisonment during the investigation. This method involves the surrender to a patron, or release, of a person accused of a minor offence after the police, without a formal investigation, admonishes the accused. Since this method returns to society an accused who may be incarcerated under formal criminal justice procedures, it also may be viewed as containing elements of non-custodial measures.

b. Non-custodial measures in prosecution

Suspension of prosecution and prosecution for a summary order are non-custodial measures for offenders in the stage of prosecution. The former diverts the accused from the formal criminal justice process, and the latter by imposing a fine reduce the applicable scope of imprisonment.

Upon determining after an investigation that an accused committed a crime, the public prosecutor may initiate prosecution. (Code of Criminal Procedure Art. 246). The public prosecutor, however, may choose not to initiate prosecution after considering the following factors regarding the accused: age, character and conduct, intellect and environment, relationship with the victim, motive, method and result of the crime, and circumstances following the commission of the crime. (Code of Criminal Procedure Art. 246; Criminal Code Art. 51). If, upon consideration of the foregoing, a public prosecutor chooses not to prosecute offenders, this would constitute a suspension of prosecution.

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On the other hand, in initiating the prosecution, a public prosecutor can ask for formal procedures or he can demand summary procedures which would result in summary order. Upon the public prosecutor's demand, the court may impose a fine, minor fine or confiscation upon the accused through a summary order without conducting formal trial proceedings. (Code of Criminal Procedure Art. 448).

c. Non-custodial measures in sentencing

Non-custodial measures in sentencing include pecuniary punishments such as fines and minor fines as well as suspensions of sentence or suspension of execution.

Fines differ from minor fines only in the monetary amounts imposed. (Temporary Act on Fines Art. 3). When judges sentence fines or minor fines instead of imprisonment, such cases may be viewed as non-custodial measures.

In the event a judge prescribes imprisonment rather than a form of pecuniary punishment, the judge may still choose non-custodial measures by suspending sentence or execution. In cases involving penal servitude or confinement of no more than one year, if there are extenuating circumstances and the criminal expresses sincere repentance, the judge may suspend the sentence. (Criminal Code Art. 59). Such cases then would constitute suspension of sentence. Two years after the suspension of imposition of sentence, the sentence is deemed to have expired, (Criminal Code Art. 60), and the possibility of imprisonment is thereby eliminated. However, a suspended sentence is imposed in the event the criminal is convicted for another crime that carries a sentence no less severe than suspension of qualification, or in the event of a discovery (during the term of suspension) of a prior conviction resulting in suspension of qualifications or a more severe punishment. (Criminal Code Art. 61).

A judge, while imposing imprisonment, may also suspend the execution of imprison-

ment. If a sentence of penal servitude or confinement of not more than three years is imposed and there are extenuating circumstances, the execution of a sentence may be suspended for a period of 1 to 5 years. (Criminal Code Art. 62). After the suspension of execution, if the term of suspension fully elapses without the suspension being nullified or revoked, the sentence loses its validity, (Criminal Code Art. 65), and the possibility of imprisonment is thereby eliminated. On the other hand, if a person whose execution was once suspended is again sentenced to imprisonment or a more severe punishment during the period of the suspension and the judgement becomes final, the previous suspension of execution of sentence would be nullified (Criminal Code Art. 63) or, in certain cases, revoked (Criminal Code Art. 64). In the event the suspension of sentence is nullified or revoked, the sentence would then be executed.

A particular characteristic of the procedures in Korea for suspension of sentence or suspension of execution is that the offender is released without supervision or a community service order. A proposal to impose supervision or community service order on the suspended offender, however, is being examined in connection with the current project for amending the Criminal Code.¹⁰

d. Non-custodial measures in execution of punishment

The most typical non-custodial measure is parole. A person serving penal servitude or confinement who has behaved well and has shown sincere repentance may be paroled through the decision of the administrative authorities when ten years in case of a life sentence or one-third of determinate sentence has been served. (Criminal Code Art. 72). In the case of a convict released on parole, after the lapse of ten years in case of a life sentence or the remaining term in case of the determinate sentence without nullification or revocation of parole, the parolee will be deemed to have served fully his punishment,

(Criminal Code Art. 76), and the possibility of reincarceration is thereby eliminated. In contrast, in the event the parolee, during the period of parole, commits an intentional crime and is thus sentenced to imprisonment, the parole is nullified and in the event the parolee violates the condition of parole, parole may be revoked. (Criminal Code Art. 75). In such cases, imprisonment is reinstated.

Two particular characteristics of parole in Korea are that it is under the control of administrative authorities and that the parolee is not subject to supervision. In connection with the current project for amending the Criminal Code, however, it is being argued vigorously that a system for supervising parolees must be introduced.

Besides, open correctional institution, although not completely a non-custodial measure, may be considered as an intermediate measure falling between non-custodial measures and imprisonment. Open correctional institution functions as a treatment center for rehabilitation of criminals as well as institution for execution of prison sentences. Open correctional institution is available to prisoners convicted of crimes of negligence who are eligible for parole within from six months to three years, first offenders, and prisoners who serve good time. Such prisoners are permitted to work and study outside of the institution for the purpose of acquiring technical experience, finding employment, and reestablishing family ties and social relationships, etc.

In addition to open correctional institution, home and job training leave approved by the prison warden permit prisoners who have behaved well and served a specified period of time to make visits outside of the prison. The purpose of allowing home leave is to promote the rehabilitation of prisoners by permitting them to plan for life after release or maintain family ties. In order to be eligible for home leave, a prisoner must have (i) served more than one year of imprisonment; (ii) served more than one half of his prison term;

and (iii) demonstrated sincere repentance and good behavior. Home leaves are granted for less than three weeks throughout the entire term of imprisonment. Job training release permits exemplary prisoners who have completed certain prescribed requirements to commute to work outside of prison for a limited time period for job training in order to obtain certificates of skilled workers.

Lastly, from 1988, work release system has been implemented in ordinary prisons. This system has been implemented recently on a much broader scale. Work release system permits prisoners who have met prescribed requirements to work outside of the prisons. The prisoners' wages are paid in the form of work remuneration so that such payments may be utilized for post-release rehabilitation.

B. Juvenile Offenders

1. Judicial Treatment of Juvenile Offenders

In Korea, judicial treatment of juvenile delinquents under the age of 20 consists of two types of proceedings. One is criminal and the other is protective proceedings. For the former, ordinary criminal courts exercise jurisdiction. Juvenile protection cases, however, are under the jurisdiction of the Juvenile Department of the Family Court or of a District Court. The trial and ruling on the disposition of juvenile protection cases are handled by a single judge of the Juvenile Department (Juvenile Act Art. 3). The question of how to treat a juvenile offender is determined, in principle, by the prosecutor who investigates the particular case, and as an exception, by the Juvenile Department or ordinary criminal court (Juvenile Act Art. 7, 49, et seq.).

Though some juvenile delinquency cases are treated as criminal cases, the Juvenile Act, the purpose of which is to "ensure the sound fostering of juveniles" (Juvenile Act Art. 1), contains special provisions to mitigate, *inter alia*, death penalties, life sen-

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tences, requirements for parole, and stipulates indeterminate sentence. (Juvenile Act Art. 59, 60, 65, et seq.). Furthermore, in accordance with the Supervision Act enacted in 1988 in order to promote rehabilitation of juveniles, juveniles are supervised in cases of suspension of sentence or suspension of execution or parole. For matters not stipulated in the Juvenile Act or other such laws, they are handled in ways similar to ordinary criminal cases. (Juvenile Act Art. 48).

The purpose of the Juvenile Act, which is to ensure the sound fostering of juveniles, manifests itself when protective disposition is imposed on a juvenile in protection cases. In order to be eligible for protective disposition, juvenile must be either (i) of the age 14 or over but less than 20 who have committed crimes (juveniles who have committed crimes); or (ii) of the age 12 or over but less than 14 who have committed acts which are contrary to criminal laws and decrees (juveniles who have committed acts contrary to criminal laws); or (iii) of the age 12 or over but less than 20 satisfying certain prescribed categories who, in view of their characters or circumstances, may be deemed to commit acts which are contrary to criminal laws and decrees (juveniles viewed as having high chance to commit crimes or delinquency). (Juvenile Act Art. 4). A judge of the Juvenile Department imposes protective disposition (Juvenile Act Art. 32, Par. 1) as a measure to adjust the environment of, and reform the character of, juveniles exhibiting anti-social behavior. (Juvenile Act Art. 1). The various types of protective dispositions are as follows (Juvenile Act Art. 32, Par. 1):

- (1) Placement of the juvenile under the care and custody of his guardian or a person who can provide protection for the juvenile in substitution for the guardian;
- (2) Short-term probation;
- (3) Probation;
- (4) Placement under the care and custody of a child welfare institution;
- (5) Commitment to a hospital or sanatorium;
- (6) Short-term transfer to a training school; and
- (7) Transfer to a training school.

In addition, at the time of placing on a short-term probation or probation, a Judge of the Juvenile Department may also issue to juveniles of the age 16 or over community service order or attendance center order. (Juvenile Act Art. 32, Par. 3).

2. Non-Custodial Measures for Juvenile Delinquents

There are two types of cases in which juvenile delinquents are incarcerated in Korea. First, juvenile delinquents may be subject to imprisonment such as penal servitude or confinement in ordinary criminal cases. Second, juvenile delinquents may be placed in juvenile training school in protection cases. Although it may be difficult to refer to the latter, which is a protective disposition measure, as incarceration, one can not deny that, in reality, a juvenile training school takes on the nature of incarceration.

As a result of the awareness that incarceration is not effective for rehabilitation and sound fostering of juveniles, various non-custodial measures are being developed. However, implicit in non-custodial measures for juveniles is the belief that such measures should go beyond mere release and serve to protect and support juveniles. In Korea, non-custodial measures for adults often mean release only. In contrast, those for juveniles include social protection and support in addition to release. Consequently, non-custodial measures for juveniles may be referred to as non-custodial treatment. Diverse non-custodial treatment systems have been actively introduced in Korea in 1980's. Main examples are as follows:

- (1) Suspension of prosecution with supervision;
- (2) Supervision of juveniles who are granted suspension of sentence or suspension

of execution, parole or early release from training school; and

- (3) Community service order and attendance center order imposed in conjunction with probation and short-term probation.

a. Suspension of prosecution with supervision

Suspension of prosecution with supervision, a system which may be unique to Korea, is granted by a prosecutor on the condition that the juvenile offender will be under the supervisory protection of a volunteer supervisor. This system is based on the premise that supervisory protection by a well respected volunteer supervisor is more beneficial for the juvenile offender who shows potential for improvement despite having committed a serious crime than correctional institutions such as prison or training school. This system was started on April 1, 1978 in the District Public Prosecutor's Office of Kwang-joo and, from January 1, 1981, has been implemented nationwide.

The prosecutor of the juvenile offender determines whether or not to grant suspension of prosecution with supervision. In particular, the prosecutor picks from among the cases to be otherwise assigned to the ordinary criminal court or the juvenile department those juveniles who have a low possibility of recidivism in consideration of the nature, motive and circumstances of his crime. Then, rather than focusing on the gravity of the crime, the prosecutor considers required materials such as risk classification [tables], and social inquiry report on the juvenile, as well as discretionary materials such as opinions of his guardian, teacher or supervisor at work, restitution for the victim, opinion of the victim, and any records on behavior during custody.

After selecting the juvenile for suspension, the relevant prosecutor designates a volunteer supervisor. There are two methods of designation: one by prosecutor's recommendation and the other by voluntary application. In the case of the former, the relevant prosecutor recommends a volunteer super-

visor to assume the supervisory responsibilities. In the latter case, a volunteer supervisor applies to assume the supervisory responsibilities. In voluntary application cases, the volunteer supervisor submits a written opinion to the prosecutor stating that, on the basis of a preliminary examination of the juvenile's circumstances, there is a possibility of reformation with little or remote chance of recidivism. In practice, voluntary application is rare, and recommended designation is the primary form of supervision.

Supervisors may be either permanent or temporary. A permanent supervisor is selected by the Minister of Justice to actively participate in the care of the juvenile. A temporary supervisor is selected on a temporary basis by the relevant prosecutor, and assumes supervisory responsibilities only for the relevant case. The former is an honorary post without pay and the term is two years (reappointment permitted). The number of supervisors in Korea has grown from 2,691 in 1981 to 5,392 in 1990.¹¹

When a supervisor takes on supervisory responsibilities, he receives from the juvenile a written pledge stating that the juvenile will observe all conditions and start a new life. The duration of supervision for a first class juvenile who has a relatively high possibility of recidivism is one year and for a second class juvenile who has a relatively low possibility of recidivism six months, where the term may be extended two times for three months each. Suspension with supervision may be revoked if the juvenile clearly violates the stipulations thereof. This revocation makes it different from ordinary suspension.

b. Supervision (probation and parole)

Supervision promotes rehabilitation of a criminal through supervision by a probation officer instead of imprisonment or continuance of imprisonment. Supervision takes two forms: the probation which suspends punishment on the condition of supervision and the parole which provides early release on the condition of supervision.¹²

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In Korea, from early on, the juvenile supervision existed under the Juvenile Act and Training School Act. In an effort to expand and invigorate the supervision, the Supervision Act was enacted in December of 1988 and put in to effect as of July 1, 1989, following several years of experimentation and preparation. The Supervision Act limits its application to juvenile offenders only but not to adult offenders.¹³ The reason is that the newly implemented supervision system may be unable to fulfill its goals due to difficulties in budgeting and securing probation officers if it is extended to adult offenders. However, as mentioned above, introduction of the probation program for adults is being considered in connection with the current efforts to amend the Criminal Code.

Candidates for supervision include juveniles who were granted suspension of sentence or suspension of execution, paroled from prison, released early from training school, or put on probation through protective disposition under the Juvenile Act. (Supervision Act Art. 3). Supervision of juveniles who were granted suspension of sentence or suspension of execution or of juveniles who were put on probation as a protective measure have the characteristics of probation. In comparison, supervision of juveniles provisionally released from Prison or released early from training school have the characteristics of parole.

The supervision system comprises two organizations: the Probation and Parole Committee and the Probation Office. The Probation and Parole Committee determines, *inter alia*, parole of juveniles and its revocation, revocation of early release from training school, suspension and revocation of probation. (Supervision Act Arts. 5, 6). The Probation Office is in charge of matters relating to the enforcement of supervision (Supervision Act Arts. 14, 15) through assigned probation officers (Supervision Act Arts. 16, 36). Though special qualifications are not required for a probation officer, he should attend to his work with expert knowledge of

a variety of subjects including criminal policy, penology, criminology, public welfare, pedagogy, psychology which are necessary for supervision matters. (Supervision Act Art. 16). Volunteers in the supervision system act as assistants to probation officers. Probation officers may utilize volunteers in supervising juveniles. (Supervision Act Art. 36, Par.2). Volunteers in the supervision system hold an honorary post and they are appointed by the Minister of Justice upon recommendations of the chief probation officer. Qualifications for such volunteers include respectability in character and behavior, enthusiasm for social services, good health and vitality. (Supervision Act Art. 18, et seq.).

Those under supervision should comply with the general conditions prescribed in the Supervision Act and the special conditions imposed by the competent court and the Probation and Parole Committee. General conditions include continued residence, employment, good conduct, separation from evil friends, compliance with supervision and visitation of probation officer, and notification to the probation officer in case of removal of residence or travel. (Supervision Act Art. 37). The probation officer and volunteer guide those under supervision in order to reduce recidivism, promote rehabilitation, and provide the necessary support to ensure the person's self-reliance and reformation, such as helping him to find employment and lodging, providing opportunities for job training, and generally improving the person's environment. (Supervision Act Arts. 38, 39).

The duration of supervision is determined according to individual circumstances. For example, one year in the case of a suspension of sentence, and the duration of suspension in the case of a suspension of execution.

If those under supervision violate the conditions, a warning, arrest, detention or revocation may be activated. Supervision terminates upon the occurrence of any of the following: expiry of the term of supervision, nullification of suspension of sentence, revocation of suspension of execution, revocation

of parole or of early release from training school, modification of protective disposition, and a decision to terminate indeterminate imprisonment. (Supervision Act Art. 35).

c. Community service order and attendance center order

A community service order prescribes that the criminal works without pay for a given period. An attendance center order mandates that the criminal attend classes for a certain amount of time.

The modern type of community service order is considered to have its origin in the Criminal Justice Act of England which has been enforced since January 1, 1973.¹⁴ Following the example of England, the community service order and attendance center order were introduced in Korea through the Juvenile Act which was amended and promulgated in December 1988, and implemented since July 1, 1989.¹⁵

Under the Juvenile Act, in conjunction with probation or short-term probation, a community service order or an attendance center order may be issued to juveniles of the age 16 or over by the judge of the Juvenile Department. (Juvenile Act Art. 32, Par. 3). A community service order or an attendance center order shall not exceed 50 hours for short-term probation and 200 hours for ordinary probation. (Juvenile Act Art. 33, Par. 4). In issuing a community service order or an attendance center order, the judge of the Juvenile Department determines the total duration of the order and, if necessary, specifies the kind, method or institution of community service or class. The chief judge of a court may also determine the above particulars. (Decree on Judgment of Juveniles Art. 31, Par. 2 and Art. 34, Pars. 2, 3). A community service order or an attendance center order is implemented by a probation officer. In implementing such an order, the probation officer should not disrupt the normal life of the juvenile. (Juvenile Act Art. 33, Par. 4).

The types of community service orders

and attendance center orders which are currently being or are proposed to be implemented are as follows:

Community service orders: (i) activities for ecological conservation such as sweeping up rubbish; (ii) services at botanical gardens such as watering flowerpots and tending to flowers; (iii) services at libraries such as arranging books; (iv) services at historical sites and ancient palaces such as preserving and repairing the sites and guiding visitors; (v) services at judicial or correctional institutions such as directing traffic and assisting in patrol for crime prevention; and (vi) services at institutions for the handicapped, the elderly and the weak such as assisting a disabled.

Attendance center orders: (i) meeting hours such as recreation and self-introduction; (ii) education in human relations; (iii) special lectures on humanity; (iv) audio-visual education; (v) free discussion; (vi) situation drama; (vii) psychological testing; (viii) mental development; (ix) group counseling; (x) individual counseling; (xi) counseling with parents; and (xii) hiking.¹⁶

The completion of community service order or attendance center order may result in a provisional release from probation. (Supervision Act Art. 55). In the event the order is not completed within the prescribed time, the duration of probation may be extended in order to permit completion. If the offender does not comply with the order, sanctions for violation of the conditions of probation are imposed.

III. Current Status and Effect of Non-Custodial Measures for Offenders in Korea

A. Introduction

A comprehensive and systematic research analyzing the effects of various non-custodial measures for offenders in Korea has yet to be fully documented; only partial studies have been often conducted. Generally, humanizing the execution of punishment, re-

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ducing the labeling effect on criminals, decreasing the number of prisoners and thereby reducing costs, and reducing the recidivism rate through effective rehabilitation are noted as the major effects of non-custodial measures. It may be mentioned that, among these, humanization of punishment, decrease in the number of prisoners and reduction of labeling effect naturally accompany non-custodial measures themselves. However, in Korea, decrease in the prison population is not deeply appreciated because, unlike the Western world, drastic increases in the number of prisoners have never caused any particular problems in Korea. Furthermore, there are doubts whether non-custodial measures call for

decrease in correction costs. Nevertheless, it is agreed without much controversy that non-custodial measures at least do more than imprisonment for the same cost. In other words, correctional expenses could be used more efficiently in non-custodial measures. Therefore, when we evaluate the effectiveness of non-custodial measures, only reduction of recidivism can be criteria.

Discussed below are reviews of the current status and effects of suspension of prosecution, demand for summary order, fine and minor fine, suspension of sentence, suspension of execution, open correctional institution, work release for adult offenders and those of suspension of prosecution with supervision, supervision, community service

Table 1: The Number of Prosecutions and the Component Ratio of Contents (1981-1990)¹⁷

Year	No. of Persons	No. of Prosecuted	Requests for Ordinary Trial		Requests for Summary Procedure (%)
			Detention	No Detention	
1981	769,401 (100)	436,038 (56.7)	82,661 (19.0)	12,562 (2.9)	340,815 (78.2)
1982	835,998 (100)	409,062 (48.9)	84,107 (20.6)	13,017 (3.2)	311,938 (76.3)
1983	933,445 (100)	426,507 (45.7)	83,534 (19.6)	19,476 (4.6)	323,497 (75.8)
1984	1,003,035 (100)	440,725 (43.9)	82,327 (18.7)	22,613 (5.1)	335,785 (76.2)
1985	1,009,411 (100)	432,329 (42.8)	77,152 (17.8)	23,617 (5.5)	331,560 (76.7)
1986	1,045,329 (100)	479,851 (45.9)	87,432 (18.2)	22,012 (4.6)	370,407 (77.2)
1987	1,115,034 (100)	504,241 (45.2)	83,454 (16.6)	48,805 (9.7)	371,982 (73.7)
1988	1,146,680 (100)	514,624 (44.9)	87,451 (17.0)	27,720 (5.4)	399,453 (77.6)
1989	1,341,923 (100)	620,597 (46.2)	95,974 (15.5)	40,432 (6.5)	484,191 (78.0)
1990	1,426,189 (100)	718,911 (50.4)	100,180 (13.9)	34,423 (4.8)	584,308 (81.3)

order, attendance center order for juvenile offenders. At the moment, however, analysis of the extent of actual effectiveness of these systems in reducing recidivism has hardly scratched the surface.

B. Current Status and Effect of Non-Custodial Measures for Adult Offenders

1. Prosecution Stage

The following is a summary of the current status of prosecutions in Korea: First, with respect to the prosecution rate from 1981 on, it has decreased from a peak of 56.7% in 1981, to 42.3% in 1985 (see Table 1). How-

ever, in 1986 the rate was 45.9%, a 3.1% increase over 1985. Although the rate decreased to 45.2% in 1987 and to 44.9% in 1988, by 0.3% and 1.0% respectively, it rose to 50.4% in 1990. Consequently, the number of non-custodial dispositions in the prosecution stage averages a little over 50%.

The ratio of unprosecuted cases to total number of cases has increased steadily: 42.2% in 1981, 49.7% in 1982, constantly above 50% from 1983 on and finally dropping to 48.6% in 1990 (see Table 2). Among the unprosecuted cases, the rate of suspension of prosecution is significantly important in relation to non-custodial measures because

Table 2: The Number of Non-Prosecutions and the Component Ratio of Causes (1981-1990)¹⁸

Year	No. of Persons	Non-Prosecutions (No. of Persons)					
		Total	Suspension of Prosecution	Absence of Evidence	Absence of Prosecution Right	No Crime	Cessation of Prosecution
1981	769,401 (100)	324,744 (42.2)	106,352 (13.8)	104,134 (13.5)	32,641 (4.2)	3,480 (0.5)	78,137 (10.2)
1982	835,998 (100)	415,894 (49.7)	137,224 (16.4)	100,070 (12.0)	93,528 (11.2)	3,621 (0.4)	81,451 (9.7)
1983	933,445 (100)	496,951 (53.2)	142,636 (15.3)	99,827 (10.7)	134,107 (14.4)	3,237 (0.3)	117,139 (12.5)
1984	1,003,035 (100)	553,202 (55.2)	160,572 (16.0)	112,037 (11.2)	146,316 (14.6)	2,620 (0.3)	131,657 (13.1)
1985	1,009,411 (100)	569,744 (56.4)	156,154 (15.6)	115,958 (11.5)	157,411 (15.6)	3,164 (0.3)	137,057 (13.6)
1986	1,045,329 (100)	555,231 (53.1)	142,922 (13.6)	109,991 (10.5)	173,808 (16.6)	2,177 (0.2)	126,333 (12.0)
1987	1,115,034 (100)	602,229 (54.0)	136,845 (12.3)	104,099 (9.3)	226,586 (20.3)	3,384 (0.3)	131,315 (11.8)
1988	1,146,680 (100)	622,622 (54.3)	128,439 (11.2)	97,124 (8.5)	278,956 (24.3)	2,983 (0.3)	115,120 (10.0)
1989	1,341,923 (100)	711,327 (53.0)	148,437 (11.1)	103,840 (7.7)	332,668 (24.8)	2,353 (0.2)	124,029 (9.2)
1990	1,426,189 (100)	692,923 (48.6)	144,972 (10.2)	102,943 (7.2)	321,391 (22.5)	2,648 (0.2)	120,969 (8.5)

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it diverts guilty offenders. The rate has been around 10%—15% during the last 10-year period. It reached its peak of 16.4% in 1982, and thereafter gradually decreased, dropping to 10.2% in 1990. The rates of suspension of prosecution for major types of crimes are high in cases of theft and burglary (34.6%), violations of the Act for Punishment of Violence, etc. (25.6%), violations of the Homeland Reserve Forces Act (22.6%), handling stolen goods (21.0%), and bodily injury (17.7%), but low in murder (1.5%) and rape (2.0%).

Among cases of prosecutions, the rate of demand for summary orders where pecuniary punishments such as a fine, minor fine or confiscation is imposed instead of imprisonment increased to approximately 75%—80% (see Table 1), and at its peak reached 81.3% in 1990.

Among cases of requests for trial, the number of requests for trial with detention was 6.6 times the number of requests for trial without detention in 1981. It decreased to 1.7 times in 1987. Thereafter it increased to about 2.5 times in 1989, and about 2.9 times

in 1990. The number of trials without detention is increasing as the recognition of human rights of defendants prevails (see Table 1). This indicates a downward trend in the rate of pretrial imprisonment.

2. Sentencing Stage

Fine and minor fine, suspension of execution and suspension of sentence are non-custodial measures available to a judge in sentencing stage. Analysis of the statistics for the last 10 years reveals that the rate of imprisonment without suspension was 40.4% in 1981. However, this rate dropped to 37.7% in 1985 and to 27.9% in 1990, indicating a decreasing proportion of imprisonment. In contrast, the rate of suspension of execution of imprisonment increased to 54.9% in 1990, while registering 46.8% in 1981 and 46.3% in 1985. The rate of fine or minor fine has also increased from 12.7% in 1981 to 15.5% in 1985 to 17.2% in 1990. The rate of suspension of sentence was approximately 1% in 1990. In sum, it may be inferred that the court for the last decade has tended to reduce imprisonment and expand the use of

Table 3: The Number of Persons Disposed at the 1st Instance Trial¹⁹

Year	Total	Penal Servitude or Confinement							Juvenile Department Transfer	Others
		Death	Life	Determinate	Suspension of Execution	Indeterminate	Fine	Acquittal		
1981	102,054	33	70	32,278	42,566	4,367	11,571	544	4,976	5,649
1982	110,902	35	90	33,600	45,650	4,355	14,261	582	5,567	6,762
1983	107,710	19	83	31,994	44,465	4,217	14,178	549	5,359	6,846
1984	105,946	18	108	30,505	42,617	4,380	14,179	520	4,842	8,777
1985	106,424	25	104	30,784	42,974	4,049	14,374	466	4,950	8,221
1986	114,815	8	88	30,670	47,840	4,475	16,649	458	5,911	8,716
1987	114,684	18	81	28,907	50,731	4,059	15,574	481	5,993	8,840
1988	115,499	15	65	28,025	53,586	3,699	15,672	424	6,705	7,308
1989	122,645	17	70	27,396	58,932	3,777	17,844	428	6,666	7,515
1990	137,621	36	150	29,894	66,601	3,881	20,828	478	7,132	8,621

various non-custodial measures in the sentencing stage. Figures of cases disposed at the 1st instance trial from 1981 to 1990 are shown in Table 3.

3. Execution Stage

The most important non-custodial measure in the execution stage is parole. The number of parolees was 7,539 in 1982, and increased to 8,431 in 1984. However, it decreased thereafter to 7,434 in 1989 and to 5,539 in 1990. The proportion of parolees among the total released was 26.2% in 1982, 24.4% in 1985 and then increased to 34.6% in 1989 but decreased to 27.7% in 1990. The total number of parolees and their proportion among the total released are shown in Table 4.

In addition, under the work release which is recently enforced as a measure similar to non-custodial measures, 3 prisoners in 1988, 106 in 1989 and 112 in 1990 participated, and the number increased sharply to 831 in 1991. They have been engaged in activities in construction such as bricklaying for apartments, plastering, tiling, and in manufacturing of products such as shoes, shelves, plywood, high-pressure valves, kitchenwares, etc. This work release has the following positive influences on prisoners: instillment of pride and the desire for better life because they feel they can work together with other members of society as an equal in the field of industry; determination to change prejudice against convicts by working harder than the average workers in society; and determination to become first-class skilled workers with the firm belief that acquired skills in prison are useful in the field of industry. Further, the families of the prisoners express support and positive responses to the prisoners' efforts to lead new lives and engage in hard work unlike in the past. Business circles also respond affirmatively because a continuous and stable supply of work force is created and the productivity of prisoners is better than that of the average worker. Public opinion evaluates the work release in

Table 4: The Number of Parolees and Total Releasees (1982-1990)²⁰

Year	Parolees	Total Releasees	Parole Rate* (%)
1982	7,539	28,725	26.2
1983	8,345	27,759	30.1
1984	8,431	26,475	31.8
1985	6,333	25,929	24.4
1986	7,690	25,991	29.6
1987	7,298	24,173	30.2
1988	6,428	23,373	27.5
1989	7,434	21,475	34.6
1990	5,539	19,978	27.7

*Parole rate = (number of parolees/total number of the released) x 100

the same manner as above.

C. Current Status and Effect of Non-Custodial Measures for Juvenile Offenders

1. Suspension of Prosecution with Supervision

Generally, juvenile offenses are dealt with differently from adult crime in that its prosecution rate is low whereas its rate of suspension of prosecution is high. With respect to the changes during the past decade, the prosecution rate increased during 7-year period from 1983 to 1989 due to a sharp increase in juvenile offenses and atrocity of crime; however, this rate decreased slightly in 1990 (see Table 5). Meanwhile, the rate of suspension of prosecution recorded over 40% from 1982 to 1984 but showed a gradual decrease since 1985 and increased to some degree in 1989. Nevertheless, the rate of suspension of prosecution of juveniles is 20% higher than that of adult offenders.

Furthermore, following the introduction of suspension of prosecution with supervision since 1981, 4,000 juveniles in 1981, 6,430 in 1982, 7,949 in 1983, 8,426 in 1984, 8,212 in 1985, 7,594 in 1986, 7,508 in 1987, 7,521 in

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Table 5: Proportion of Prosecution Disposition of Juvenile Crime²¹

%

Year	Total	Subtotal	Request for Public Trial	Request for Summary Procedure	Transfer to Juvenile Department	Non-Prosecution	
						Subtotal	Suspension of Prosecution
1981	100 (88,894)	35.3	18.5	16.8	9.7	55.0	37.7
1982	100 (106,249)	31.9	16.8	15.1	10.4	57.7	41.3
1983	100 (103,013)	32.1	17.3	14.8	9.7	58.2	41.6
1984	100 (104,476)	32.6	17.4	15.2	8.7	58.7	41.9
1985	100 (101,224)	34.2	17.8	16.4	7.2	58.6	38.8
1986	100 (106,115)	35.4	18.5	16.9	1.0	54.9	35.4
1987	100 (97,675)	37.2	19.8	17.4	8.8	54.0	34.4
1988	100 (103,770)	39.3	19.1	20.2	9.1	51.6	30.4
1989	100 (107,819)	39.3	19.1	20.2	9.3	51.4	32.7
1990	100 (105,364)	36.9	15.7	21.2	13.6	49.5	32.1

Table 6: The Number of Suspensions of Prosecution with Supervision (1981-1990)²²

Year	Total	Violence, etc.	Theft and Burglary	Robbery	Fraud	Others
1981	4,000	1,319	2,314	85	5	277
1982	6,430	2,193	2,814	107	6	310
1983	7,949	2,512	4,908	114	22	393
1984	8,426	2,831	4,918	155	14	508
1985	8,212	3,029	4,561	152	12	458
1986	7,594	2,662	4,319	112	0	501
1987	7,508	2,713	4,252	86	11	446
1988	7,521	2,732	4,118	145	4	522
1989	6,683	2,614	3,474	139	5	451
1990	7,348	2,693	3,886	205	8	556

1988, and 6,683 in 1989 were suspended and supervised by supervisors (See Table 6). These figures amount approximately to 7–8% of the total number of juvenile offenders.

In 1989, the list of juvenile offenses which were granted suspension of prosecution with supervision was as follows: theft and burglary 52.0%—the highest, violent crimes 39.1%, robbery 2.1%, handling stolen goods 0.8%, and rape 0.2%. To classify by age, 60% or more of the juveniles who are granted suspension of prosecution with supervision are between 15 and 17 years old, while the proportion of juvenile delinquents aged 18 and 19 is the highest. Such concentration of its efforts on age group of 15–17 indicates that the program places much emphasis on those group who are most likely to be reformed.

In 1989, 6,683 juveniles were granted suspension of prosecution with supervision, and among these, however, only 65 juveniles committed crime again. On the whole, the recidivism rate of juveniles who were granted suspension of prosecution with supervision is approximately 1%, which is remarkably lower than the general recidivism rate of 20% for other juvenile offenders.

The effects of suspension of prosecution with supervision that should be noted are as follows: reduction in budget for incarcerating juvenile offenders in correctional facili-

ties; protection from the crime-breeding effect; more participation of prestigious citizens in social work (ex. 4,943 in 1989). Analysis shows that it also has considerable effect in curbing recidivism.

2. Supervision

Since the implementation of supervision, from July 1, 1989 to December 31, 1990, 88 juveniles released on suspension of execution, 12,587 juveniles put on probation under Par. 1 of Art. 32 of the Juvenile Act, 899 juveniles paroled, and 2,534 juveniles released early from training school, were placed under supervision. It is quite noticeable that no juvenile who was granted suspension of sentence has been put under supervision. Details of supervision are tabulated in Table 7.

With regard to decisions from July 1, 1989 to December 31, 1990 of the Probation and Parole Committee on requests for parole and early release, it granted 1,063 cases out of 1,458 (72.4%) for parole, and 2,599 cases out of 3,118 (83.4%) for early release from training school. These parolees and the early released are placed under supervision.

Due to the limited time period the new supervision system has been in effect, a comprehensive analysis of its effect in reducing recidivism has not yet been performed. Only

Table 7: Present Status of Supervision (31.12.1990)²³

	Cases Com-menced	Cases Com-pleted	Cases in Progress
Suspension of Sentence	—	—	—
Suspension of Execution	88	11	77
Probationer	12,587	5,022	7,565
Parolee	899	689	210
Early Releasee	2,534	1,296	1,238
Total	16,108	7,018	9,090

Table 8: Recidivism Rate of Parolee²⁴

	1983	1984	1985
Parolee with Supervision	34.9%	35.7%	31.7%
Ordinary Parolee	37.5%	39.0%	38.9%

Table 9: Recidivism Rate of Early Releasee²⁵

	1984	1985
Early Releasee with Supervision	47.3%	52.8%
Ordinary Early Releasee	54.4%	56.3%

research on recidivism rate of juveniles who have been placed under supervision on an experimental basis as compared with that of juveniles who have not been was carried out to determine whether the supervision should be introduced. In case of provisional release from prison, the comparison was made during 3-year period from 1983 to 1985 (see Table 8), and in early release case from training school, the comparison was made between the year 1984 and 1985 (see Table 9). As one finding of the above research, the rate of juveniles who were again subject to criminal prosecution or suspension of prosecution within 2 years of their release is shown in Table 8 and Table 9. These tables show that the recidivism rate of the juveniles under supervision was lower by 3.3% to 7.2% than that of juveniles who were not.

According to the result of experimental implementation of supervision, on the whole, it is considered effective in reducing recidivism although the supervision was conducted by laymen instead of expert probation officers. In addition, it may be counted as a byproduct of supervision that leaders of all social walks of life have begun to be more interested in treatment of offenders through opportunities to have contact with offenders and thus guide and support them.

3. Community Service Order and Attendance Center Order

Each probation office is responsible for the implementation of community service orders. From July 1, 1989 to September 30, 1990, 665 out of 1,618 orders were implemented across the country. Detailed contents of community service orders are as follows: cultural services—sweeping snow and rubbish in historical sites and palaces; library services—binding worn books, repairing chairs and cleaning; botanical or zoological garden services—watering, cleaning, and caring for trees; conservation activities—sweeping up of parks; public office services—compiling transcripts in prosecutor's office; welfare organizations services—caring

for handicapped and elderly; public facility services—working in the National Cemetery.

Because it is still in early stage of implementation of community service orders in Korea, research analyzing the effects of the order on recidivism has not yet been fully documented. Only research on the juveniles' attitudes toward the community service orders have been studied as of now. The research shows that recipients of the orders developed affirmative attitudes through community services as illustrated below: "I realized that services for others are worthy" (89.3% of all respondents); "I realized that hard work is worthy" (95.7%); "I realized that hard work has its own rewards" (89.3%); "I realized that lawbreakers must be punished" (82.8%); "I learned that law and order are important" (89.2%); "I realized that I am also needed by our community" (90.3%); "I gained confidence in my own ability in all areas" (87.1%); "I realized that tasks I undertake must be completed" (96.7%); "I learned that continued effort and patience with hard work are important" (96.7%); and "I realized that living in harmony with others is important" (89.3%). Moreover, juveniles who had performed community service orders had a strong tendency to believe that the direct effect of order is more in correcting delinquent tendency than in restitution or cultivation of working spirit.²⁶ While thus far there has been no analysis of the effect of community service orders on the recidivism rate, the positive attitudes illustrated above can be viewed as a factor which may contribute to reducing recidivism.

Similarly, attendance center orders are executed by probation offices. In the Seoul Probation Office, from July 1, 1989 to December 27, 1991, 91 terms of Green Class and 36 terms of Good Hope Class are conducted.²⁷ In the Green Class, mental development and education in human relations through small group counseling are conducted to remedy juvenile offenders. In the Good Hope Class, the primary emphasis is placed on providing lectures to remedy delinquency of

juveniles who are in the habit of using or experiencing drugs or hallucinogen.

IV. Prospects for Non-Custodial Measures for Offenders in Korea

"Standards of prisons reflect standards of society," said Barnes. This phrase implies that the higher the standards of society, the more its prisons are likely to be future-oriented with high standards for reform, education, and rehabilitation. Many advanced nations have already trained correctional experts for reform, education, rehabilitation and developed various programs of treatment in prisons, typical examples being classification, progressive treatment, job training, and counseling.

With the recognition that mere imprisonment is not an adequate solution for reform, education, and rehabilitation, many advanced nations have made efforts to introduce and diversify non-custodial measures. In addition, international efforts for cooperation have continued to expand the use of non-custodial measures. For example, the recent United Nations Congress on the Prevention of Crime and the Treatment of Offenders established definitions and types and minimum standards of non-custodial measures. Consequently, in addition to traditional non-custodial measures such as probation and parole, innovative non-custodial measures and intermediate systems such as community service orders, day training centers, group homes, detoxication centers, half-way houses, open correctional institutions, weekend imprisonments, work releases, and study releases have been suggested. Therefore, a modern translation of Barnes' quote may read: "Standards for non-custodial measures reflect standards of society."

As for treatment of criminals in Korea, from its independence in 1945 to the 1970's, we could not afford to have much interest in the treatment of criminals, due to the national drive for modernization, industrialization and economic growth to be liberated from

absolute poverty. During this period, criminals were often regarded as cancerous objects in society that should be eradicated rather than as members of society. Korea, thus, was unable to focus much attention on non-custodial measures. Even custodial treatments primarily depended upon pre-modern measures, although various reform efforts were also made. With some degree of success in modernization and economic growth, however, concern and care for social minority groups increased during the 1980's when distribution of wealth and quality of life became one of the issues of much concern and interest. Consequently, treatment of criminals, as a minority group of society, became a matter of interest. Moreover, the nation's demand for effective crime control policy increased as crime went up sharply as a by-product of rapid industrialization and urbanization. In this context, efforts to deter crime through effective treatment of criminals have been made. Under this circumstance, various plans for improvement and activation of both custodial and non-custodial treatments were explored during the 1980's. For example, new treatment programs such as suspension of prosecution with supervision, experimental implementation of supervision, community service and attendance center orders for juveniles, open correctional institution, and work release programs were introduced. Furthermore, more importantly, the Korean Institute of Criminology was established.

These trends are expected to continue and will be accelerated. Although Korea generally will seek to explore plans for improvement and introduction of new programs for custodial as well as non-custodial measures, more attention is likely to be focused on non-custodial measures. The relationship between custodial and non-custodial treatments is not really contradictory but rather complementary, and they are indeed basic frames for treatment of criminals. Therefore, emphasis on non-custodial measures should not necessarily mean disregard of custodial

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treatment. Nevertheless, since the latter half of the 1980's, academicians and practitioners in Korea have emphasized the importance of non-custodial measures or community-based treatments.

Korea, while seeking to improve custodial treatment, is likely to keep pace with the rest of the world in focusing more on non-custodial measures.

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The Use and Effectiveness of Community Service Orders

by Satyanshu K. Mukherjee, Ph.D.*

Introduction

The 1980s have seen an unparalleled crowding of the criminal justice system in many countries; the impact of this is the greatest at the corrections level. Prisons are overcrowded as never before and not millions but billions of dollars are being invested in building new prisons in several countries. In the Western system there is hardly a country which has shown any different result. Along with this, the population under non-custodial corrections has shown the most debilitating effects. In certain cities probation officers have caseloads in excess of 1,000.

The issue is not just crowding or cost. It has attained a profoundly human dimension. One out of every 50 adults or two per cent of the adult population in the United States are under correctional supervision at any given time. This means that on an average, within one's family and close friend circle there can be an adult who is under correctional supervision. A recent study observed that:

On an average day in 1991, 21,800 (42%) of Washington, D.C.'s 53,375 African American males aged 18 through to 35 were either in jail or prison, on probation or parole, out on bond awaiting disposition of criminal charges or being sought on an arrest warrant.¹

The author of the report suggests that:

If present policies continue, approxi-

mately 75 per cent of African American males residing in the District of Columbia will be arrested and jailed or imprisoned at least once as they negotiate the years between 18 and 35. Given current practices, the lifetime risk of arrest for an African American male residing in D.C. approaches the 90th percentile.²

As can be seen from Table 1, the situation in some selected countries is not quite so discouraging.

The disturbing part of the trend in imprisonment is that simultaneous to an increase in prison population, has been an increase in the use of non-custodial measures. This is in spite of the fact that some non-custodial measures, (e.g. community service orders) emerged strictly as an alternative to prison. Yet when one speaks of overcrowding in corrections, he/she usually refers to prisons. Rosenfeld and Kempf, in a recent article allude to this misguided situation:

Table 1: Persons in Correctional Supervision: Ratio to Adult Population

Country	Prisoner: Population	All Correctional Supervision: Population
Australia	1:890	1:190
Canada	1:550	1:140
New Zealand	1:800	1:180
Sweden	1:1,900	1:450
England and Wales	1:700	1:180
United States	1:200	1:50

* Director, Research and Coordination, Criminal Justice Commission, Australia

Source: Estimated from published and unpublished documents.

Initiatives to reduce prison crowding by "keeping offenders in the community" must take account of the large population of offenders already under community supervision. In many jurisdictions, community-based corrections programs are more crowded than prisons. In Los Angeles, half of the probation population is supervised by probation officers with caseloads of 1,000 or more offenders. Probation caseloads in San Diego County are running as high as 700 offenders per officer.³

Encountering this grave situation countries have begun to learn about each other, learn about each other's successes and failures. Criminal justice administrators and scholars are not only examining sentencing options, but are seriously debating the possibilities of minimizing the numbers of those who are officially processed into the system. As stated earlier, the reasons for examining these options are not only overcrowding and cost but also ideological, humanitarian, and above all a moral dilemma.

In the following sections only one such option, community service orders, which is gradually becoming an acceptable option, will be described. Although evolved as an alternative to imprisonment, community service orders appear to have become a sentencing option. Again, the measure was originally developed for adults, but gradually it is being extended to juveniles as well.

Community Service Orders

Many of the non-custodial measures are of relatively recent origin. These did not, however, come about in a vacuum. Particularly during the last two decades, there has been a realization all over the world that the existing methods used to contain crime and to deal with offenders have not produced the desired results. Repression, retribution, reformation and rehabilitation have not succeeded in changing many offenders. Strict enforcement of laws with the help of in-

creased resources and technology has not convinced the community that the problem is any less now than it was before. On the contrary, the criminal justice system in most countries is at a breaking point; the expenditure on criminal justice has escalated (it costs on average approximately US\$40,000 to keep a prisoner for a year in Australian prisons, in Denmark the cost is about US\$60,000 per prisoner per year); the problem is so serious in many countries that even during recession when expenditure on health, education and welfare has to be reduced, expenditure on police services continue to increase. In most western countries, including Australia, expenditure on police has, since the Second World War, increased at a rate that is at least twice that of growth in the gross domestic product.

The system overload has produced significant management problems and has resulted in serious mistakes. Unprovoked and illegal raids on the homes of innocent citizens, wrongful convictions of persons, wrongful confinement of persons in prisons and injury to and deaths of innocent citizens as a result of high-speed pursuits, are making news in many parts of the world.

Out of the chaos of the last two decades has emerged a glimmer of hope. For the first time in many countries, governments have at last paid some attention to the prevention of crime.

The emergence of community service orders as an alternative to imprisonment since the early 1970s also reflect a shift in emphasis on prevention and a move away from detention. It reflects, on the one hand, the recognition that prisons cost a lot and on the other, that prisons do not change offenders for the better. Most prisoners will be returning to the open community, and if they do not come out reformed, what could the community expect? The main requirements of community service orders relate to the performance of supervised work for the community for a specified number of hours. The operation of the scheme in a number of coun-

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tries indicate that 40 to 200 hours work during the period of 12 months is the norm.

A community service order is an option which can serve a number of functions. It is a penalty in the sense that the offender has to perform work not of his/her choosing. It has an element of restitution—by working for the community the offender makes amends to the society. Particularly for offenders with no work experience the supervised work may inculcate a sense of discipline and may bring about positive attitudinal changes. Descriptive reports from a number of sources reveal the program's high success rate (the issue of success rate will be discussed later in this section).

The Use of Community Service Orders

This penalty was introduced in the United Kingdom by the Criminal Justice Act, 1972, on an experimental basis and soon became an accepted alternative to imprisonment. Table 2 presents data on offenders

sentenced for indictable offences in England and Wales from 1979 to 1989. The data reveal some interesting trends. The number of offenders sentenced to community service orders in 1979 was about 13,500; by 1982 this number more than doubled to 28,000. During this period the number of offenders sent to prison also increased substantially. Another notable feature of the data is a significant drop in the number of offenders sentenced to any penalty in 1989. This reduction in number is explainable in that there was substantial reclassification of indictable offences as summary offences.

In Australia, community service orders have become an established penalty since the early 1970s. Figure 1 presents monthly trends in correctional orders since September 1988. Like the trends in England and Wales, the use of probation with supervision, imprisonment and community service orders (reparation) in Australia is increasing.

The state of Queensland introduced com-

Table 2: Offenders Sentenced for Indictable Offences by Offence Group and Type of Sentence or Order, England and Wales, 1979-1989 Number of Offenders (Thousands)

Year	Probation Order	Supervision Order	Fine	Community Service Order	Attendance Centre Order	Imprisonment		
						Fully Sus-pended	Partly Sus-pended	Unsus-pended
1979	23.6	15.0	206.7	13.5	10.3	29.9	*	39.3
1980	28.8	16.7	220.5	19.5	12.9	31.9	*	43.0
1981	31.4	15.8	209.9	24.8	14.0	34.1	*	47.5
1982	32.7	14.6	209.7	28.0	14.8	35.3	1.2	50.3
1983	34.0	12.8	199.3	31.4	14.6	29.8	3.9	43.4
1984	35.9	12.4	186.8	33.6	13.8	26.3	3.9	39.4
1985	37.2	11.4	177.8	33.8	12.9	27.6	3.8	43.1
1986	34.8	8.8	150.3	30.5	9.4	24.7	3.1	39.7
1987	35.9	7.9	148.9	31.1	8.6	25.8	2.8	41.7
1988	36.4	6.8	151.7	30.4	7.3	27.3	2.7	41.4
1989	32.3	5.1	135.4	23.7	5.5	22.7	2.1	35.8

*Not applicable.

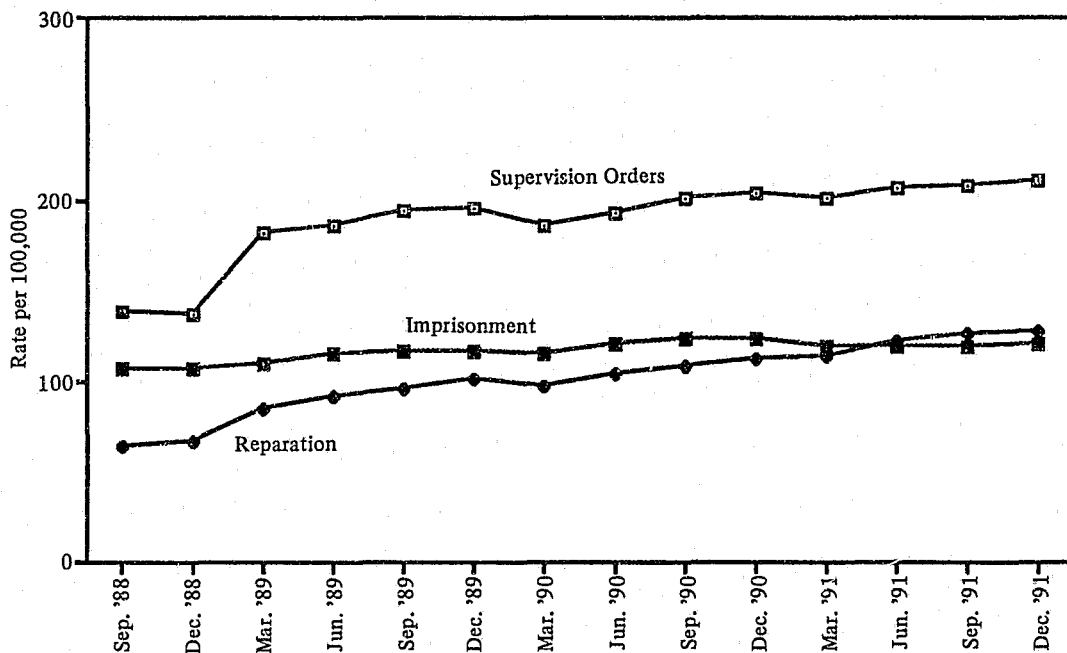
Source: Adapted from *Criminal Statistics England and Wales 1989*, Home Office, Government Statistical Service.

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munity service orders as an alternative to imprisonment in 1982. The number of impositions of community service orders by the

Magistrate's Court in Queensland has increased six times since 1982, from 848 to 5,088 in 1989-90 (see Table 3). The data do

Fig. 1: Rates of Correctional Orders per 100,000 Adult Population, Australia, September 1988-December 1991



Source: Australian Institute of Criminology, *Community Based Corrections Data and Australian Prison Trends*, Canberra, September 1988-December 1991.

Table 3: Magistrates Courts, Queensland Outcome and Punishment (1982-1990)

Year	Imprisoned	Community Service	Placed on Probation	Fined and/or Ordered to Pay Money	Other	Summarily Convicted
1982-1983	2,427	848	1,999	85,959	26,618	117,003
1983-1984	2,328	1,363	1,595	88,210	27,645	121,141
1984-1985	2,537	2,442	1,821	89,938	24,203	120,941
1985-1986	2,894	2,440	1,707	93,046	25,541	125,628
1986-1987	3,197	2,952	1,633	97,196	28,162	133,140
1987-1988	2,827	3,153	1,556	95,108	29,077	131,721
1988-1989	3,050	3,895	1,747	112,551	29,318	150,561
1989-1990	2,841	5,088	1,924	127,388	28,060	165,301

Source: Law and Order Queensland, 1982-83 to 1989-90.

Note: Other includes Fined and Licence Disqualified or Licence Disqualified; Bond of Good Behaviour and Convicted not Punished.

USE AND EFFECTIVENESS OF COMMUNITY SERVICE ORDERS

not show any systematic movements in imprisonment rates.

In New Zealand, the community service order as a substitute for imprisonment was introduced in 1981. As data in Table 4 show, such orders are being increasingly utilised, yet there was no noticeable decline in the prison population.

In Scandinavia, Denmark was the first country to introduce community service in 1982 as an alternative to unconditional imprisonment, followed by Norway in 1984 and Finland in 1989. Up until 1988 about 1,200 community service sentences had been given in Denmark. While a majority of recipients of such penalty were those convicted of property offences, about 12 per cent of the decisions concerned narcotic drugs or violent offenders. About half the offenders placed on community service were in the age group 15 to 24 years.⁴

In spite of opposition from influential quarters, Sweden introduced community service on an experimental basis in 1990. The opposition to community service in Sweden was expressed by Judge Bo Svensson. In a speech, denouncing the need for and the feasibility of community service, Judge Svensson stated:

What very few seem to devote a thought to are the practical difficulties to be confronted when trying to realise a program

Table 4: Distinct Prisoners Received and Those Placed on Community Service Orders, New Zealand 1985-1988

Year	Distinct Prisoners Received	Community Service Orders Made
1985	5,144	2,378
1986	5,545	2,297
1987	5,865	2,503
1988	5,392	3,313

Source: New Zealand Department of Statistics, 1990.

of apology and reparation. The person who has been physically violated is not prepared to let a perpetrator of the outrage with no special training wash and repair the plaintiff's bloodstained and torn suit much less to put back the teeth he had knocked out.⁵

In 1988, Sweden also introduced a measure called "contract treatment" for offenders convicted of substance abuse. Such a measure can be used if the offender agrees to follow a "planned treatment for substance abuse."⁶

Community service instead of prison is a recent development in the Netherlands. Effective 1st January 1990 this new sanction has begun in five geographical areas.

Effectiveness of Community Service Orders

The above survey of the use of community service orders in a number of countries shows that this non-custodial measure is gradually becoming an important option available to the courts. Theoretically, if this option was not available, all offenders sentenced to perform community service would have gone to prison. That no doubt would have represented a substantial cost to governments.

It is almost two decades since community service was introduced as a sentencing option. How effective has this form of penalty been? Before this question is answered, some facts are in order.

- The use of community service as a sentencing option is on the increase.
- Although used for juveniles as well, the penalty is more often used for adults.
- Young adults are more likely to be sentenced to community service than adults of other age groups.
- As with other types of penalties, an overwhelming majority of those placed on community service orders are men.
- The penalty of community service is used primarily for those convicted of property

offences, although evidence from Denmark and England and Wales indicates that occasionally offenders convicted of violent crimes are also sentenced to community service.

—Generally community service orders are made in cases where the offenders could have been sent to prison for up to one year.

Now the answer to the question posed earlier. There has been no systematic evaluation of the effectiveness of the penalty anywhere. Notwithstanding this fact, there now exists a variety of literature which informs us that this measure has been "successful."

Before the scheme was initiated in Denmark, Professor Bondeson submitted a program of rigorous evaluation which was not accepted. In Sweden the National Council for Crime Prevention has been asked to evaluate the measure. The only types of assessment conducted in Denmark and England and Wales relate to completion of the required number of hours of community service. Professor Bondeson cites a study in Denmark which shows that only 25 per cent of those sentenced to community service recidivated during a two-year follow-up period. It is perhaps worthwhile to note that the comparative recidivism rate for ex-prisoners in Denmark was at least twice as high. Bondeson further reports that 80 per cent of those sentenced to community service concluded without a breach, 20 per cent rescinded either through breach of condition or engaging in criminal activity.⁷ Bondeson also cites a survey of the opinion of labour market officials, the police, attorneys, workers, and offenders on the experiment. The results of that survey were highly encouraging:

To put it briefly, the proportion of satisfied persons almost resembles the voting figures in certain authoritarian states. There was almost unanimous satisfaction with the arrangement and an almost complete consensus of opinion that it should be made permanent.⁸

In England and Wales evidence reveals that 18 per cent of the community service orders in 1987 were terminated for breach, and in 74 per cent of the cases the specified number of hours were successfully completed.⁹

The decline in the number of community service orders since 1985 in England and Wales, in part led to the introduction of National Standards for Community Service Orders in April 1989. An evaluation, with the help of questionnaire sent to 55 probation services, of the first two years of operation of the National Standards does not offer much hope. Lloyd arrives at the following conclusions:

The Probation Statistics and the National Standards monitoring show that there has been an increase in the rate of conviction of breach of CSOs in 1988 and 1989, and that this increase has continued through 1990 to the first quarter of 1991. The implementation of the Standards is likely to be, at least in part, responsible for this increase.¹⁰

The increased breach rate may have a number of consequences, perhaps the most significant is the likelihood that it will have led to more offenders receiving custodial sentences on revocation of their CSO.¹¹

Lloyd observes that:

A further consequence of the increased breach rate may be that sentencers become irritated by the larger numbers of breach cases brought before them and this could detrimentally affect their attitudes towards the order.¹²

It is disconcerting to note that not one research or assessment examines the issue of the impact of the use of community service orders on the level of imprisonment. In all the countries surveyed, community service was introduced as an alternative to imprisonment. Statistical information from some of these countries (see Tables 2, 3 and 4 and

USE AND EFFECTIVENESS OF COMMUNITY SERVICE ORDERS

Figure 1) shows that whilst the use of community service orders has steadily increased over the years, the use of prisons has not diminished. Indeed, in some countries the use of prisons has increased. This state of affairs appears to suggest that those in charge of initiating, implementing and administering corrections are not serious about correctional reform. Hawkins makes a very pertinent point:

It is not so much that correctional system reforms have failed; it is rather that they have been token changes, nibbling away only at the periphery of the problem, with the larger system remaining untouched. We have a few front-of-the-house reforms, a few new facades, but the result remains a Potemkin Village.¹³

A proper evaluation of community service orders requires careful planning. Such planning must involve analysis of:

1. the evolution of community service orders:
 - because prisons were becoming overcrowded;
 - because prisons cost too much;
 - because the recidivism rate of ex-prisoners is very high;
 - because prisons dehumanize offenders;
 - because prisons stigmatize offenders;
 - because prisons are not effective in deterring offenders.
2. the use of community service orders:
 - examine cost;
 - examine prison occupancy and CSO placement data;
 - examine the level of crimes for which offenders could be sent to prison.
3. criteria for placing offenders on CSO:
 - examine CSO manual and other documents;
 - study a sample of offenders placed on CSO;
 - examine offenders placed on CSO vis-a-vis CSO criteria;
 - examine offenders sent to prison vis-a-vis CSO criteria;

—interview official.

4. whether CSO is a suitable alternative to imprisonment:

—interview CSO operators, services they provide—job placement, family counselling, educational services, etc.;

—interview offenders;

—interview victims;

—interview community representatives—social agencies, business groups, schools;

—interview local police, magistrates;

—follow offenders for a period.

Lest it be misunderstood, the effectiveness of community service orders cannot be evaluated only with the help of data on custodial measures, e.g. increases or decreases in the levels of imprisonment. While the law usually provides that community service is an alternative to imprisonment, those who dispense justice have their own views about how to judge a case and what punishment is appropriate. Furthermore, in any evaluation the objectives of a sentencing option cannot be overlooked. A judge's decision in relation to sentence often becomes complicated because several of the available, alternative sentencing options have similar objectives. For example the sentences of imprisonment and community service orders are aimed at:

—punishing the offender;

—protecting the community;

—preventing further crime by the offender;

—detering other potential offenders;

—assuring the victims and helping overcome their trauma and assist them to recover from the harm.

If both community service orders and sentences of imprisonment continue to increase simultaneously, one could argue that this trend reflects increases in the level of serious crimes.

Unfortunately, the information systems available in many countries are so archaic

that one cannot effectively assess whether the level of serious crimes in a nation is increasing, remaining stable, or declining. Thus, one can persuasively argue that increases in the use of custodial measures, in spite of new alternatives, simply reflect increases in the level of serious crime.

As stated previously, judges and magistrates, like other professionals, have views about their work. The Scandinavians appear to take a rather pragmatic approach. Whenever there are major modifications of the penal code or other significant legislation, the court administration organizes nationwide orientation and information conferences, all judges can take part in these conferences. Also annual "sanction seminars" are organized for Swedish judges. The important point which emerges from the Scandinavian approach is that judges, magistrates and other criminal justice professionals are the ones who will administer justice, it is important that they are adequately consulted before any new initiatives are developed. Norman Bishop puts this view succinctly:

It is probably important to attempt to deal with resistance from the very start of any legislative reform. For this reason, it would seem to be desirable that representatives of the judicial community are associated with any attempts to introduce new legislation on substitutes for imprisonment or to improve the credibility of existing non-custodial alternatives. The purpose of the involvement is to enable full information to be presented and discussed about particular non-custodial alternatives. However, a further purpose is no less important, namely to strengthen understanding between the various judicial community groups. This involvement should not be limited merely to innovations and new initiatives. Ideally, some form of continuous involvement should be developed to permit the presentation of new information in the light of experience.¹⁴

Conclusion

Scandinavia and the Netherlands are reputed to be liberal societies. Initiatives in these settings may not be looked at favourably in other countries. In some societies judges attract a revered status, training seminars for them are not generally welcomed, and indeed may be considered demeaning. In non-liberal societies certain groups dominate others. In the criminal justice community police are the most powerful and vocal group. They can and do criticize the actions of courts and prisons, but no one dares criticize the police. Prevention and community-based measures are "soft" approaches according to police in some countries. They believe that electronic gadgets, firepower, unrestrained authority to interfere with citizens' lives, and stiff penalties are the only solution to the increasing crime problem. There are investigators in some settings who not only share these views but also deride civil libertarians and people with social conscience. They also want unlimited resources for the police. They ignore the fact that the users of these technological gadgets and authority also require training and education. The quality of such training and education can improve substantially through research. It is not only the police and other criminal justice personnel who need to be educated. A justice system can only operate effectively if the general population is also educated and informed.

Crime is affected not only by the criminal policy of the government, but more importantly by overall social and economic policy. Threats of sanction and surveillance alone will not influence the level of crime. For too long we have accepted the intuitive logic of this approach. Criminal policy cannot be developed in isolation from social policy. Development of measures to deal with specific problems like violent crime, drug related crimes, sex crimes, etc., need to be looked at in a global context. In this process, it may be desirable to experiment with initiatives

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for a fixed period (say 2 to 3 years), evaluate these, and then decide on alteration or rejection. Governments need to measure their success not by how many elections they have won, but by what contribution they have made to improving the quality of life of the people they govern. Autocratic and authoritarian measures have brought us to the present situation. It is now time to pause and consider the alternatives.

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Development, Social and Psychological Mediators and Crime

by Ugljesa Zvekic*

Introduction

This project proposal is a follow-up to the research project entitled "Development and Crime: An Exploratory Study in Yugoslavia" (UNICRI/IKSI, forthcoming). One of the findings of the above-mentioned research was that almost all links between development and crime are of indirect nature, that is to say, mediated by a whole set of macro- and micro-social and psychological processes. This was confirmed in a consistent manner throughout the twenty-year period (1966—1986) covered by the exploratory study. Furthermore, this study identified territorial units with distinct developmental profiles and distinct criminal cultures. In order to develop an adequate crime prevention policy based on a combination of socio-economic development and opportunity-reduction initiatives it became imperative to further explore the nature of the relationship between development and crime; in other words, to improve the understanding of how "development turns into crime."

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The Problem and the Objectives

The basic idea of this project is that development produces both desirable and undesirable secondary phenomena. Improvement in the quality of life represents a typically desirable consequence while the increase of criminality and ecological problems represent some negative effects. The notion "social development" most frequently refers to the total processes of slower or faster rates of social change. This change affects the life of all individuals, but not in always in the same way. The satisfaction of individuals by the distribution of surplus value generated by development is never optimal. Subjective feelings of injustice regarding the distribution of opportunity and wealth, as well as the possibility for individuals to "move up" in illegal or semilegal ways represent a particular incitement to the development of property crimes. At the same time, intense development in a given region sets in motion processes of migration, produces conflicts between the members of different subcultures and creates a new conflictual basis for the appearance of criminal behaviour.

On the more general level, development has three dimensions: economic, social and cultural. Criminal behaviour is also expressed through several qualitatively different forms, the economic, social and personal determinations of which are significantly different. The exploratory study also revealed that certain socio-cultural characteristics and types of development of a region are significant sources of deviation. This knowledge is necessary in order to understand the correlation between social development and criminality as global phenomena.

Criminal behaviour also presents a large number of variations which have to be taken into account. Variables related to the kind of criminal act, its volume and seriousness, as well as the age of the offender, must be included in the definition of this relationship. Only if specified in this way can the variables of development and criminal behaviour allow for a research to be carried out on the effects of factors which are chosen as possible mediators between these two phenomena. In the further elaboration of the research project it must be kept in mind that the hypothesized factors and those obtained through data analysis do not often coincide. Therefore, it is necessary to initiate with the hypothesized empirical rather than theoretical structure of the mediating factors to be included in the research model. The hypothesized empirical structure of the mediating factors is based on the results of the exploratory study and related past research. Yet, the research model itself is a construct and needs to be verified.

The hypothesized areas to which the mediating factors belong are:

- (1) criminal macro-field;
- (2) social status;
- (3) micro-social status;
- (4) personality traits;
- (5) social attitudes and system of values.

The main aim of this project, from both a theoretical and methodological perspective, is to IDENTIFY MACRO-SOCIAL, MICRO-SOCIAL AND PERSONAL FACTORS WHICH INCREASE THE PROBABILITY THAT ONE OR SEVERAL CONCOMITANT FACTORS OF DEVELOPMENT FAVOUR THE APPEARANCE OF PARTICULAR CRIMES.

Epistemologically speaking, we are dealing with the complex problem of the transposition of the sum of social, economic and cultural processes included in the concept of social development into the form of individual development which is socially pun-

ished and stigmatized as CRIMINAL BEHAVIOUR.

The main focus of the previously mentioned exploratory study was the relationship between development and crime as global phenomena at the municipal level in Yugoslavia. The present project aims to examine the relationship between a multi-dimensional construct such as social development (expressed structurally, through the mutual relationships of the indicators of development within the social milieu in which an offender resides) and individual criminal behaviour. This, in fact, alters the research plan and the interpretative mode and style of the proposed project as compared to that of the exploratory study. The problem is further complicated by the likelihood that some criminal acts have no relationship whatsoever with the developmental characteristics of the environment. For example, excessive forms of violence exerted by very nervously irritable persons do not depend at all on any form or characteristic of social development. However, during the preparatory phase of the present research it was assumed that such cases represent the exception rather than the rule. Almost all studies of criminality suggest that this form of social deviance is usually socially determined. However, as an additional measure of control, we planned a statistical partialization of the effects of the influence of particular factors in order to identify effects of social development, when all other factors are controlled. An analysis of the probable effects of particular groups of mediating factors on the development-crime relationship must also take into account the degree of integration of individuals into social institutions (the opportunity structure). For instance, white-collar crime implies a given social position and availability of means to perform criminal acts. Property crime (e.g. theft of public or private property) could be perpetrated by both individuals within or external to the organization (for example, an enterprise) in which a criminal act occurs. Traffic offences represent quite dif-

ferent forms of violation of social norms and have quite a different social and individual determination. In theory, juvenile criminal behaviour is more likely to be affected by micro-social and personal factors (for example, frustrations the family level which increases and externalizes the level of individual aggressiveness), whereas for adult offenders family causes are more of a historical character.

The main operational goals of the research could be defined as follows:

- (1) the influence of development on the formation of mediators of criminal behaviour;
- (2) the influence of mediators on criminal behaviour;
- (3) the influence of mediators on criminal behaviour after partialization for the influence of development;
- (4) the influence of social control on the de-

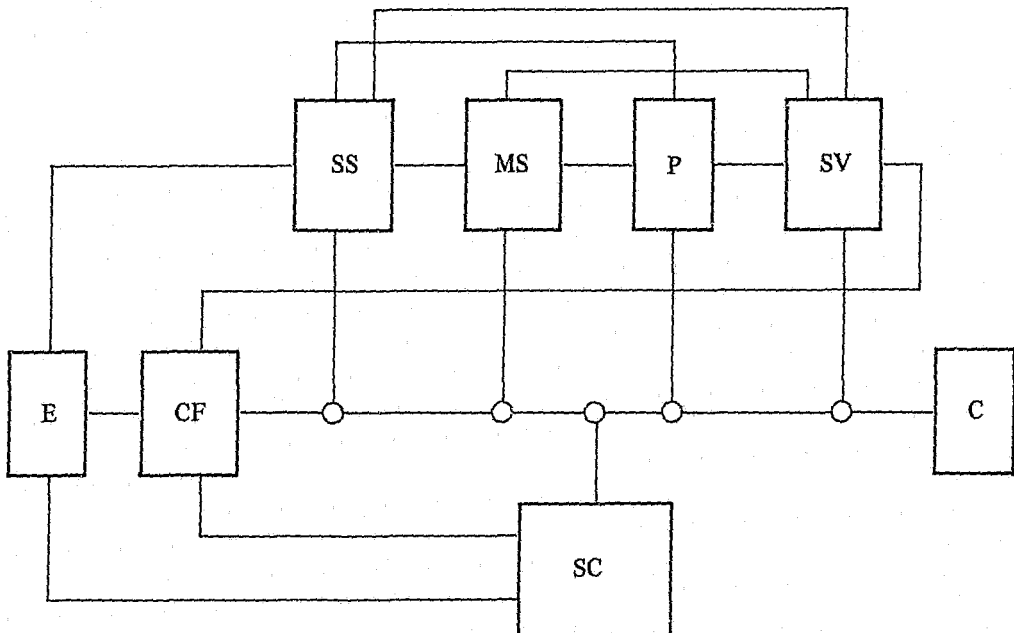
gree and type of criminal behaviour, directly and after partialization of development and psycho-social mediators.

On a policy level this research aims to improve the planning process of different types of crime preventive interventions. Interventions related to the first group of mediators (social and micro-social status and related variables) are oriented towards changes in the value system of individuals, behavioural control mechanisms and the position of individuals within macro- and micro-social milieu. Interventions related to the second group of mediators are oriented towards changes in the organization, functioning and activities of organized social control.

The Model and the Hypotheses

Influences of socio-economic development, criminal macro-field, psycho-social mediators

Model of Influences of Development, Social and Personal Mediators on Criminal Behaviour



E= socio-economic development
 CF= criminal macro-field
 SC= social control
 C= criminal behaviour

SS= social status
 MS= micro-social status
 P= personality characteristics
 SV= social attitudes and system of values

and social control can be represented as a simple cybernetic model.

These components have been selected according to two criteria:

1. The main reason for including a given component in the model was because past research has revealed a relationship between the component (represented by its logically and empirically corresponding variables) and criminal behaviour.
2. The main condition for retaining a given component in the model was that the component could be acted upon within the framework of feasible crime prevention interventions.

Hypothetical links between the components and their relationships with criminal behaviour are defined by relations between the blocks. Although it was possible to predict the direction of these relationships, we have refrained from doing so partly because many of these hypotheses are unstable and partly because both methods of hypothesis testing (canonical discriminatory and canonical correlation analysis) do not allow the hypotheses regarding asymmetric relationships to be tested.

On the model level, the content of the variables can be described as follows:

- a) socio-economic development is understood as the level and configuration of all measurable characteristics responsible for social and economic welfare;
- b) criminal macro-field is defined as the frequency of crime in the observed area;
- c) social status is the position in the hierarchical network of social roles, the factors upon which it is dependent and the economic consequences of the given position;
- d) micro-social status is conceptualized as the position within the family and informal groups, as well as the structure and relationships within the family and informal groups to which a person belongs;
- e) characteristics of personality refer to those

characteristics responsible for the regulation and control of behaviour;

- f) social attitudes and the value system refer to attitudes which determine social behaviour and socially accepted values respectively;
- g) social control is understood as the level and configuration of all measurable factors which play a role in crime prevention;
- h) criminal behaviour is understood as the commission of an offence defined by the criminal code.

Therefore, the model presupposes that:

- * Socio-economic development influences criminal behaviour indirectly (i.e. through the criminal macro-field and through social and personal mediators), because the influence is hindered by the effects of social control;
- * There are marked relationships between the socio-economic development of a given area and its crime rate;
- * The probability of individual criminal behaviour depends on the level and configuration of the criminal macro-field, i.e., on the psycho-social characteristics of offenders and the effects and effectiveness of the social control structure;
- * A significant relationship exists between the characteristics of the criminal macro-field and the social attitudes and the value system;
- * The socio-economic development of a given area is related to the social status of individuals, albeit indirectly.
- * Significant relations exist between social and micro-social status, social attitudes and the value system;
- * Independently of their mutual relations and relations with socio-economic development and criminal macro-field, social and micro-social status, social attitudes and systems of values affect criminal behaviour;
- * Independently of all other factors, criminal behaviour depends on social control structures.

The model provides the basis for the formulation of formal research hypotheses.

Hypothesis

The first group of hypotheses concerns the differences between delinquent and non-delinquent populations. These differences will be tested by discriminatory analysis, with and without partialization of particular groups of variables, as well as by an additional test of differences between groups of some particularly important variables. This group contains the following hypotheses:

- H1: Delinquent and non-delinquent groups differ significantly on all variables measuring the influence of developmental, social and personal mediators on criminal behaviour.
- H2: Delinquent and non-delinquent populations differ significantly on all variables that estimate social and micro-social status, personality traits, social attitudes and the value system, before and after partialization of variables that estimate socio-economic development, criminal macro-field and social control.
- H3: Delinquent and non-delinquent populations differ significantly on all variables that estimate personality traits, social attitudes and the value system, before and after partialization of variables that estimate social and micro-social status.
- H4: Delinquent and non-delinquent populations differ significantly on variables estimating socio-economic development and criminal macro-field, before and after partialization of variables of social control.
- H5: Delinquent and non-delinquent populations differ significantly on all variables estimating socio-economic development, before and after partialization of all other variables.
- H6: Delinquent and non-delinquent populations differ significantly on all variables of criminal macro-field, before and after partialization of all other variables.
- H7: Delinquent and non-delinquent populations differ significantly on all variables estimating social status, before and after partialization of all other variables.
- H8: Delinquent and non-delinquent populations differ significantly on all variables estimating micro-social status, before and after partialization of all other variables.
- H9: Delinquent and non-delinquent populations differ significantly on all variable estimating personality traits, before and after partialization of all other variables.
- H10: Delinquent and non-delinquent populations differ significantly on variables estimating social attitudes and systems of values, before and after partialization of all other variables.
- H11: Delinquent and non-delinquent populations differ significantly on variables estimating social control, before and after partialization of all other variables.

The second group of statistical hypotheses is deduced from the hypothetical links between the components of the model of the influence of development, and social and personal mediators of criminal behaviour. These relationships will be tested by canonical correlation analysis and canonical analysis of covariances.

- R1: At least one canonical correlation between variables estimating socio-economic development and those estimating criminal macro-field differs significantly from zero.
- R2: At least one canonical correlation between variables estimating socio-economic development and those estimating social control differs significantly from zero.
- R3: At least one canonical correlation between variables estimating socio-economic development and those estimating social status differs significantly from zero.

- R4: At least one canonical correlation between variables estimating criminal macro-field and those estimating social control differs significantly from zero.
- R5: At least one canonical correlation between variables estimating social status and those estimating macro-social status differs significantly from zero.
- R6: At least one canonical correlation between variables estimating social status and those estimating personality traits differs significantly from zero.
- R7: At least one canonical correlation between variables estimating social status and those estimating social attitudes and the value system differs significantly from zero.
- R8: At least one canonical correlation between variables estimating micro-social status and those estimating personality traits differs significantly from zero.
- R9: At least one canonical correlation between variables estimating micro-social status and those estimating social attitudes and the value system differs significantly from zero.
- R10: At least one canonical correlation between variables estimating personality traits and those estimating social attitudes and the value system differs significantly from zero.
- R11: At least one canonical correlation between variables estimating criminal macro-field and those estimating social attitudes and the value system differs significantly from zero.

These hypotheses will be tested on two separate delinquent and non-delinquent samples.

The third group of hypotheses will be tested on a sample of delinquent population only. This group concerns the relationship between variables of socio-economic development, social and personal mediators and the type and seriousness of offences. The correlation with offences will be tested by a ca-

nonical and quasicanonical discriminatory analysis, whereas the relationship with the seriousness of the offence will be tested by regression analysis.

K1: The persons committing criminal acts differ significantly on all selected variables.

K2: The multiple correlation between the whole group of selected variables concerning the seriousness of crime differs significantly from zero.

Type I error, related to the rejection of the null hypothesis, is fixed for all hypotheses at the 0.01 level.

Sample

(1) Sample from the Adult Population

Data regarding the variables contained in the model will be collected from two different samples of the population consisting of clinically sane and literate persons between 18 and 60 years of age. The delinquent population is defined as those persons who have been sentenced to imprisonment. The non-delinquent population consists of persons who were never sentenced for crimes or misdemeanors against public order and who come from families with a clean criminal record.

Two special samples of the adult population will be used:

1. A two-step sample will be used for the delinquent population. A sample of 6 prisons will be chosen, from which a second random sample of prisoners proportional to the total inmate population will be selected. Care will be taken to ensure that the number of chosen inmates reaches or slightly exceeds the envisaged size of the sample. This size is defined so that any non-extremized correlation, with an absolute value higher or equal to 0.10, can be taken as different from zero within the confidence limit of 0.95. Therefore, the

delinquent population sample will consist of 304 respondents.

2. A three-step sample will be used for the non-delinquent population. The first step will consist of selecting 12 cities, towns or villages with the optimal allocation. The second step will involve selecting two enterprises with the optimal allocation within each location. The third step will consist of the selection, from each of these enterprises, of a number of respondents that equals or slightly exceeds the necessary size of the sample. The same method described above will be used to define the sample size, and will result in 384 respondents.

(2) Sample of Juveniles

The delinquent juvenile population refers to the population of all those individuals aged between 14 and 18, who are literate and have been condemned to a juvenile correctional facility.

The non-delinquent juvenile population is defined as the population of all those individuals who satisfy the above criteria but who have neither committed any criminal acts leading to a sentence or to an acquittal, nor ever been sentenced for an offence against public order and peace. An additional condition for the definition of non-delinquent population is a clean family record.

If the same criteria used for adults are applied in this case, both the delinquent and non-delinquent juvenile samples will consist of 384 respondents each.

Variables

The proposed model suggests three groups of variables:

- * variables describing social and economic development;
- * mediating variables, defined by the characteristics of criminal macro-field, social and micro-social status, personality traits and social attitudes and the system of values;

- * variables describing the social control structure.

Mediating variables can be divided into two groups:

- variables describing the characteristics of the environment which directly affect the likelihood of criminal behaviour; according to the model this group contains variables related to criminal macro-field;
- variables describing personal mediators; this group contains variables describing the position within the social field, the characteristics and relations in the immediate social environment, personality traits and social attitudes, and the value system.

Development variables (56) are grouped as follows:

1. Economic variables (20);
2. Tourism (5);
3. Size of municipality (1);
4. Surface of agricultural area (4);
5. Traffic and communication (4);
6. Education (5);
7. Culture (4);
8. Health and care (3);
9. Housing construction and retail trade (6);
10. Demography (5).

The score on each variable will be ascribed to the respondents (from the experimental and control group) as a "personal developmental score."

The Mediators

The research model suggests that social mediators relate to the criminal culture of a given environment manifested by the type, magnitude and intensity of criminal behaviour. Other mediators are necessarily of a psychological and socio-psychological nature. Among these mediators two groups define the position of the entity in the social field. The group of status mediators defines the position of the entity in the social macro-

field, while the group of micro-social mediators defines its position in the immediate micro-field, i.e. in the immediate social environment. As can be seen from the review of the past research, this position is significantly linked with criminal behaviour and is by no means independent of socio-economic development; in other words, it is evident that these two groups play a mediating role. Furthermore, the micro- as well as macro-status variables are significantly linked with all psychological variables, while the sociological characteristics directly influence the development of many psychological characteristics. This means that micro- and macro-status variables can have an important direct or indirect role in predicting criminal behaviour. The most important of the personal indicators are the personality traits defined by the efficiency of regulative functions; in other words, the characteristics of cognitive functioning, i.e. social attitudes and attitudes towards values. It has been demonstrated that these characteristics are related to criminal behaviour and sociological characteristics, and are therefore vitally important for appreciating the role of the social and personal mediators.

Criminal Macro-Field

This component regards the relationship between criminal characteristics (climate) of the environment and the motivation for the commission of criminal offenses. In terms of prevention it regards the relationship between the criminal climate and formal social control.

a) Adult crime

1. The total number of adult persons convicted for criminal acts in the municipality (rate).
2. Number of adult persons convicted for offences against life and limb in the municipality (rate).
3. Number of adult persons convicted for property crime in the municipality (rate).
4. Number of adult persons convicted for traffic offences in the municipality (rate).
5. Number of adult persons convicted for sexual offences in the municipality (rate).
6. Number of adult persons convicted for other crimes in the municipality (rate).
7. The total number of adult persons reported for crimes in the municipality (rate).
8. The ratio of the number of persons reported to the number of persons convicted for crimes in the municipality.
9. The total number of persons reported for offences against public order and peace in the municipality.

b) Juvenile delinquency

10. Total number of minors sentenced for criminal acts in the municipality (rate).
11. Number of minors sentenced for offences against life and limb in the municipality (rate).
12. Number of minors sentenced for property crime in the municipality (rate).
13. Number of minors sentenced for sexual offences in the municipality (rate).
14. Number of minors sentenced for other crimes in the municipality (rate).
15. Total number of minors reported for crimes in the municipality (rate).
16. The ratio of the number of minors reported to the number of minors sentenced in the municipality.
17. The total number of minors reported for offences against public order and peace.

c) Common variables

18. The total number of recidivists in the municipality of origin.
19. Number of pubs, discotheques, gambling places, etc.
20. Existence of criminal gangs.

Secondary data for the period 1981–90 will be used due to the time effect. The score obtained will be attributed to the respondents as a "personal score on criminal macro-field."

The social status model used to construct the variables which define the position in the

social environment was originally constructed and evaluated in 1972. Because of a well developed system of social regulators this model is practically insensitive to socio-economic and political orientations. The model assumes that there is a well-ordered hierarchical network of social roles. This network is understood as a network of mutually linked ladders where every role (except for the extreme ones) is simultaneously superior to all those hierarchically lower and subordinate to all those hierarchically higher. The model enables prediction and further presupposes the existence of a general social status. The model envisages three status subsystems:

- * the institutional subsystem;
- * the subsystem of socialization;
- * the subsystem of sanctions.

Previous research revealed that the status indicators of the subsystems can be divided to the following formalized primary dimensions:

- a) educational status;
- b) primary residential status;
- c) professional status;
- d) political status;
- e) economic status;
- f) residential status.

Each primary dimension is operationalized by related measures pertaining to the respondent and his/her family, while the residential status refers to the degree of the urbanization of the municipality in which the respondent resides.

The levels of the hierarchical model are indicated as I, II and III. The questionnaire was constructed on this basis and contains 60 indicators of social status. Variables deduced from these indicators are defined as ordinal categorical variables.

Micro-Social Status

The "micro-social status" denotes the

criminogenic influences of those factors belonging to or stemming from the micro-social environment of individuals. It therefore refers to those areas in which potential criminogenic influences are located and not to the status of the offender within the primary groups of his/her social milieu. Two main influences can be identified: family and informal groups.

Family influences are represented by six dimensions:

- 1) Exchange (quality of emotional exchange);
- 2) Activity (structuring of time in the family);
- 3) Organization (the rules of family functioning);
- 4) Individuation (effects of family climate on the individuation possibilities of the family members);
- 5) Order (the structure of the familial system, roles and quality of interaction between family members as social actors);
- 6) Satisfaction with the family.

The instrument developed to measure family influences will be used to evaluate the climate and relationships within the primary family, while a new instrument for measuring the influences of the secondary family is in the process of being developed. The following dimensions thus form the core of the family sector of influences:

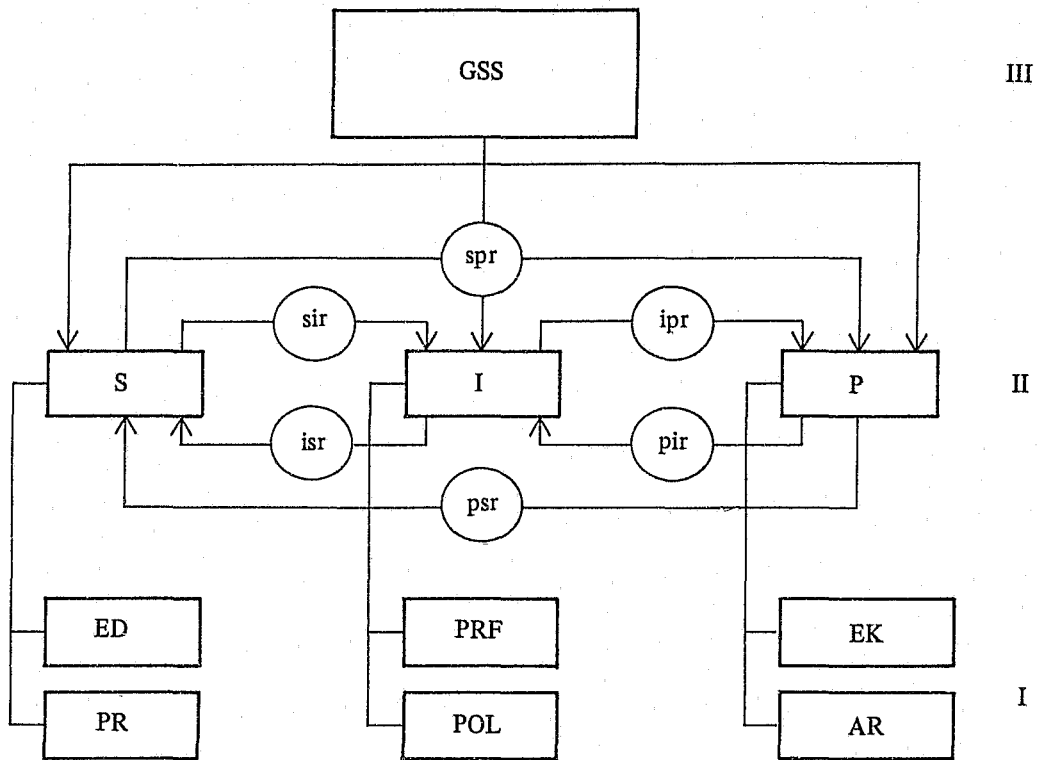
—For the primary family:

- 1) Exchange, i.e. the quality of emotional exchange;
- 2) Activity, i.e. the structuring of time within the family;
- 3) Organization, i.e. the rules of family functioning;
- 4) Individuation, i.e. the effects of the family climate on the possibility of individuation of the family members;
- 5) Order, i.e. the structure of the family system, its roles and the quality of interactions among family members.

—For the secondary family:

- 6) Emotional communication;

Hierarchical Model of Social Status



GSS= general social status
 S= subsystem of socialization
 I= institutional subsystem regulatorstional
 P= subsystem of sanctions regulators
 ED= educational status
 PR= primary residential status
 regulatory-socializational
 PRF= professional status
 POL= political status

EK= economic status
 AR= actual residential status
 sir= socializational-institutional
 ipr= institutionally-sanctional regulators
 spr= socializational-sanctional regulators
 isr= institutionally-socializational
 pir= sanctionally-institutional regulators
 psr= sanctionally-socializational regulators

- 7) Problem solving capacity;
- 8) Conflicts;
- 9) Mutual harmony.

—For both families:

- 10) Demographic characteristics and completeness of the family;
- 11) Deviant behaviour of other members of the family (deviant support).

Informal Group Influences

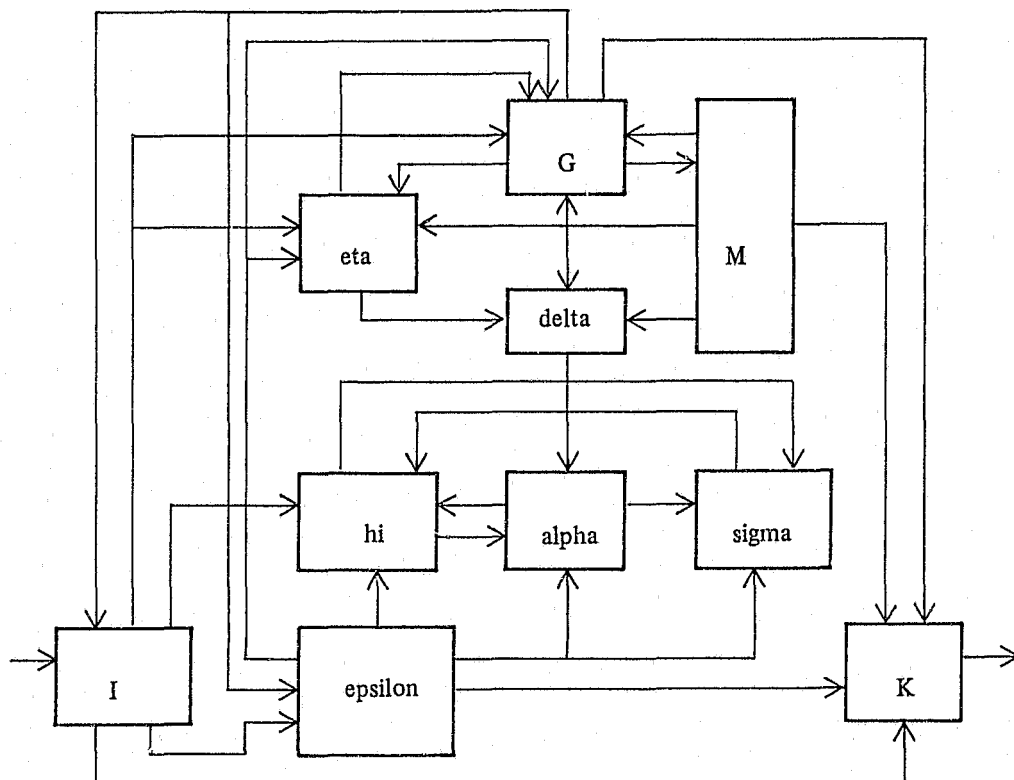
As a result of previous empirical research and theory and in particular the “levelling”

of psychic functions, it was decided to focus on the following dimensions:

- a) belonging to the group;
- b) sharing the group quality;
- c) status within the group;
- d) cohesion of the group.

Each dimension is operationalized by a number of indicators and data will be gathered through scales and questionnaires. For the experimental group these data will con-

Cybernetic Model of Regulatory Functions



1. The regulator of activity (epsilon)
2. The regulator of organic functions (hi)
3. The regulator of reactions of defense (alpha)
4. The regulator of reactions of attack (sigma)
5. The system for the coordination of regulative functions (delta)
6. The system for the integration of regulative functions (eta)

cern the period of the commission of the offence or the period prior to that commission (for example one or two years before), while the data for the control group will refer to the period immediately preceding the time of the actual research.

Personality

The model of cognitive functions used to select personality tests applied in the present research is a synthesis and, to a certain extent, a reformulation of the model which presupposes the existence of the six regula-

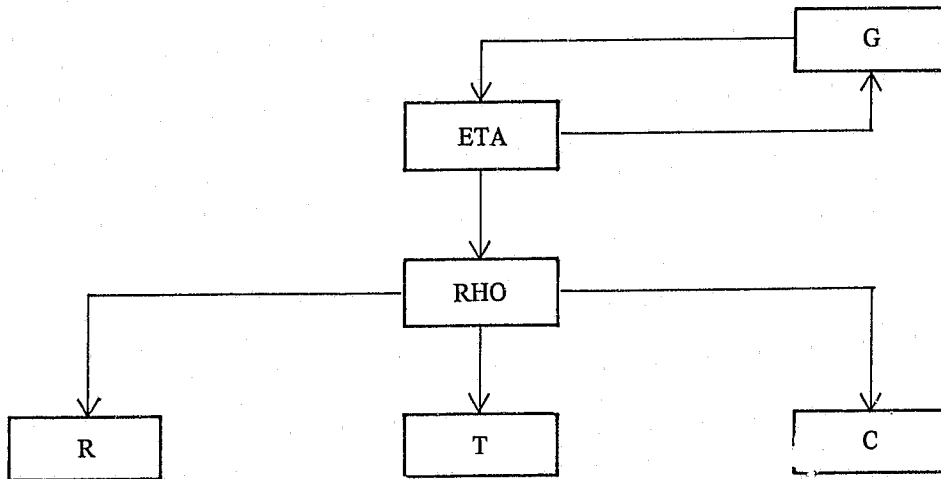
tive systems. In order to obtain the highest degree of reliability the final result in each test will be defined as the first main component of items rescaled on universal metrics.

Social Attitudes and the Value System

The model is based on a reformulation of Eysenck's principal dimensions of social attitudes (R and T factors) with an additional dimension related to conformity (C factor).

These attitudes will be evaluated by tests which reliably and validly measure these dimensions and also effectively differentiate

Structure of Social Attitudes



G= central processor
ETA= system for evaluation
RHO= flexibility-rigidity

R= radicalism-conservatism
T= tolerance-intolerance
C= non-conformism-conformism

the delinquents according to the intensity of criminal behaviour and the reaction to the socialization processes.

Social Values

This is a rather complex area and its importance for understanding deviance became a common place in criminological literature. For the purposes of this project two types of values will be examined.

General values are based on Rokeach's work on instrumental and terminal values and the results of empirical research carried out by IKSI. The model is built around the following dimensions:

1. Personal values;
2. Social values;
3. Moral values;
4. Competitive values.

Pro-criminal values are based on the theory of Walter Miller and are measured by scales focused on the following five dimensions:

- a) physical toughness;
- b) machismo;
- c) machiavelism (or criminal definition of intelligence);
- d) hyperindividualism—valuation of independence;
- e) sensation seeking.

Social Control

This part of the project focuses on formal social control (state-centred criminal justice system) and informal mechanisms of crime control, as exemplified by the study carried out by UNICRI (Mark Findlay and Ugljesa Zvekic, *Informal Mechanisms of Crime Control*, 1988).

A study of formal aspects of social control will include statistical data on fluctuations of criminal activities as well as secondary information on the attitudes of respondents towards the forms and functioning of formal social control. An analysis of informal mechanisms of social control of criminality will also be based on objective and subjective indicators.

The following is a list of social control vari-

ables:

1. Number of prosecutors (rate);
2. Number of judges (rate);
3. Number of policemen (rate);
4. Number of juvenile justice judges (rate);
5. Number of lawyers (rate);
6. Number of social workers (rate) in charge of crime prevention and/or post-release programmes;
7. Number of other experts (rate) involved in crime prevention and in the implementation of post-release programmes;
8. Number of criminal cases processed by each judge and prosecutor;
9. Ratio of the number of processed to non-processed cases;
10. Ratio of the number of dismissed police reports to the total number of reports;
11. Level and quality of technical equipment of a) police and b) administration of justice (estimate);
12. Number and quality of personnel in a) police and b) administration of justice (estimate);
13. The amount of material means at disposal of a) police and b) administration of justice (estimate);
14. Organizational facilities of a) police and b) administration of justice (estimate);
15. Opinion of expert workers in a) police and b) administration of justice with respect to variables 11, 12, 13 and 14;
16. Number of social work centres;
17. Number of police stations;
18. Number of prisons.

Social services and attitudes towards control

1. Number of educational institutions.
2. Number of psychologists and other experts in educational institutions.
3. Number of cinemas.
4. Number of libraries.
5. Number of sport facilities.
6. Number of religious institutions.
7. Number of ecclesiastic personnel.
8. Number of theatres and cultural centres.
9. Number of video-clubs.

10. Number of amateur arts and cultural associations.
11. Number of sport clubs and associations.
12. Attitudes towards the agencies of formal social control (judiciary and police).
13. Respondent's religion.

Criminal Behaviour

Criminal behaviour, like all other social phenomena, could be defined in numerous ways. In this project we refer to acts which result in sentences based on the existing penal code. This is a very restricted notion of criminal behaviour and regards only a small portion of the criminal population. It also represents a very serious limitation to this project. The choice was based on methodological reasons, particularly in terms of data collection and models of data analysis. Keeping in mind the results of the previous research, as well as the fact that the model includes a control group, criminal behaviour will be measured in the following way:

1. Did/did not commit a criminal act;
2. Offences (adults);
 - 1) Offences against life and limb
 - 2) Major theft
 - 3) Theft (excluding 2.2)
 - 4) Robbery
 - 5) Other property crimes
 - 6) Traffic offences
 - 7) Sexual offences
 - 8) Other crimes
3. Offences (juveniles);
 - 1) Offences against life and limb
 - 2) Property crime
 - 3) Sexual offence,
 - 4) other crimes
4. Recidivism;
5. Length of sentence (in months);
6. Age at the time of commission;
7. Existence of juvenile criminal record (for adults);
8. Age at the time of the first arrest.

Methods of Data Analysis and Hypothesis Testing

All methods of data analysis and hypotheses testing formulated on the basis of the proposed model can be divided into the following groups:

- * methods for a preliminary data transformation and analysis;
- * descriptive methods;
- * methods for analysis of relations between groups of variables;
- * methods for analysis of differences between groups of entities.

(1) Methods for a Preliminary Transformation of Data

In order to apply effectively the methods for testing a proposed hypothesis, almost all variables have to undergo some preliminary transformation, so as to remove the effects of unwanted concomitant variables, transform ordinal categorical variables into real numerical form, or minimize the variance of measurement error. The following operations will be applied:

- 1) Calculation of rates or indexes for all variables which depend on the concomitant characteristics of municipalities, such as their population and surface. Rates based on the number of inhabitants will be calculated for all variables describing the criminal field and for the majority of variables describing socio-economic development. For some of the spatial variables from that group rates will be calculated in relation to the surface of municipalities. Rates based on the number of inhabitants will be calculated also for all variables of social control.
- 2) Normalization and standardization of ordinal categorical variables. All variables except income, number of children and number of books in the family library, which describe social status, belong to the category of ordinal categorical variables.

To that group also belong all those variables which describe micro-social status as well as the items in all tests of personality, social attitudes and the system of value. Since numerical indicators of categories define the order but not the size, it is necessary to transform these variables into the real numerical form. It will be done on the assumption that all these variables are products of some altering system which produces discrete manifestations of latent variables which have a continuous, multivariate normal distribution. If this assumption is correct (which is true for a large majority of biological, psychological and sociological characteristics) then it is possible to transform ordinal categorical variables into numerical form on the basis of the inverse integral of normal distribution. This will be done for all mentioned ordinal categorical variables, with the parameters of normal distribution fixed on 0.1 and 1.0, since all real parameters are unknown, arbitrary or conventional. This procedure will be effectuated by the algorithm proposed by Abramowitz.

- 3) The calculation of the final results on test of personality, social attitudes and the system of values will be effectuated in a such a way as to minimize measurement errors within the model which allows for non-zero covariances of error variables.

(2) Descriptive Methods

Normalization automatically generates data on frequencies, relative frequencies and relative cumulative frequencies in such a way that it makes no sense to calculate central and multidirectional parameters and test hypotheses on the distributional function of all the variables which will appear in the final form as a result of that operation (the majority of these are status and micro-status variables). For all other variables (i.e. variables of socio-economic development, criminal macro-field, social control and variables defined as the total score on the tests of personality, social attitudes and value systems)

the arithmetic means, variances, standard deviations, the span of results within which the real arithmetic mean varies with 0.99 of confidence, the total span of results and measures, and tests of rectangularity and curvilinearity will be performed. The hypothesis of the normal distribution will be tested by the Kolmogorov and Smirnov method. Matrices of correlation for all variables which form a logical unity and represent a block defined by the cybernetic model of criminal behaviour will be produced. These will be analyzed in terms of the main components with an oblique transformation of latent dimensions. If this method makes it easier to obtain dimensions which describe or define variables in a better or a more simple manner, these dimensions will be treated as variables (instead of original variables) by the methods for analysis of relationships between the groups of variables and methods for analysis of differences between the group of entities.

(3) Methods for Analysis of Relationships between the Groups of Variables

Relationships between manifest and/or latent variables which define the blocks of the model, as specified by the model, will be analyzed by using two different methods, especially in the sample of non-delinquents and delinquents:

- 1) The method of canonical correlational analysis which maximizes the correlations of orthogonal standardized dimensions deduced from the analyzed variables, with the number of dimensions defined on the basis of the results of Bartlett's test.
- 2) The method of canonical analysis of covariances which maximizes covariances of oblique non-standardized dimensions deduced from the analyzed variables, with

the number of dimensions defined on the basis of the number of covariances which are larger than the generalized quasicanonical index. If the model assumes that one group of variables influences another group of variables from the model, then both methods will be applied on the first group after the partialization of that influence. If the model assumes a unilateral relationship between two groups of variables it will also be submitted to:

- 3) An analysis of asymmetric redundancies which maximizes the quantity of information that one group can transfer to the other.

The standard method of regression analysis will be applied if certain variables can be treated as truly dependent (e.g. seriousness of offence).

(4) Methods for Analysis of Differences between the Groups of Entities

Differences between the samples of delinquents and non-delinquents will be analyzed either on the group of all independent variables taken together or on sub-groups of these variables defined by the blocks of the model, by the use of two different methods:

- 1) Canonical discriminatory analysis which maximizes the canonical correlation between the variables describing the entities and the indicator variables which define group belonging.
- 2) Quasi-canonical discriminatory analysis which maximizes canonical covariance between the variables which describe the entities and the indicator variables which define group belonging. Differences between the groups on particular, important variables will be tested by the ordinary t-test.

Alternatives to Imprisonment in Sweden

by Bo Svensson*

Punishment is by definition unpleasant. But everything which is unpleasant is not punishment. Punishment is pain to an individual imposed on him precisely as a punishment. In Sweden the driver's licence is withdrawn if the driver is convicted of drunken driving, but this is a measure which is taken in order to promote traffic security and is not seen as a punishment.

For the purpose of the Swedish Penal Code, sanctions for crime shall be understood as comprising: the penalties of fine and imprisonment; conditional sentence, probation and surrender for special care (1:3). In the statutory provisions governing the individual offences only imprisonment or fines are named. Other sanctions like conditional sentence, probation and surrender for special care may nevertheless be applied in accordance with the directives governing their use.

Fine

In Sweden there are four types of fines. There is the traditional fine where the amount is related solely to the gravity of the offence. In practice the amount often is fixed according to a schedule issued by the Prosecutor-General. There is also the day-fine which is imposed as proportional to the offender's daily income. Furthermore there is a fine where the amount is to be determined according to a special basis of computation (standardized fine). Finally there is a corporate fine for legal persons.

Day-Fine

The idea that the amount of a fine ought to be settled in accordance with the per diem income of the accused was discussed as early as the beginning of the twentieth century in Sweden. A day-fine system was introduced in 1931 and is still working.

In the day-fine system the *number* of days corresponds to the severity of the offence, and the per diem *amount* of each fine is estimated in accordance with the financial situation of the accused.

The scale for the *number* of days is 30—150 (30—200 if more than one offence).

The scale of 30—150 day-fines is intended to fit both petty and more serious offences. Only in very exceptional cases do the courts apply the maximum of the scale. Naturally the apportionment of day-fines has a tendency to follow a set pattern when the prosecutors and the courts are dealing with the more frequent types of offences.

The scale for the per diem *amount* of a day-fine is SEK 30—1,000. Accordingly, the highest sum which can be imposed in one sentence is (150 × 1,000 =) SEK 150,000 for one offence and (200 × 1,000 =) SEK 200,000 for more than one offence. A fine less than SEK 400 cannot be imposed.

The amount of the day-fine shall be determined depending on what is deemed reasonable in view of the defendant's income, wealth, obligations to dependents, and other economic circumstances.

In the deciding of the amount of a day-fine a circular from the Prosecutor-General plays an important part. The prosecutors have to impose day-fines—see below—and accordingly very often have to decide their amount. The Prosecutor-General has felt he has to ensure uniformity in the practice of the prose-

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cutors in this respect. In 1963 he issued a circular with guidelines concerning the fixation of the amount of day-fines. Inflation and changes in the tax legislation have forced the Prosecutor-General frequently to issue new circulars. The most recent circular is from 1991 (RAC 1991:01).

According to the *travaux préparatoires* of the legislation of 1931 the offender's *per diem* income should be the starting point for determining the amount payable in a day-fine. This income should in principle be the offender's mean income per day calculated on the basis of his financial circumstances over a not too short period. It was later recommended that 1/1,000 of the offender's yearly income should be the basis for the day-fine, as this part (about 1/3 of his daily income) could be regarded as the *per diem* amount which would be left when the offender had spent what was absolutely necessary for himself and his family.

The calculation of annual income is made on the basis of the offender's circumstances at the time of the sentence. Usually it is based on statements by the offender to the police or to the court. The statements are sometimes checked when there is reason to believe that the offender's declaration is false or incomplete. Such a check is normally done by comparing the offender's statement with the tax authorities' assessment of his income (in Sweden there is a capital tax).

The circular of the Prosecutor-General regards as annual income the total amount which the offender has received during a year in the form of salary, interest, pension, annuities, etc. financial provisions from a divorced spouse and permanent social benefits are also included in the annual income. From this total annual amount is deducted the offender's expenses for earning the income.

The effect of the progressive direct taxes are taken into consideration by deducting from the net income an amount equivalent to the estimated progressive effects of the tax system.

The obligation to support a child normal-

ly decreases the amount of the day-fine. According to the circular of the Prosecutor-General a sum for each child is to be deducted from the net income. This sum is now (in 1992) SEK 16,850.

If the offender is married and the spouse has no income of his or her own or only a very small one, this circumstance is taken into consideration. Under the circular a reasonable amount not exceeding (in 1992) SEK 33,700 shall be deducted from the net income.

The day-fine is according to the circular 1/1,000 of the net income reduced for progressive tax effects and for support of children and spouse.

However further considerations are made concerning the effects of indirect taxes on the offender's ability to pay a fine. This is done by deducting SEK 30 from the last mentioned amount of day-fine.

The Penal Code prescribes that the amount of the offender's property shall influence the amount of the day-fine. According to the *travaux préparatoires* the property must be taken into account to a higher degree than is justified solely by the amount of interest earned on it. (The interest is regarded as part of the income, as mentioned above). The question is how the property itself is to influence the amount of the day-fine. It has been pointed out that consideration of the property must not lead to a practice which virtually entails confiscation of the offender's property. The circular prescribes that if the net value (assets minus liabilities) is less than SEK 400,000 it is usually not taken into consideration. If its value is SEK 400,000 or more the day-fine is increased by SEK 25 and by SEK 25 more for every further SEK 200,000. If on the other hand the offender has liabilities the sum of which by far exceeds the amount of assets, reasonable consideration hereto is to be taken.

When estimating the property of the offender consideration shall not be taken to the house or the flat where the offender and his family live permanently. The offender's

ALTERNATIVES TO IMPRISONMENT IN SWEDEN

summer house and similar assets shall on the other hand be taken into consideration.

If the offender has no or very little income, but high living costs, the amount of day-fine shall be decided with consideration to his living standards.

The amount of day-fine is finally rounded off downwards to the next figure ending with 0 or 5.

The Prosecutor-General has condensed his circular into a table, the use of which can be exemplified as follows:

Determination of the Amount of a Day-Fine

1. Yearly Income	+ 340,000
Expenses for Earning the Income	- 40,000
2. Progressive Effects of the Tax System (300,000—200,000). 20%	- 20,900
3. Support of Children (2 × 16,850)	- 33,700
4. Support of Spouse	- 33,700
	212,600
5. 1/1,000 × 212,600	212
6. Vat and Other Indirect Taxes	- 30
7. Offenders Property (600,000)	+ 25
8. Liabilities	-
	207
9. Day-Fine (Rounded Off)	205

If there are particular reasons for it, the amount of the fine may be adjusted accordingly. This rule is not applicable to petty offences. If the offence deserves less than 30 day-fines a traditional fine must be imposed. Instead the rule is aimed at situations where the penalty according to standards will be too hard. The Prosecutor-General refers to the *travaux préparatoires* where the rule is recommended if the offender is sentenced to great many day-fines but his ability to pay is reduced due to enduring illness or grave handicap. The amount of day-fine should in such a case be reduced so as to fit the fine to the offender's ability to pay.

The guidelines are of an advisory nature and the Prosecutor-General stresses that the

determination of fines must be based upon the practice of the courts. The latest guidelines have been issued after hearing the Union of Judges in Sweden.

The circular is used in many courts, not only by the young judges. It has been reproduced in the commentary to the Penal Code which is used by all lawyers in criminal cases. The Prosecutor-Generals guidelines have undoubtedly heavily influenced the practice of the courts.

The courts do not act quite uniformly and sometimes their assessment of certain circumstances is made intuitively. The prosecutors on the other hand, generally follow the guidelines in the Prosecutor-General's circular quite closely.

Traditional Fine

The traditional kind of fine is nowadays used only for petty offences e.g. small traffic offences or disorderly behaviour. The maximum amount is SEK 2,000 (SEK 5,000 if more than one offence) and the minimum SEK 100 (with some exceptions).

The relation between day-fine and traditional fine in Swedish law is apt to cause some difficulties. The provision that a day-fine must not be imposed to a number less than 30 is aimed at avoiding situations where persons of good economy are sentenced to pay an amount which seems to be too great in relation to the gravity of the offence. This provision was introduced recently and has had the effect that petty offences which used to be sanctioned by day-fines now are punished by traditional fines. It can however not be excluded that in some rare cases the amount of a traditional fine will be greater than the day-fines imposed for the same offence. This may be the case for instance if the offender has committed an offence with a rather high penal value but has an extremely small income.

Standardized Fine

A standardized fine used to be applied for tax offences. The amount of fine was deter-

mined according to the amount of tax avoided, had the declaration of the offender passed the tax authorities without notice. Standardized fine is no longer used for tax offences and this type of fine is rarely used at all nowadays.

Corporate Fine

For a crime committed in the exercise of business activities the entrepreneur shall, at the instance of a public prosecutor, be enjoined to pay a corporate fine if: 1. the crime has entailed gross disregard for the special obligations associated with the business or is otherwise of a serious kind; and 2. the entrepreneur has not done what could reasonably be demanded for prevention of the crime. However if the offence was directed against the entrepreneur or if it would otherwise be manifestly unreasonable to impose the penalty of a corporate fine the court may decide not to do so.

A corporate fine shall be at least SEK 10,000 and at most SEK 3,000,000. When the amount of a corporate fine is determined, special consideration shall be paid to the nature and extent of the crime and to its relation to the business activity. A corporate fine may be remitted or reduced: 1. if a sanction for the crime is imposed on the entrepreneur or a representative for him; 2. if the crime involves other payment liability or a special consequence defined by law; 3. if otherwise called for on special grounds.

In practice corporate fines are almost never applied.

Fines Proposed by the Prosecutors

There is an extensive use of a summary procedure in cases concerning admitted offences punishable by fine. These fines are to a large extent determined by the public prosecutors. The prosecutor can invite the perpetrator of an offence to accept a fine proposed by the prosecutor. Acceptance of this proposal has the same legal effects as a sentence by a court. This system, which was introduced in 1948 nowadays applies to all

offences with fines—except standardized fines—as the maximum punishment. It also applies to all offences which can be punished by a fine or a short prison term not exceeding six months. The latter offences include e.g. petty larceny, careless driving and the less serious form of drunken driving. The prosecutor, however, cannot propose a more severe fine than 120 day-fines.

Fines Proposed by the Police

Policemen are authorized to order traditional fines for certain petty offences. The same authority have custom officers concerning small smuggling offences. These fines are small, and fixed according to a schedule issued by the Prosecutor-General.

Parking Offences

Charges levied by traffic wardens for parking offences are technically not regarded as fines.

Collection of Fines

When fines are *collected*, the competent administrative agency is empowered to extend the time for payment and to allow payment in instalments. In principle the collecting agency can use the same methods of enforcements as are used when enforcing judgements concerning debts. If the collection of a fine would be very harmful to the offender or to somebody dependant on him for a living, the agency can cease collection pointed that the collection is not regarded as essential in public interest. There are no recent statistics on the efficacy of the fine collectors but estimations from 1975 indicate that close to 90 per cent of the fines are actually collected.

Conversion of Fines

Fines that are not paid can be *converted* to imprisonment from 14 days to three months. The conditions for conversion are, however, rather strict. Conversion may take place only if it is obvious that the offender contumaciously neglects to pay the fine or if for other

special reasons conversion is required in the public interest, for instance when the offender is a recidivist who has been sentenced to fines many times previously without having paid them.

These conditions, together with the rule that day-fines should be adapted to the offender's ability to pay, as well as an appropriate use of the devices of extensions of time, payments in installments and enforced payment, are intended to reduce conversion of fines to the smallest number possible without jeopardizing their preventive effect. The result is that very few cases, if any, of such imprisonment have been enforced in Sweden in the last years.

Conditional Sentence

Conditional sentence is used when the crime has such a high penal value that the penalty of a fine is considered insufficient. In contemplating conditional sentence the court shall consider whether there is no particular reason to believe that the accused will continue to commit criminal acts in the future.

A person who receives a conditional sentence shall undergo a probationary period of two years. During the probationary period the offender shall lead on orderly life and seek to support himself according to his ability. If the offender has been enjoined to make compensation for damage caused by his crime, he shall do what he is able to meet this obligation.

Conditional sentence thus is a sort of penal warning. It is not combined with supervision or any other visible restrictions on the offender. The reality of a conditional sentence is close to a waiver of prosecution. To increase the punishment, conditional sentence shall be combined with a day-fine unless the penalty of a fine, in view of other consequences of the offence, would occasion the offender undue hardship or if there are otherwise special grounds for not imposing the sentence of a fine.

Probation

Like conditional sentence probation is used when the crime has such a high penal value that the penalty of a fine is considered insufficient. In contemplating probation the court shall consider whether such a sanction might encourage the accused to refrain from committing further criminal acts. As a ground for probation the court may consider whether the personal or social circumstances of the accused have significantly improved in some aspect that may be assumed to bear a relationship to his criminal career. Another ground for probation to be considered is whether the accused is undergoing treatment for some abuse. A third ground to be considered is whether the abuse of an addictive substance or drug, or other special circumstance necessitating care or other treatment, made material contribution to the commission of the offence and the accused declares himself willing to undergo a suitable course of treatment which, drawn up on his behalf, can be organized with execution of the sanction (i.e. civil commitment; see below).

Probation may be combined with 30—200 day-fines regardless of whether or not a fine is the penalty prescribed in the offence in question. Fines are added when it is required in view of the culpability or nature of the offence or in view of the offender's previous criminal career.

Probation can however also be combined with imprisonment for a minimum period of 14 days and a maximum period of 3 months. This is done only if absolutely required in view of the culpability of the offence or in view of the offenders criminal career. Should the court impose a sentence of imprisonment and probations, it shall not at the same time impose a fine.

Probation shall continue during a period of three years and shall be combined with supervision. The supervision shall be discontinued without special direction after one year but the time of supervision can be prolonged if the offender does not comply

with what is required of him see below. Within the framework of probation, civil commitment and community service can be ordered by the court.

Civil Commitment/Suspended Sentence

If the abuse of an addictive substance or drug, or other special circumstance necessitating care or other treatment, made material contribution to the commission of the offence, and the accused declares himself willing to undergo a suitable course of treatment which, drawn up on his behalf, can be organized in conjunction with execution of the sanction, a particular form of probation can be ordered by the court.

Should the treatment planned be of decisive importance to the decision to sentence the offender to probation, the court shall indicate in its judgement the term of imprisonment to which the offender would have been sentenced had the penalty of imprisonment been preferred to probation.

In such cases, the judgement shall always issue directives as to the course of treatment the probationer has undertaken to follow. Such course of treatment may include provisions to the effect that the probationer shall be liable to submit himself to bodily search and inspection with a view to confirming that he is not abusing an addictive substance or drug.

Instructions may be issued in conjunction with such course of treatment to the effect that the person responsible for the treatment is to notify the probation officer and prosecutor if the probationer seriously neglects his undertakings under the course of treatment planned.

Community Service

In four cities of Sweden community service order can be imposed by the courts as a particular form of probation. The time for community service is 40—240 hours. This type of sanction is imposed as an experiment but it seems likely that it will be a permanent feature of the Swedish penal law with-

in short time.

A particular form of Community service can also be imposed on young offenders as a form of care within the social welfare services; see below.

Non-Compliance

If the probationer does not comply with what is required of him in consequence of the sentence to probation, the supervisory board may issue a directive. This is done when there is reason to assume that, for promotion of his rehabilitation in society, the probationer needs the support of special directives as to what he has to observe during the probationer period. The directive may be issued for a given period or until further notice. Such a directive may have reference to:

1. place of residence or lodging during a given period, at most one year at a time;
2. employment, other gainful occupation, education or training;
3. medical care, treatment for alcoholism or other care or treatment in or outside a hospital or other similar establishment.

If the probationer has been enjoined to make compensation for damage caused by his crime, directives may be issued concerning the time and manner for meeting this obligation unless, in view of the probationer financial situation and other circumstances, such directives may be presumed to obstruct his rehabilitation in society.

If the probationer is under supervision, special directives may be issued as to how it shall be exercised. They may specify the manner in which and the extent to which the probationer shall maintain contact with the supervisor or probation officer. They may also prescribe an obligation for the probationer to notify the supervisor or probation officer of absence from him place of work, school or other occupation or institution stated in the directives.

The supervisory board may also:

ALTERNATIVES TO IMPRISONMENT IN SWEDEN

1. decide that a warning be issued to the probationer; or
2. decide on supervision of the supervisory during a given period after one year of the probation term has elapsed, but at the most until the expire of the probation term.

Should the probationer seriously neglect his undertakings, and if the measures available to the supervisory board can be expected to be without effect, the board shall request the prosecutor to bring the matter before a court and demand that the probation order be set aside. The matter may also be brought before a court without request from the board should the probationer, seriously neglect his undertakings under the course of a civil commitment treatment planned for him. The proceeding just mentioned shall be instituted before the expiration of the probation term.

Should the probation order be set aside, the court shall impose another sanction for the offence and in doing so shall pay due regard to the treatment to which the probationer has been subjected in consequence of his sentence to probation and to any fine or imprisonment to which he may have been sentenced. In such cases, the court may impose a sentence of imprisonment shorter than that prescribed for the offence in question. Should the court have given indication in its judgement on the term of imprisonment, had probations not been chosen, and should a sentence of imprisonment be imposed, the court shall pay due regard to this indication in establishing the length of the term to be served.

If adequate reasons for the revocation of probation are not present, the court may instead take a measure referred to above i.e. directives, warning, etc., such a measure may not be ordered when the probation term has expired.

Concerning the revocation of probation and concerning certain other measures when the probationer is found to have committed

another crime, provisions exist in the Penal Law.

Surrender for Special Care

Care within the Social Welfare Services

Should a person, being under the age of twenty-one and having committed a criminal act, be subject to care or other measure by virtue of the Social Services Act or the Care of Young Persons (Special Provisions) Act, the court may instruct the social welfare board to organize the appropriate care within the social welfare services.

Should the culpability or nature of the criminal act, or the previous criminal career of the accused, so demand, the court, in addition to committal to care within the social welfare services, may impose a sentence of a fine corresponding to a maximum of two hundred days income, regardless of whether or not a fine is the prescribed penalty for the offence in question.

Should the offence have occasioned damage to property and it is considered that such would tend to promote the offender's adoption to society, the court, in conjunction with committal under the provisions of paragraph one herein, may instruct that the offender, at times and in the manner indicated in the judgement, assist the injured party in such work as may help repair or contain the damage, or which, considering the nature of the offence and of the damage, may otherwise appear suitable. Such instruction may be issued only with the consent of the injured party.

Care of Abusers

In the event that an individual who has committed a criminal act might be subject to care under the Act on Care of Abusers, a court shall be entitled to instruct the county administrative board, or, should the individual in question already have been admitted to an institution where such care is provided, the board of such institution, to arrange for all and any care as may be necessary. Be-

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fore deciding to commit the offender to care in an institution, the court shall seek the opinion of the county administrative board or the institutional board.

Should the penalty prescribed for the offence be more severe than imprisonment for one year, the offender shall be committed to institutional care only if there are special grounds for so doing.

Care of Mentally Disturbed Persons

Should a person commit an offence under the influence of mental illness, mental debility or other mental abnormality of such deep-seated nature that it must be accorded the status of mental illness, the court may impose no sanction other than committal to institutional care, a fine or probation.

Should none of the above sanctions be deemed suitable, the accused shall go free of sanction.

If a person who has committed a criminal offence can be provided with care under the Act on the Provision of Closed Psychiatric Care or with care in a mental hospital under Section 35 of the Act concerning the Treatment of Certain Mentally Disturbed Individuals, the court may, if it finds the need for

such care established, order his surrender for mandatory care at an institution for the mentally ill or an institution for the feeble-minded. If the act was not committed under the influence of mental disease, feeble-mindedness or other mental abnormality of so profound a nature that it must be considered equivalent to mental disease, such order may, however, be made only if special reasons so dictate.

If someone who has committed a criminal act is in need of psychiatric care or supervision the court may order him surrendered for open psychiatric care if, for special reasons, no more far-reaching measure is deemed to be required.

References

- "The day-fine system in Sweden" by Hans Thornstedt, Emeritus professor of criminal law, Stockholm University, Information Bulletin 3/1986 of the National Swedish Council for Crime Prevention, Stockholm, 1986.
- "The Swedish Penal Code," BRA-report 1990:3, Stockholm, 1990.
- Prosecutor-General's CIRULAR RAC I:118. Bill (1990/91:68) on fines.

SECTION 2: PARTICIPANTS' PAPERS

Probation in Singapore

*by Julita Bte Mohd Hussen**

Introduction

In Singapore, Probation came into existence after the Second World War. In 1947, the Probation Section within the framework of the Social Welfare Department provided services to children and young persons who had gotten into trouble with the law or were creating difficulties for themselves and for their families. The arrangement was not satisfactory as it was mainly based on the voluntary supervision of the refractory child or young person. In 1949 the Children & Young Persons Ordinance was enacted to provide for the establishment of a juvenile court, statutory supervision of child or young person in need of care or protection, supervision of refractory child and probation of a child or young person who admitted to or was found guilty of an offence. A child was defined in the Ordinance as a person under the age of fourteen years and a young person, as one who was fourteen years of age or upwards and below sixteen years.

In 1951, the Probation of Offenders Ordinance was enacted. The Ordinance (now Probation Offenders Act Cap 252) clarified the scope and role of probation as a judicial disposition and made provision for the extension of probation to adults. In 1975, the Probation of Offenders Act was amended to entrust Volunteer Probation Officers with the legal responsibility for supervising probationers. To ensure that the Act is socially rele-

vant and effective in dealing with offenders, the Probation of Offenders Act was once again amended in 1989. The amendment brought forth the reduction of minimum period of probation from one year to 6 months. It also increased the quantum of fine for breach of Probation Order from the maximum of \$100 to \$500.

Probation Offenders Act CAP 252

Section 5 of the Probation of Offenders Act provides that where a Court by or before which a person is convicted of an offence (not being an offence the sentence for which is fixed by law) is of the opinion that having regard to the circumstances, including the nature of the offence and the character of the offender, it is expedient to do so, the Court may, instead of sentencing him, make a probation order, that is to say, an order requiring him to be under the supervision of a Probation Officer or Volunteer Probation Officer for a period to be specified in the order of not less than six months or not more than three years.

The Probation Offenders Act does not require mandatory probation reports or pre-sentence reports on offenders who appear before the Courts. In practice, in Singapore, a pre-sentence report is called for by the Court after the offender has been found guilty/convicted of an offence. The report that the Probation Officer has to submit should be in accordance with the rules issued under the Probation Offenders Act (see Appendix I). These rules stipulate that the Probation Officer has to provide data on the family of the offender, the neighbourhood in

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which the offender lives, his friends and associates and *inter alia*, his history of employment, delinquency and crime. The Probation Officer is also requested to provide an assessment of the offender and to recommend suitability of the offender for non-custodial treatment.

A person may therefore be placed on probation for almost any type of offence (except such offences like murder and treason). There are no limitations to age, sex or the number of times an offender may be placed on probation. The system, however is essentially based on:

- (1) a favourable prognosis of the offender's personal and social background;
- (2) the offender's willingness to cooperate with the Probation Officers; and
- (3) the offender's self-expressed desire to undergo supervision and be of good behaviour during the period of probation.

Supervision of Probationers

Rule 21 of the Probation Offenders Rules indicated that subject to the provisions in the Probation Order, a Probation Officer or Volunteer Probation Officer who undertakes the supervision of any probationer shall:

- (a) ensure that the probationer understands—
 - (1) the effect of the order placing him under his supervision; and
 - (2) the Court's power to amend or discharge the Order;
- (b) keep in close touch with the probationer, and unless there is good reason for not doing so, visit his residence from time to time and require him to report at stated interval;
- (c) where appropriate, in respect of a probationer, make use of any statutory or voluntary agency which might contribute to the probationer's welfare and take advantage of any available social, recreational, religious or educational facilities suited to the probationer's age, ability and temper-

- ament; and
- (d) where appropriate, endeavour to ensure that a probationer is in suitable and regular employment.

The Probation Service in recognising the importance of the support of the family and the community in the treatment of offenders has enhanced its programme, from rehabilitation of the offender through surveillance and individual counselling, to include rehabilitation through using group dynamics to create individual awareness, to develop individual potential and to enhance parental and community involvement as well as to involve the community in crime prevention.

Probationers are required to go through the community based supervision programme for the duration of their probation period. They are to undergo individual counselling, attend groupwork sessions and participate in social, recreational and educational activities organised for them. Parent support activities are organised by the Probation Service to assist the parents in discharging their parental function. Community support, through use of volunteers to befriend probationers and through the provision of service by probationers in welfare homes, are means to educate the public and to gain support for the rehabilitation of offenders.

Groupwork Session

Groupwork session was introduced in the Probation Service to complement individual counselling sessions. The groupwork module focuses on 3 basic core topics aimed at improving the probationer's social and coping skills as well as his interpersonal relationship. The modules the probationers are required to complete include:

- (1) friendship and refusal skill;
- (2) decision making;
- (3) family relationship.

The topics were chosen as it was considered

pertinent to address these issues in relation to our objective of securing the good conduct of the probationers. Very often it is observed that these issues were contributory factors in the commission of the crime. It also focuses on prescribing alternative ways of tackling adjustment problems commonly faced by the probationers.

Nevertheless future orientation in the groupwork programme could also be expanded to develop specific skills which are practical and relevant to probationers who are entering the job market. Such skills include budget training, coping with job interviews, form-filling and personal grooming, etc.

Parent Session

It is instrumental that parents are to be actively involved in efforts towards rehabilitation of offenders. Parents' involvement in the programme is not only through individual sessions with Probation Officers but also in the parent support group sessions. These sessions are aimed at getting the commitment and cooperation from the parents and allowing the sharing of experiences.

Time Restriction Check Group

As part of the statutory condition of probation, certain offenders are required to remain indoors in the night. Apart from their individual efforts to enforce the order, Probation Officers have also formed groups based on geographical proximity to do personal checks on these probationers in the night. For persistent breaching of the time restriction order, the probationers can be brought before the Court under Sec 7 of the Probation Offenders Act whereby he is liable to be sentenced.

Probationers in Hostel

The Probation of Offenders Act provides for the temporary removal of probationer

from his home with a view to keeping him away from his undesirable associates, accustom him to a more disciplined way of life e.g. regular attendance at work or at school. Since 1988 the Probation Service has been managing its own Hostel for male probationers. The Hostel programme is geared towards providing the residents with some discipline and structure in their daily lives and with the ability to cope with daily demands. The Hostel introduced a Living and Social Skills Training Programme for the resident with the goal of personal growth and development. Skills such as personal grooming, simple household repair work, social etiquette and gardening are being taught to the residents.

The services of the volunteers are also tapped to organise recreational and interactional activities as well as tuition for residents who are still in school.

Voluntary Welfare organizations such as the Salvation Army Gracehaven the Muhammadiyah Home and Pertapis have also been gazetted as approved institutions under Sec 12 of the Probation of Offenders Act. They serve the same function as the hostel run by the Probation Service except that they receive only female non-Muslim and female Muslim probationers respectively.

The involvement of the voluntary welfare organization in the supervision of probationers is in line with the government's attempt at greater public participation in providing welfare service to the community.

Short Term Probation

The reduction of minimum period of probation from 1 year to 6 months came into effect on 1 April 1989. Offenders who commit minor offences, coming from relatively stable family background and having no previous delinquent traits would benefit more from a concentrated period of probation.

Between April 1989 and 31 Dec. 1991 a total of 479 offenders (424 adults and 55 juveniles) were placed on less than 12

months probation.

A comparative study was made between offenders who were placed on less than a year probation from April 1989 to Dec. 1989 with those placed on minimum period of probation prior to the amendment to the Probation of Offenders Act, i.e. those placed on one year probation from April 1988 to Dec. 1988.

The preliminary findings indicated that the offenders who were on probation for less than one year achieved a higher success rate, i.e. 93.5% for juvenile offenders and 97.4% for adult offenders at the end of probation period. On the other hand, offenders who were placed on probation for one year registered a success rate of 85.7% for juvenile offenders and 90.6% for adult offenders.

Volunteer Probation Officers Scheme

It is recognised that Probation, as a correctional system can best succeed in a community which understands and appreciates its aims, principles and methods. Community Probation Service was therefore set up to provide an avenue for concerned citizens to participate actively in the rehabilitation of offenders. Volunteers are carefully screened before they are selected. The selection includes a face-to-face interview with the Volunteer Programme Coordinator and testing of volunteers' attitudes through written questionnaires. Those with no adverse record and who are successful in the interview and test are allowed to undergo a Basic Training Course. Upon completion of the course, the volunteer will be placed on 6 months field placement whereby he will take a case under the guidance of a full-time Probation Officer. At the end of the 6 months field placement, the successful Trainee Volunteer will be confirmed as a Registered Volunteer Probation Officers. Registered Volunteer Probation Officers who perform well after one year may be gazetted, after attending a refresher course, to take on the legal respon-

sibility for the supervision of probationers.

Allocation of cases to volunteers takes into consideration the residential proximity of the probationers and the Volunteer Probation Officers and their language compatibility. Except for the Gazetted Volunteer Probation Officer, the volunteers generally hold one case at a time. There are 330 volunteers in the Probation Service. They assisted in the supervision of 288 probationers (20.9% of the Probation Service's current supervision load) as of 31 Dec. 1991.

The Volunteer Probation Officers' scheme is not without its problems. Issues such as transport reimbursement, lack of attention from the Probation Officer, differences in casework approach between volunteers and Probation Officers are raised at feedback sessions. Wherever possible differences are being thrashed out at the meeting and issues are reclarified with the volunteers.

Future Direction

It is envisaged that Probation as a non-custodial treatment would be more widely utilized in future particularly because there is scope for additional conditions like rendering of community service, compensation, etc. to be enforced against the offender and also because the offender can continue to be a socially and economically contributing member of society. As the Probation Service matures and as its officers gain more experience, it is likely that the Court would consider Probation as an alternative sentence for the over-40-year-old offenders.

It is also envisaged that volunteer participation in the treatment of offenders, and in the prevention of crime, would continue to be a key element in the Criminal Justice System. Volunteers would be utilized not only for offenders placed on probation but also be extended to those on aftercare and in the approved schools.

PROBATION IN SINGAPORE

Appendix I

Form P.O. 1
The Probation of Offenders Act (Chapter 117)
Pre-Sentence Report

1. IDENTIFYING DATA

Probation Report No.:
Case File No.:
Name:
NRIC No.:
Citizenship:
Date of Birth:
Race:
Address:
Telephone:
Offence(s):

Age:

Court:
Case No.:
Date Convicted:
Bail/Remand:
Date Sentence:
Sex:
Language/Dialect:
Religion:

2. FAMILY

Nature of Household
Information about father, mother and significant others
Family relationships/marital relationships
Expectations, hopes and aspirations

3. NEIGHBOURHOOD

Type of neighbourhood
Nature of home
Local facilities and institutions
Relation between family and neighbourhood
Good and bad neighbourhood influence

4. FRIENDS AND ASSOCIATES

General information
Relationship between friends, associates and family
Influence of friends and associates

5. OFFENDER'S HISTORY

General information
Appearance and personality
Physical and mental health
Educational and employment history
Leisure activities
History of delinquency and crime
Attitude to offence
Factors relevant to explaining the offence
Co-accused persons

6. OTHER PARTICULARS

7. PROBATION OFFICER'S ASSESSMENT

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8. RECOMMENDATIONS

.....
Date

.....
Signature of Probation Officer

.....
Name in Block Letters

DECISION OF COURT:

CD7A/trg-rpt.Prob/dmu/14-15

The Parole System in the Philippines

by Reynaldo G. Bayang*

I would like to share with you, through this presentation, the current policy and system of parole and pardon in the Philippines as effective methods of non-institutional treatment of offenders. I will explain in a brief, clear, simple, and the easiest way I can, for better comprehension, the actual procedure on how parole and pardon operates in my country; How they are being carried out; How they are availed by prisoners, their requirements; the prisoner's qualifications or eligibilities; the authorities involved, etc. I will also discuss a little about probation although this particular method of non-institutional treatment belongs to another office, by means of comparing it with parole.

These three (3) non-custodial measures, as you all know, are implemented by three different government offices or agencies. The necessity to briefly touch on probation will be shown later as I go on with my presentation on the topic which I am most experienced and considered knowledgeable—the subject of parole and pardon. I just want to state here, at this point, that the government entity in charge of implementing probation law is named Parole and Probation Administration or the PPA. Please do not confuse this with our office which is the Board of Pardons and Parole. You will learn later on that there is somehow a link or connection between these two (2) independent agencies of the government both under the supervision of the Department of Justice.

I must state in advance though that the three (3) government agencies that I am referred to earlier are the following: first, the

Board of Pardons and Parole, my office; second, the Parole and Probation Administration; and the third, the Office of the President of the Republic of the Philippines. All these three offices/agencies are actually involved in the rehabilitation and treatment of offenders apart from other government agencies.

Source of Authority

The power to grant parole is lodged in the Board of Pardons and Parole by Act No. 4103, otherwise known as the "Indeterminate Sentence Law." The power to grant pardon or any other form of executive clemency is the sole prerogative of the President of the Republic of the Philippines as mandated by our constitution; and although the courts have the power to grant probation, the Parole and Probation Administration is the only agency in charge of supervising and rehabilitating probationers all over the country pursuant to Presidential Decree No. 968 otherwise known as "The Probation Law of 1976."

Before the passage of the Administrative Code of 1987, Parole and Probation Administration used to be called "The Probation Administration." Its function was expanded to include parole supervision over our parolees in accordance with the said Administrative Code of 1987 which renamed it into what it is now called, "The Parole and Probation Administration." The new name itself suggests a linkage with our Office.

Brief History of the Board of Pardons and Parole

The only agency in the Philippines tasked

* Chief Parole Officer, Board of Pardons and Parole Department of Justice, the Philippines

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to discharge the duties, functions, powers and the responsibility of implementing the Indeterminate Sentence Law or Act No. 4103, on Parole, is the Board of Pardons and Parole, with which I am presently connected. Formerly named the Indeterminate Sentence Board, this Office was created on the same day Act No. 4103 was enacted; on December 5, 1933. Several amendments were made in this law until the present Board of Pardons and Parole finally came into being, this time with an additional duty of acting as the President's adviser on what courses of action to take on petitions for executive clemency. This additional duty gave more impetus or meaning on the existence of the Board insofar as its power to grant releases is concerned because it can now recommend to the President those prisoners, who are not otherwise qualified for parole, to be released on Conditional Pardon. Usually, the recommendation of the Board is approved by the President so that it becomes purely ministerial on the part of the Office of the President to act favorably on the Board's actions/recommendations.

Composition of the Board

Headed by the Secretary of Justice as its chairman, the Board, which is composed originally of four (4) members, was later on increased to six (6) members, one of which is designated only as an ex-officio member, he is the Parole and Probation Administrator. This is exactly what I told you earlier about the link between our Office and the Parole and Probation Administration. Aside from the ex-officio member, we have a sociologist, an educator, a lawyer, a priest and one who is experienced in background corrections. All these members are appointed by the President. In practice one of the Undersecretaries of Justice is designated as its acting chairman.

The administrative support staff of the Board is headed by an Executive Director who is also the Secretary of the Board and

it is charged with the duty of implementing the decisions, policies, programs and projects of the Board.

Under Act No. 4103, the Board is authorized to adopt such rules and regulations as may be necessary for carrying out its functions and duties. The new rules and regulations adopted by the Board which is embodied in the *Blue Book* is presented to you for reference. Take note that these rules and regulations are subject to change whenever the Board deems it necessary.

The Board, pursuant to law, is empowered to call upon any Bureau, Office, branch, subdivision, agency, or instrumentality of the Government, for such assistance as it may need in connection with the performance of its functions.

Objectives of the Board

The primary objectives of the Board are the following:

1. To uplift and redeem valuable human resource to economic usefulness; and
2. To prevent unnecessary and excessive deprivation of personal liberty by way of parole or the exercise of executive clemency.

Principal Functions of the Board

Its principal functions are:

1. To look into the physical, mental and moral record of prisoners who are eligible for parole or any form of executive clemency and to determine the proper time of release of such prisoner on parole;
2. To recommend to the President the extension of any form of executive clemency to prisoners other than those entitled to parole;
3. To assist in the full rehabilitation of individuals on parole or those under conditional pardon with parole conditions by way of parole supervision;

PAROLE SYSTEM IN THE PHILIPPINES

4. To authorize the discharge of parolees or pardonees from parole supervision after five (5) years from the grant of his parole/conditional pardon or after the execution of his maximum sentence, whichever is earlier; and
5. To revoke the parole or recommend to the President the revocation of the pardon of the grantee and order his return to the penal institution for him to serve the unexpired portion of his original sentence, if he violates any of the conditions of his parole or pardon either through a technical violation or a new crime.

At this point, I would like to inform you that in the Philippines, we call a prisoner released on parole as "Parolee" and a prisoner released on pardon as "Pardonee." This is to distinguish one from the other.

Requirements/Qualifications for Availment

We now come to the requirements or qualifications in order for a prisoner to be able to avail the benefits of parole and pardon.

The present policy of the Board is to make parole available to a prisoner whose conviction has become final and executory. The same is true with executive clemency cases which, by the way, are categorized into, Commutation of Sentence, Conditional Pardon and Absolute Pardon. Those with pending cases in court or whose cases are on appeal, do not deserve the Board's consideration.

Likewise the Board does not consider the case of any National Prisoner who is serving his sentence in a local jail unless authorized by the court or by the President. In such case, the Board makes a request to the Jail Warden to effect the immediate transfer of the prisoner to the National Penitentiary or to any penal colony under the supervision of the Director of Corrections.

Aside from the requirements as stated above, parole is applicable only if the sen-

tence imposed is more than one year and the prisoners has served the minimum period of his indeterminate sentence. Take note, however, that service of the minimum period of an indeterminate sentence by a prisoner does not automatically confer upon him release through parole. It merely vests in him eligibility for parole and the same may ripen into a complete release only when the Board is convinced that there is reasonable probability that if he is released, he will be law abiding and that his release will not be incompatible with the welfare of society.

Disqualifications for Parole and Pardon

Disqualified for parole are life termers, habitual delinquents, escapees, violators of conditional pardon, mental defectives, and those convicted of crimes against national security and public order such as, treason, conspiracy or proposal to commit treason, rebellion, espionage and piracy. You will see this disqualification on page 10 of the Blue Book. And for those not eligible or not qualified for executive clemency, such as conditional pardon and commutation of sentence, you can find it in pages 7 and 8 of the said Blue Book. Of course, in the case of absolute pardon, if a prisoner does not meet the minimum requirement as indicated in Sec. 9c (page 7) of the Blue Book, he is automatically disqualified for absolute pardon.

Procedure in Processing Parole

The Board's functions to grant parole and recommend executive clemency to the President principally rests on the assistance and cooperation of the Director of Corrections who has the overall authority of supervision over national prisoners confined in the National Penitentiary and penal colonies and the keeper of inmate's prison records and carpentas (prison jackets). The practice is for the Director of Corrections to forward to the Board, the prison records and carpentas of na-

PARTICIPANTS' PAPERS

tional prisoners eligible for parole and executive clemency in accordance with the rules and regulations laid down by the Board, within a certain period of time.

A qualified prisoner may or may not file his petition for parole. However, to draw the attention of and mobilize the Board into pressing the Bureau of Corrections for a speedy transmittal of prisoner's records and carpetas, a prisoner or any person in his behalf, may file petition with the Board. This way, a prisoner's reintegration into the mainstream of society is hastened and at the same time saves the government of its unexpanded cost of confinement.

In the case of executive clemency, particularly the commutation of sentence, the Board adopted the policy of recommending to the President, the commutation of a life term to an indeterminate sentence so that eligibility for parole comes in after the minimum sentence, as commuted, shall have been served by the prisoner. The favorable recommendation normally comes after a life term shall have served 8 years of his sentence and, for other specific cases, please refer to Sec. 9a page 5 and 6 of the Blue Book. On the other hand, conditional pardon is recommended by the Board to be granted upon a prisoner if he has served certain period of his sentence for specific crimes as indicated in Sec. 9b page 6 of the same Blue Book or in other cases, petitioner must have served at least one half (½) of the minimum of his indeterminate sentence.

In considering a prisoner for parole or conditional pardon, the Board gives special consideration and favorably acts on the petition of those not otherwise eligible for an early conditional release if the following exceptional cases are present:

1. Old age—provided prisoner has not yet reached 60th year at the time of the commission of an offense;
2. Physical disability—such as when a prisoner is bedridden, a deafmute, a leper, a cripple or is blind, provided he was not

- suffering from such physical disability at the time of the commission of the offense;
3. Serious illness duly certified by a government physician (example—cancer); and
4. Similar circumstances which show that continued imprisonment will be inhumane or will pose grave danger to the life of a prisoner.

The last form of executive clemency, absolute pardon, is sought by petitioners primarily for purposes of employment and clearance of one's derogatory record. Absolute pardon has the effect of not only restoring civil and political rights but also obliterates the criminal record of an offender from the National Bureau of Investigation's (NBI) Master Name Index Files. For this particular form of executive clemency, the Board imposes the minimum requirement, for qualification thereof, that at least 10 years must have elapsed from the date of petitioner's release from confinement or five (5) years from the date of expiration of his maximum sentence, whichever is more beneficial to him. However, the Board may consider an earlier petition for absolute pardon regardless of the minimum requirement of 10 years or 5 years, in special cases such as, when petitioner is seeking reinstatement in the government service; needs medical treatment which is not available locally; will take a Government or Bar examination; or is emigrating.

Parole Supervision of Parolees/Pardonees

The function of parole supervision over parolees/pardonees is performed through a Technical Staff under the Office of the Parole and Probation Administration. Its complement was jointly determined by the Probation Administrator and the Executive Director of the Board. The Technical Service serves as the service arm of the Board in the supervision of parolees/pardonees. This is pursuant to the administrative Code

PAROLE SYSTEM IN THE PHILIPPINES

of 1987. But, prior to this law the Municipal Trial Judge, who was then designated as ex-officio Parole Officers, supervised our parolees and pardonees.

After a prisoner accepts his parole or conditional pardon, he is released from his confinement but before proceeding to his destination, he is briefed on the conditions of his parole/pardon. The number of these conditions vary from 8 to 15 depending on the nature of the crime for which the prisoner was paroled/pardoned. Foremost of these conditions are: the duty to report regularly to a Parole and Probation Officer and to reside in a specific place which may not be changed without prior consent of the Board. This residence requirement is designed to enable his supervisor to keep tabs on his activities which he must keep within bounds. The parolee/pardonee is also required to endeavor to be employed regularly and to support himself; avoid "injurious and vicious habits"; and refrain from frequenting gambling houses, bars, beer gardens and in general, places of disreputable or harmful character; he shall not commit any crime and shall conduct himself in an orderly manner.

Upon the expiration of the parole surveillance period, which ordinarily lasts 5 years or up to the expiration of the maximum sentence, the Board may, upon the recommendation of the Parole and Probation Supervisor, grant a parolee/pardonee, a certificate of Final Release and Discharge from parole/pardon, that is, if the recommendation is a favorable one otherwise, the Board will

summarily order his arrest and recommitment to prison to serve the unexpired portion of his sentence, if the report is an infraction of the conditions of his parole/pardon. In the latter case, the most common violations are, unauthorized transfer of residence, disorderly behaviour and commission of another offense.

Last Year's Performance of the Board

In 1991, the accomplishment of the Board is quite significant because of considerable increase in its performance despite problems on some of its members.

The following statistical data proves this finding.

Except the statistical data on absolute pardon, the Board surpassed all its annual accomplishment since 1986 up to 1990 or for the past 5 years.

Problems

On the point of problems in its operation, the Board has been facing the same problem for some time. This is the issue on City/Provincial prisoners. The Board's inability to extend its arm to these prisoners is attributable to the failure of the City/Provincial Wardens concerned to forward on time, the required documents to the Board. Moreover, the duty to effect immediate transfer to the National Penitentiary of national prisoners confined in City/Provincial jails are sometimes neglected or ignored by some of these

	1986	1987	1988	1989	1990	1991
Granted Parole	2,056	1,764	1,491	2,084	1,855	2,242
Recommended/Granted Conditional Pardon	560	494	251	594	707	1,352
Recommended/Granted Commutation of Sentence	1,217	1,193	1,105	1,542	1,642	2,612
Recommended/Granted Absolute Pardon	5	43	37	17	7	27

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jail Officials. This happens despite the passage of Memorandum Circular No. 6 and Department Circular No. 4 of the Department of Justice, directing jail wardens all over the country to immediately effect the transfer to the National Penitentiary or to any penal institution nearest to their location, all national prisoners confined in local jails with administrative liability for failure or non-compliance on their part of this particular obligation. As always, these jail officials cite budgetary constraints as reason or excuse for their non-compliance.

Under the present set-up, City and Municipal Jails are under the supervision of the Philippine National Police while Provincial Jails are supervised by the Office of the Provincial Governor.

There are efforts to consolidate the administration of these three (3) local jails into a single management, but such plan was put to the ground over the objections of the authorities in charge of these jails.

Essence of Parole and Pardon

Parole and pardon undoubtedly are methods of non-institutional treatment of offenders which are universally recognized as effective modes of rehabilitating prisoners. Its essence is to provide strong motivation to a parolee/pardonee in order for him to avoid going back to his old ways and instead toe the line towards a new life. It must serve as a reminder that his status as a prisoner remains and that he may be ordered arrested and recommitted to prison anytime when the chance of temporary freedom granted him proves a failure.

Parole and Probation Compared

Parole is a mode of treatment of an offender by means of releasing him after he has served the minimum penalty imposed upon him by the courts subject to certain conditions imposed by the paroling authority. It is a means devised in favor of reform-

ing criminals by gradually returning to them their freedom until they can freely enjoy it without injury or danger to their fellowmen.

Probation, on the other hand, is a disposition under which an offender, after conviction but before he starts serving his sentence, is released on conditions imposed by the sentencing court and subjected to the supervision of a probation officer.

In point of availability, probation takes precedence over parole which can be availed of only after the offender has served part of his sentence. Parole is a limited form of non-institutional treatment and as a cost reducing mechanism takes a backseat to probation which is a total form as an alternative to incarceration as it can be availed of by the offender even before he has been institutionalized and tasted prison life.

Parole is available only to a prisoner who has been convicted by final judgment, sentenced to an indeterminate prison term of more than one year and has served the minimum period of said sentence. However, service of the minimum period is not a license to parole. It only makes the prisoner eligible and it is given only when the Board finds that a reasonable probability exists showing that the prisoner will be law-abiding and that his release will not be incompatible with the welfare of society.

Unlike probation, which has to be applied for, parole need not be sought. Under Act No. 4103, as amended, the Board of Pardons and Parole is mandated to consider the release on parole of a prisoner not otherwise disqualified, after he has reached parole eligibility date.

To ensure the review by the Board of the case of prisoners qualified for parole, existing rules require the Director of Corrections and the Wardens of City and Provincial Jails to forward the prison records to the Board within a certain period of time before the expiration of their minimum sentence. The Administrative Code of 1987 also vests in the Parole and Probation Administration the supervision over parolees and pardonees re-

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leased by, or upon the recommendation of the Board of Pardons and Parole. This is precisely the reason why I told you earlier that there's some point of attachment between the Board of Pardons and Parole and the Parole and Probation Administration, aside from the fact that the Probation Administrator holds a membership slot in the composition of the Board in an ex-officio capacity.

Probation can be availed of only by first offenders whose sentence is not more than 6 years. An application for probation is filed with the sentencing court which, if it finds "that the ends of justice and the best interest of the public as well as that of the defendant will be served thereby," will grant probation. The Court may however, deny the application if it finds that:

1. The offender is in need of correctional treatment that can be provided most effectively by his commitment to an institution;
2. There is undue risk that during the period of probation, the offender will commit a crime; and
3. Probation will depreciate the seriousness of the offense.

On the point of revocation, parole may be summarily revoked by the Board and effect his arrest and recommit him to prison for violation of the conditions of his parole in order to serve the unexpired portion of the sentence for which he was sent to prison. At this juncture, please remember that the legal status of a paroled convict is that of a prisoner, hence there is no need of resorting to judicial proceedings.

Probation may be canceled or recalled by the awarding court upon report of the pro-

bation officer that probationer has seriously violated the condition of his probation. In this case, probationer is entitled to a summary hearing. If the violation is established, the court may revoke or continue his probation and modify the conditions thereof. If revoked, the court shall order the probationer to serve the sentence originally imposed against him and his commitment to prison or that purpose.

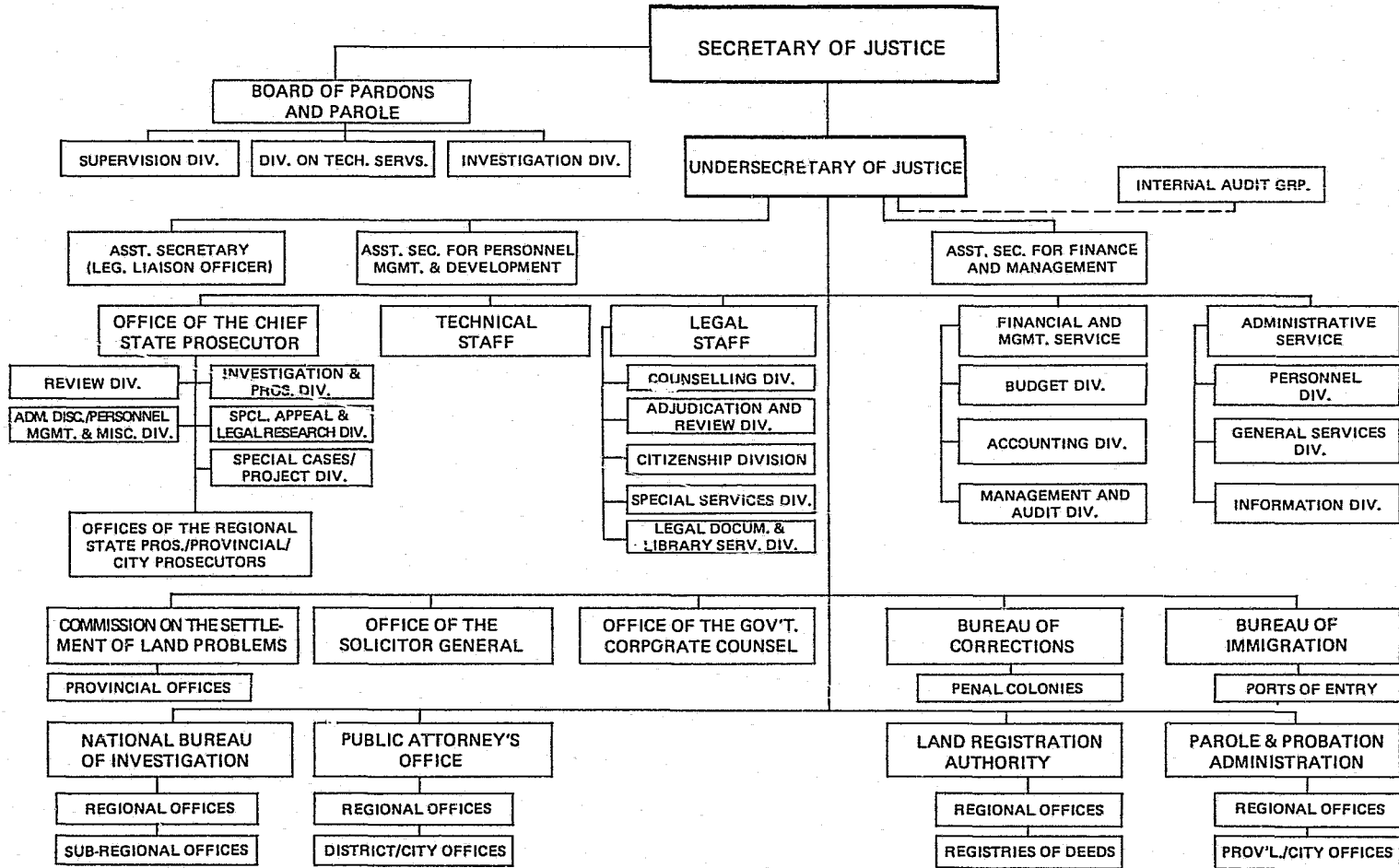
Let me state here at this point that a former probationer may still avail the benefits of parole and pardon once he qualifies according to the rules of the Board.

The successful completion of the parole surveillance of a parolee or pardonee will entitle him to a certificate of Final Release and Discharge. This certificate does not, by the way, restore him his lost civil and political rights as a result of his conviction as there is still need for the parolee/pardonee to file petition for absolute pardon.

On the other hand, probation is terminated by the same Court which granted probation upon the recommendation of the probation officer after finding that the probationer has complied with the conditions of his probation. Such termination signals the issuance by said court of an order of final discharge in his favor.

Before I finally end my presentation, I have attached the latest organizational chart of all the agencies under the Department of Justice pursuant to the Administrative Code of 1987 which, I believe, may be of great help for a better understanding of the position and the important role played by the Board of Pardons and Parole as an agency mandated to humanize the correctional system of the Philippines. With this, I am concluding my Presentation.

ORGANIZATIONAL CHART OF THE DEPARTMENT OF JUSTICE
(ADMINISTRATIVE CODE OF 1987)



Treatment and Rehabilitation of Juvenile Delinquents

by *Leo Chiline Tohichem**

Introduction

The development of Papua New Guinea, especially of its mineral resources has produced pockets of wealth for a number of citizens who have been fortunate enough to live in a developed area or otherwise take advantage of increases in wealth. In addition, there is a significant expatriate population in urban areas which enjoys a western lifestyle in terms of accommodation, transport, and amenities. The cost of urban life is high and it is easy for juveniles migrating to the urban areas to experience envy and to believe that (as was traditionally the case) wealth should be shared if not voluntarily then by simply taking it.

This paper will attempt to dissect the problem only in so far as the treatment and rehabilitation of juvenile delinquents is concerned. The development of the country has brought a lot of positive changes and inevitably negative effects as well. Initially, statistics are provided in order to understand the possible scope of juvenile delinquency in the country. This is followed by institutional treatment and community based rehabilitation programmes. The paper then concludes with options on how the country could better deal with the problem of juvenile delinquency.

Traditional culture placed significant controls over behaviour. It required obedience to parents and infractions of discipline were punished severely. Western concepts such as education, human rights, questioning as-

sumptions and authority have weakened the traditional system of social controls especially in the home. A casual borrowing of an article which in a village community would excite no suspicion, let alone be considered a crime, can now be treated as a crime. In traditional society juveniles were occupied with many tasks which were necessary for the maintenance of the community. In urban areas in particular where water and electricity are supplied and food is purchased and not grown, these tasks no longer exist. Juveniles may have little to do and become more susceptible to pressure from their peers to develop criminal practices. Females however, still retain the burden of their traditional tasks and consequently very few females come into conflict with the law.

Urban Migration has resulted in substantial population increases in urban centres of Papua New Guinea. The city of Port Moresby for example has grown from a population of around 130,000 in 1985 to approximately 200,000 in 1990. A substantial part of the increase is attributable to urban migration and the development of squatter settlements on the outskirts of the city.

Statistics

Statistics indicate that the youth figures form more than half of the PNG's population. National census for 1980 show 1,855,038 persons aged 24 or less out of a total population of 3,010,727; that is 62%. The 62% is comprised of 656,838—22% 6 years or below, 884,411—29% 7 to 18 years and 313,789—11% 19 to 24 years.

According to 1990 National census the population had risen to 3,529,538 from 3,010,727 in 1980, an increase of 17% or

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518,811. These figures exclude North Solomons where census was not taken due to prevailing political situation. Although the percentage distribution of population by age is yet to be finalised the general trend would be that there will be an increase in the group 7—18 years. Based on the 29% of 1980 the minimum population of youth from 7—18 years would be approximately 1,023,566 in 1990. This indicates that a little over 1/3 of the total population is comprised of people who will by the very nature and predictability display behaviour contrary to the norms or acceptable level of conduct throughout the country.

The Education system of the country seems to offer some relief in absorbing a proportion of youths particularly in keeping them occupied. In 1990 468,148 young people attended formal education from grade 1—12. These youths would generally be from 7 to 18 years. The attrition has also been quite high over the last five years. In 1986 82,838 pupils commenced primary school education at grade 1 and by 1990 a period of 5 years only 52,766 did grade 5. Again for the same period 45,363 pupils did grade 6 in 1986 and of that figure only 15,842 found high school placings in grade 7 during 1987. By 1990 only 10,288 pupils did grade 10. In 1990 98,232 pupils attended grade one (1) and if everything were to go well one would hope that in 9 years time all of them would be in grade 10. But if the previous record is anything to go by then the best hope is for 20,000 to complete grade 10 in 1999. The current education system is geared to formal employment and yet jobs in the public and private sector are scarce even for those who make it through to grade twelve. Indeed it is almost impossible for those who drop out along the way to get any formal employment at all. What happens to them then, the 1/3 of the population? This is a question facing the policy makers today. There is no doubt in anybody's mind that many of them will turn to a life of crime. It is this proportion of young people who turn

to juvenile crime that we should concern ourselves with.

Institutional Treatment Programs for Juvenile Delinquents

The Child Welfare Act of Papua New Guinea establishes Children's Courts which have jurisdiction over a child, a boy or girl under the age of 16 years. Over 16 years a juvenile enters the adult Court system. The Act gives power to the Children's Court to impose various penalties where offences are committed by children. The Act provides for the Minister to approve a "Mission Station, reformatory, orphanage, school or other establishment whether within the country or not as an institution for the purposes of the Act." The Act also provides for the appointment for the Director of Child Welfare who is responsible for the administration of the Act. The powers of the Children's Court include the imposition of a fine, imprisonment for up to six months and making a child a ward of the Director of Child Welfare. Where a child is committed to the care of the Director, he or she is often placed in a declared institution.

Presently there are a number of Juvenile Institutions in the country which are operated by the Catholic Church and the Salvation Army. They receive a subsidy from the State for their operations. The cost of keeping a child who is declared a Ward of the Director in an institution is also met by the State. The State does not itself operate any institutions. The objective in placing a child in an institution is the rehabilitation of the child with a view to his return to the community. The Courts may be said to take a strict view of offences committed by juveniles and it is not uncommon for juveniles to be sent to institutions for relatively minor offences such as petty theft. As indicated, the Court also has the power to commit a child to a corrective institution for up to 6 months. Sometimes the Court is obliged to do this against it's wishes because there is insufficient space in institutions.

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Overall the church institutions are capable of handling around 120 juveniles.

The programs followed by the institutions depend heavily on spiritual counselling and work schemes. The institutions also provide some basic education and in at least one case teach the juveniles how to earn and save income. This is done by way of allocating each juvenile a piece of land for the growing of crops. The crops are then sold in the market and the proceeds, which belong to the offender, are placed to his credit in a bank. These funds are then paid out to the juvenile on his release.

There are no studies on whether institutional programs have proved successful. Subjective evidence suggests that successes are achieved but where juveniles return to urban areas and squatter settlements it may be doubted whether the institutional period results in any basic change in behaviour. The juveniles are protected by legislation whilst detained in institutions and in corrective institutions. The Constitution of Papua New Guinea requires that juveniles be kept separate from adults in corrective institutions. The Director is responsible for supervising the treatment and care of juveniles in institutions and inspections are regularly carried out for this purpose.

Resources for the operation of juvenile institutions and related activities were funded at K556,000 in 1991. This amount included K257,000 for grants to institutions for juveniles as well as those concerned with the disabled and the mentally handicapped. In addition, in 1991 the government provided other grants to institutions by way of funding from the Ministerial Law and Order Committee. These grants are based on specific projects but are also applied for to supplement running costs. Staffing of institutions is a matter for the churches operating them and any staffing costs are expected to be met out of the government grant.

The principal constraints faced in relation to institutional treatment and institutional facilities are:

- (a) Overall lack of financial resources;
- (b) The absence of clearly defined programs of rehabilitation in institutions which identify objectives, methods and provide for eventual evaluation;
- (c) The lack of information on background of offenders, home circumstances, social and educational status, all of which if made available to the court at an earlier stage might well remove the need for custodial treatment;
- (d) The lack of up-to-date legislation providing for juveniles. The Child Welfare Act was enacted in 1961 and reflects the concepts of incorrigibility and destitution which were then current. Fortunately the recent enactment of the Juvenile Courts Act 1991 will substantially assist in improving the legislative framework for juvenile treatment;
- (e) There are insufficient places in institutions and because of this juveniles are sent to corrective institutions. The evidence suggests that by so doing the Courts encourage juveniles to develop greater criminal tendencies;
- (f) There is a tendency for the Courts to stand in loco parentis so that discipline and instruction which ought to be delivered by parents is imposed by the Court system. This inevitably results in the Courts imposing harsh penalties including the sending of juveniles to institutions who might otherwise benefit from other sanctions such as probation or community work;
- (g) Because of pressure on the prison system when juveniles are sent to jail, it is sometimes not possible to separate them from adult offenders.

As well as the Juvenile Courts Act (due to be brought into force in 1993) it is considered that institutional problems could be eased by greater use of Probation. The Children's Courts are being encouraged to make more probation orders and recent amendments to the Probation Act establish a direct

connection with the Children's Court. Probation has a low failure rate in that breaches of Probation run at around 5% only. The experience of Probation is that offenders benefit from the one to one contact between the Probation Officer and the offender. Probation Officers are taught the skills of counselling and it is considered that in many respects Probation with counselling conditions would be of greater benefit than institutional incarceration. The introduction of the Juvenile Courts Act will hopefully hasten this process since under that Act the Juvenile Court will be assisted by a team of Juvenile Court Officers whose principal task will be ensuring that a juvenile is protected within the system and, in terms of disposition, is appropriately dealt with. In fact, the Juvenile Court will not be able to impose a sentence for an offence unless and until a Pre-Sentence Report is provided to it by the Juvenile Court Officer.

Community Based Rehabilitation Programs for Juvenile Delinquents

It may be said that all community based programs for juveniles who have come into conflict with the law are operated by the churches in Papua New Guinea. Increases in crime over the past few years have produced greater efforts by the churches in attempting to convince both adult and juvenile offenders of the value of leading a life based on Christian values and principles. Programs by the churches have been developed on an ad hoc basis and are not in most cases structured in any particular way. Many have been developed on a case by case basis in response to public announcements by criminals that they have decided to give up criminal behaviour and become law-abiding citizens. Sometimes these events have been provoked by the churches who have gone out and actively sought to persuade known criminals to change their ways. In other cases the criminals have simply decided to choose a different path in life.

It is difficult to provide any thorough ana-

lysis of the structure, content or value of programs run by the churches as indicated above. Many of them depend upon strong spiritual guidance and little else. Others combine spiritual guidance and discipline with employment of some kind. One program in particular which terms itself a "halfway house" takes in criminals who have been released from prison or who have decided to give up criminal ways. It provides them with accommodation and food.

It seeks employment for them in the private sector and if problems arise during that employment it is always ready to visit and counsel the reformed person. This ongoing contact with continual reinforcement of spiritual values seems to give reformed offenders a sense of belonging and of security which was not present before in their lives. What is not known is whether discharge from such a program would result in recidivism or whether the patterns of behaviour hopefully entrenched by the program would remain intact.

The Government, in conjunction with local level government and the community has attempted to deal with this issue by providing activity or small-scale employment opportunities to unemployed youth. Some of these youths may be convicted offenders and others have the potential to commit crime for a number of reasons. Activities such as cleaning the cities, engaging in small-scale poultry and piggery projects, fishing and transport services have been organized to attempt to soak up the uneducated and unemployed who have no other activity to pursue. Attempts have been made to encourage juveniles to return to the rural areas and to their villages but to date with little real observable success. The government has not adopted any policy of forced relocation either administratively or as a penalty for an offence. Vagrancy legislation adopted from before independence has been ruled in conflict with the Constitution by the Supreme Court. Recently the Constitution was amended to allow persons to be deprived of their

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liberty if judged to be vagrants. However, no implementing legislation has been formulated as yet to give effect to the constitutional amendment.

In 1990 the Government passed the National Volunteer Service Act. The legislation provides for a Director of the National Volunteer Service who is responsible to a governing council. The objectives of the NVS are, broadly speaking, to assist in nation building. Persons can join the NVS for 2 years at a time and may receive a nominal allowance. The National Volunteer Service has completed its planning and strategy and is currently developing a number of programs which will eventually result in significant numbers of persons being employed as volunteers within the community. The Government has provided K200,000 to date to fund the NVS. It is expected that overseas funding through UNDP will be made available for some NVS activities. The Government has instituted a program for the involvement of youth in development. This program was funded at K5,000,000 in 1991. Its objective is to lessen the vulnerability of youth to law and order problems, to enable them to participate meaningfully in community service activities in the modern and traditional sectors.

The program description is the coordination, support and development of relevant social and economic activities through provision of funds, manpower and dissemination of information. The program is operated by 31 Government Officers with assistance from Provincial Government Officers in the Provinces. The concept is for particular programs and projects within the overall objective to be formulated and implemented with Government grants.

The Government also supports the expansion of women's role in development through a program funded at K400,000 in 1991, the objective of which is to establish and promote the recognition of women's role in society through the enhancement of their participation in economic and social develop-

ment. The program description is the provision of funds to facilitate women's promotional activities and the provision of grants to the National Council of Women.

As indicated above at this stage of its development Papua New Guinea must take active steps to provide activities or employment for its growing youth population. The issue is not therefore simply that of providing appropriate community based rehabilitation programs but extends to measures which hopefully will prevent an increase in juvenile offender population. The constraints associated with the church, community and government programs are similar to those noted above in relation to institutional programs. In particular, there is a lack of overall policy coherence and coordination.

The Government, in addition to the programs noted above, has recently elected to introduce a further program based on legislation establishing a National Service Corp. This organization appears similar in scope to the National Volunteer Service and indeed may overlap in terms of objectives and policies. The National Service Corp was funded at K6,000,000 in 1992. The Corp is intended to be voluntary and initially at least will be established in rural areas. The rationale is that providing activity in those areas will slow down urban migration. The Corp will be engaged in projects which can broadly be described as nation building especially the construction of roads and bridges. The concept represents a further attempt to provide activity and lessen the likelihood of further criminal activity. Obviously there is scope for rationalization of all these programs at some stage.

Other programs that hopefully will assist with rehabilitation and which are being planned relate to community work. A community work program did operate in the capital city for about 12 months and was successful in that it reduced the number of persons who might otherwise have gone to jail for minor offences.

It was not especially designed for juvenile

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offenders however. One difficulty with community work is that of supervision and another is the traditional dislike of publicly shaming persons within the community. For administrative and traditional reasons therefore, community work has problems which are taking some time to resolve.

Future prospects for the development of community based programs are difficult to assess. In terms of community, Papua New Guinea traditionally had a strongly structured rural community. This community is still strongly bound together in the rural areas. In urban areas community as such relates to place of origin.

Conditions for ensuring a meaningful life in the community relate to the economic and social development of the country and to the various cultures of Papua New Guinea. Economic development is at present concentrated only in certain parts of the country and it is the task of the Government to attempt to distribute the benefits so that all may share a meaningful life.

Positive measures involving the mobilization of resources include programs for crime prevention as detailed above and the procedures and processes provided for by law. Juvenile justice is an integral part of the criminal justice system with its own system or rules and procedures under the Child Welfare Act and Juvenile Courts Act. The introduction of the latter act is a development with a view to improving present juvenile justice practices and procedures.

The Government is attempting to develop a constructive social policy for juveniles which will assist in the prevention of juvenile crime. The Government's medium term priority areas of law and order, education and manpower development, economic growth and job creation and constitutional reform support the general development of a constructive and positive social policy. The Constitution of Papua New Guinea sets an objective of integral human development and the State is obligated to assist juveniles and others to improve themselves through pro-

vision of:

- (a) Adequate means for shelter, food and water;
- (b) Educational opportunities for all;
- (c) Access to health care and social welfare services;
- (d) Provision of adequate infrastructure and;
- (e) Protection of basic human rights by means of the Constitution and the law.

The focus of the Government on integral human development underlines the belief that the development process is designed to improve the well-being of all the people including juveniles. A juvenile under the law is a person within the jurisdiction of the Children's Court, that is a person aged 16 or less. The Juvenile Courts Act brings all persons under the age of 18 within the jurisdiction of the Juvenile Court. The age of majority in Papua New Guinea is 18 years. The Child Welfare Act and the Juvenile Courts Act establish a set of laws, rules and provisions specifically applicable to juvenile offenders and institutions responsible for administering juvenile justice. The age of criminal responsibility in Papua New Guinea is 7 years fixed by the Criminal Code Act and repeated in the Juvenile Court Act. The juvenile justice system provides for the interests of the juvenile to be paramount. The aim of the legislation is to seek the most appropriate disposition of an offender and not merely punish that person. Whilst the Child Welfare Act is not in line with modern thinking the Juvenile Courts Act establishes the office of Juvenile Court Officer charged with the responsibility of protecting infants and juveniles who come into conflict with the law.

Before a Juvenile Court imposes sentence it must order a Juvenile Court Officer to prepare a Pre-Sentence Report on the juvenile. This will ensure that the personal circumstances of the juvenile are taken into account in sentencing. The report must contain:

- (a) A report of any interview with a parent

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- of the juvenile or a responsible person with whom the juvenile is living;
- (b) Reports of interviews with any person relevant to the Court proceedings;
 - (c) Social background information; and
 - (d) A recommendation as to the most appropriate sentence.

The Juvenile Court has a wide discretion in terms of sentencing and may:

- (a) Discharge a juvenile without conviction;
- (b) Enter a conviction but impose no further order;
- (c) Order payment of a fine not exceeding K200;
- (d) Order payment of damages by the juvenile not exceeding K200;
- (e) Place the juvenile on probation for not more than three years;
- (f) Order that the juvenile be made a ward of the Director of Child Welfare;
- (g) Order that the juvenile be made a ward and placed in the care of the Director with a directive that the ward be committed to custody in a juvenile institution and sentence the juvenile to a term of imprisonment in the juvenile section of a corrective institution.

A Juvenile Court Officer is given the power:

- (a) To enter police stations to interview juveniles;
- (b) To be present at interrogations of juveniles; and
- (c) To question an arresting officer in relation to a charge laid against a juvenile.

The relationship that should develop between the police and the Juvenile Court Officer will assist in ensuring that Police discretion is exercised in an objective manner.

Where an infant is detained by police there are provisions in the Act requiring immediate notification of parents and a Juvenile Court Officer. Where a juvenile is arrested

police must also immediately notify the parents and the Juvenile Court Officer. In terms of accountability the Act provides that a person who detains an infant or arrests a juvenile and who exercises a power or performs a duty in breach of the act may be liable to pay exemplary damages. In addition the Constitution of Papua New Guinea provides a broad range of protection for persons arrested or detained.

A good deal of responsibility will rest upon the Juvenile Court Officers. The Juvenile Court Act will not be brought into force until 1992 since the intervening period is required in order to thoroughly train the Juvenile Court Officers in their duties and functions. It has been decided that the functions of the Juvenile Court Officer will be given to Officers now carrying out the duties of a Probation and Parole Officer. This should ensure that qualified personnel are operating with the Juvenile Justice System. The orders of the Juvenile Court, and of the present Children's Court can be appealed to the National Court and from there to the Supreme Court.

Of special importance in the Juvenile Court Act is a list of factors which the Court must take into account before deciding whether or not to commit a juvenile to imprisonment or custody. The factors relate to:

- (a) The offence;
- (b) The characteristics of the juvenile;
- (c) The family background and social environment of the juvenile;
- (d) Any previous history of offences, community services;
- (e) Facilities available to assist the juvenile; and
- (f) Proposals put forward by the juvenile or the parents for future improvement of the juvenile, and other relevant factors.

Orders made in respect of juveniles for custody or imprisonment may be reviewed on application by the juvenile, a parent, the Director, a Juvenile Court Officer or a Pro-

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bation Officer. The grounds for review include the best interests of the juvenile. The Court has power on a review to confirm, vary or discharge the order. The rights of juveniles are provided for by the Constitution of Papua New Guinea. The right of the juvenile to privacy is safeguarded in the Child Welfare Act and the Juvenile Courts Act. Proceedings are held in private under both Acts and it is a criminal offence to publish a report of proceedings except in specified circumstances. The Court must also reduce to a minimum contacts between the juvenile and the public and a juvenile and an offender appearing before any other court. A juvenile's fingerprints may not be taken and he may not be photographed except where the offence is an indictable offence. Where proceedings for an indictable offence are dismissed fingerprints or photographs of the juvenile must be destroyed. The Court records of a juvenile must be kept separate and may not be published except in specified circumstances. Similarly, the records of juveniles in institutions must be kept confidential.

With regard to detention pending trial the Juvenile Courts Act provides for a juvenile when arrested by police to be placed in a remand centre or other approved place and for a Juvenile Court Officer to be notified of the arrest, the reasons for the arrest and the place of detention. When placed on remand the Juvenile Court Officer must notify the parents or a responsible person. Proceedings before the Juvenile Court may be adjourned for a maximum of 14 days only unless the juvenile or person representing the juvenile agrees to a longer period. A bail application can be made at any time to the Juvenile Court.

The Juvenile Court and the Children's Court are required to follow specified procedures in taking a plea from the juvenile as to guilt or innocence. The procedure ensures that the juvenile fully understands and appreciates the nature of the proceedings. In all hearings the Court must receive all facts

and opinions into evidence and is not bound by strict rules of evidence. The Court may where it considers it necessary or desirable, adjourn the proceedings for the purpose of discussing any relevant matters with the juvenile or any other person immediately concerned with the matter. The Constitution of Papua New Guinea further imposes requirements intended to ensure that all persons are given fair trials.

In proceedings before the Children's Court and a juvenile Court a juvenile may be represented by a lawyer or other person and a Juvenile Court Officer will also be present. Further, the Constitution of Papua New Guinea guarantees the right of a person charged with a criminal offence to be represented by a lawyer of his or her choice. As indicated the Juvenile Court may not proceed to impose sentence unless and until a Pre-sentence Report is provided to it. The Court may not impose capital punishment or corporal punishment and may terminate the proceedings at any time. In relation to institutionalization it is clear that the legislation envisages this will be a last resort. Probation is intended to be fully utilized and many conditions may be imposed when ordering probation. These include:

- (a) Attendance at a specified school;
- (b) The performance of appropriate community service;
- (c) Restitution where damage to property is caused;
- (d) The juvenile shall undergo treatment to overcome problems associated with alcohol or dangerous drugs.

If placed in an institution located within a corrective institution the juvenile institution must be separate and detached from all other sections within the corrective institution, it must be used exclusively for juveniles and it must provide appropriate accommodation, supervision and facilities for recreation and rehabilitation. Remand Centres may only be used for juveniles awaiting trial or placement

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in a place of imprisonment or custody. An institution must arrange for the maintenance and care of a juvenile committed to it and for the provision of medical treatment as required. So far as is practicable the juvenile section of a corrective institution and a juvenile institution must provide rehabilitation, educational and training programs and religious instruction. The superintendent of an institution must formulate rules for the good conduct and management of the institution and of juveniles and must report to the Director every six months on the progress of each juvenile detained. The superintendent stands in loco parentis to the juvenile detained in custody and is responsible for the well-being of the juvenile subject to the direction of the Director.

Release from an institution may result in the termination of the period of imprisonment, by way of a review of the original order, or by appeal. The review provisions in particular enable the Juvenile Court Officer and the Director to ensure protection of the juveniles and their release at the appropriate time. There is no sex discrimination in Papua New Guinea under the law and female offenders are therefore entitled to the same rights as male offenders.

Recommendations

In developed countries adequate research, evaluation, and police planning results in a greater degree of knowledge of the probable causes of juvenile delinquency. In developing countries like Papua New Guinea the process of policy formulation is often based on scant information and data. This does not necessarily mean that the programs and solutions proposed and introduced are or will be wrong or ineffective. In developing countries also, the social structure which is often a matrix of traditional and introduced cultures often is itself a complex and developing aspect of development. The causes or apparent causes of deviant behaviour may be thought mainly to be economic in nature. However, it is also likely, especially in soci-

eties which have strong traditional cultures, that super-imposing another culture on a traditional base itself leads to problems of dislocation, disfunction and is a cause of deviant behaviour. Education is crucial so that there is a greater understanding amongst the people of economic and social development. Information and awareness as to the introduced systems for dispute resolution and deviant behaviour is also vital.

In this sense the causes of delinquency may be more social than economic as may be the case in western societies. A greater appreciation and analysis of the effects of social change in a developing society would undoubtedly assist in formulating policies and programs to counter anti-social behaviour. Information gathering and analysis, education and awareness raising are therefore essential elements in any strategy in a developing society which is faced with problems of juvenile delinquency. In economic terms, with development comes crime. Many studies especially in Africa have shown this to be the case. Some States attempt to deal with economic dislocation by introducing measures which might be considered repressive such as use of vagrancy laws to control urban migration and the removal of squatters in urban areas. This produces a conflict between what might be considered effective but repressive and the alternative of allowing time to take its course and upholding the value of human rights.

It is perhaps necessary to attempt to find a middle ground. This means that programs must be devised which are integrated and which are supportive of integral human development.

A program which is community based must take account of the nature of the community and its cohesion or lack of cohesion. It may be necessary initially to convince the community that it is indeed a community. It cannot be assumed that a sense of community and of volunteerism within that community will automatically be present.

A program which is intended for both

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crime prevention and rehabilitation of juvenile offenders must, at least in Papua New Guinea, provide some activity or employment for those placed in it. It should also have a strong spiritual content which is supportive of good social values. There must be a clearly defined set of objectives and there must be adequate evaluation of the results of the program. The Government of Papua New Guinea has amongst its objectives in the law and order sector the encouragement and further participation of the rural and urban communities in the maintenance of law and order. The sectorial strategy provides for increased government support to the community and its informal mechanisms for settling disputes. The aim is to resolve problems at the community level so that the formal court system is not entered. For this purpose the Government has established local level courts called Village Courts which settle disputes within the community by reference to custom. These courts appear to work well in rural areas where there is a strong

sense of community but in urban areas they have become copies of the formal court system. One of the reasons for this is the lack of an identifiable community.

As indicated, a cohesive community is essential to any program for crime prevention or juvenile delinquency. Efforts should therefore be made to increase the awareness of the importance of community and to tap into its resources once established. It should not be necessary in a developing society with strong traditional structures for the youth of the country to be locked away in institutions for deviant behaviour. There is no reason why the community should not take responsibility for any corrective action. What is required is an integrated plan and a policy framework which will awaken within the community its responsibility, its caring and its right, within an acceptable and properly defined structure which respects the rights of all, to effectively resolve deviant behaviour by juveniles.

SECTION 3: REPORT OF THE COURSE

Summary Reports of the Rapporteurs

Session 1: Pre-Trial Detention and Pre-Trial Dispositions by Police, Public Prosecutor and Other Agencies

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Solonga Arachchi
(Sri Lanka)
- Co-Chairperson:* Mr. Mohammed Jahir Khan
(Fiji)
- Rapporteur:* Ms. Naree Tantasathien
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Mr. Masaki Tamura (Japan)
- Ad Hoc Advisers:* Ms. Carol Ann Nix
Mr. Satyanshu Kumar
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- Advisers:* Mr. Hiroshi Nakajima
Mr. Katsuyuki Nishikawa

Introduction

Our group consists of Mr. Mohammed Jahir Khan (Fiji), Mr. Nuruddin Kassim (Nigeria), Mr. Don Bernard Rufus Solonga Arachchi (Sri Lanka), Ms. Naree Tantasathien (Thailand), Mr. Tsuyoshi Iha (Japan), Mr. Kazuhiro Ishida (Japan) and Mr. Masaki Tamura (Japan). The topic for discussion in this group workshop is "Pre-Trial Detention and Pre-Trial Dispositions by Police, Public Prosecutor and Other Agencies." It is intended to study the present system as it applies, to review and explore all possible means of making it more humane as it will reflect "the principles of the fundamental human rights" of the United Nations Charter to which all the countries represented in this training course are signatories. It is further

intended to encourage the rehabilitation of offenders, reduce stigmatization caused by sentencing so as to facilitate the reintegration of the offender into the society, curtail prison overcrowding, and to reduce the financial burden incurred by parties involved and the judiciary. This paper is partly the outcome of all the individual presentations, as it relates to all the respective countries and is a reflection of the individual experiences of the group members. We wish to extend our profound gratitude to the Deputy Director Hiroshi Nakajima and Prof. Katsuyuki Nishikawa of UNAFEI for their invaluable contributions during our deliberations. We also wish to acknowledge the benevolence of visiting experts; Ms. Carol Ann Nix, Deputy Prosecuting Attorney of St. Joseph County Prosecutor's office in U.S.A., and Dr. Satyanshu Kumar Mukherjee, Director, Reserch & Co-ordination, Criminal Justice Commission in Australia. We are also grateful and indebted to our interpreters whose expertise and efforts made deliberations possible and successful.

Scope

The group combination as has been reflected in the introduction of this paper cuts across different cultures, religious and social backgrounds, which in no small measure affects common definitions and their applications to the local statutes. Similarly, procedures as to handling of criminal cases differ from one country to the other, and so the offences taken into consideration are those that do not have any political undertones. In some countries there exist "Terrorist Activities" but today, it is very difficult to draw a clear line in the definitions of Terrorism and Civil War. So, as much as possible, ef-

forts shall be made to restrict definitions to the general principles as contained in the United Nations Charter on "Protection of Human Rights," and to enhance the extension of these principles to reflect the content of the postulates of existing written laws/statutes of the individual countries represented in this group.

Similarly the initial title of this paper was "Avoidance of pre-trial detentions and pre-trial dispositions." The participants argued the possibility of ambiguity with "avoidance" as it may affect the purpose of the paper in relation to pre-trial detention. It was also further argued that writing on pre-trial detention would rather stimulate more research work than just discussing the avoidance since it is agreed that there are unavoidable detentions. And so the title of this paper has been changed to "Pre-trial detentions and Pre-trial dispositions."

The group also had to resolve and to standardise the meaning of "Pre-trial Dispositions" since in all countries the police and the public prosecutor have such powers to dispose of some cases, and in Sri Lanka there exists community based disposal of criminal cases. Looking at it legally also, one could see pre-trial disposition to mean before the trial starts. However, since this paper ideally is to examine the damaging effects of sentencing and the stigmatization of imprisonment, and also to look into the dynamics of overcrowding of prisons, the definition of "Pre-trial" was agreed, on consensus of the members of the group, to include the trial itself. "The trial itself" is to mean when the prosecution and the defence have closed their cases pending judgment.

General Approach to the Judicial Administration System

In the earliest formal system of law, one of the most noted was the Codes of Hammurabi. The Codes of Hammurabi were written on a column of stone and were discovered by the French explorers in the Persian

Gulf in 1901. They contained 282 Codes describing the responsibilities and duties of each individual in the society, and detailed penalties for violations of social norms. These Codes were the first discovered to be based on the principles of "Lex Talionis" which when translated means "An eye for an eye and a tooth for a tooth." On the premise of these Codes, then, one could exact no lesser penalty than the worth of that which had been lost. Although crime is a deviant social behavior for which there is a universal acceptance for punishment, the evolutionary development of man in criminal justice system somehow had to discard these Codes, as they are brutal, vengeful and retributive. Societies nowadays take to a more formal and rational approach, and espouse a kinder, more humane and rehabilitative response. The task to fight and check criminal behavior is the responsibility of all citizens. However, the state, with the help of appropriation, accords special powers to the law enforcement officials, judicial officers and other relevant agencies.

In Japan, the principal investigative agencies are the police and the public prosecutor (a government lawyer). The police, while concerned with the primary function of enforcement, hands over all arrests to the public prosecutor for investigations and all other subsequent actions. The public prosecutor has also powers to arrest and initiate investigations on his own initiative.

In Thailand, the responsibilities of investigation of criminal cases are initiated by the police and the investigating files can be supplementarily inquired by the public prosecutor.

In Fiji, Nigeria and Sri Lanka, investigations into criminal cases are solely handled by the police. The prosecutor in his own right, while the case is undergoing legal scrutiny in court, may require the police to investigate further or clarify areas of complexity in a particular case.

PRE-TRIAL DETENTION AND DISPOSITIONS

Arrest

In Japan, a warrant of arrest issued by a judge is usually necessary for an arrest of an offender, but any person may arrest without a warrant an offender who commits an offence in his presence; and also an investigating officer having sufficient grounds to believe that a person has committed a serious offence may arrest him, but must procure a warrant from a judge immediately thereafter.

In Fiji, Nigeria, Sri Lanka and Thailand, specified power of arrest are conferred on the police. The police officer may arrest without a warrant:

- (a) any person whom he suspects on reasonable grounds of having committed an indictable offence, except if the written law creating the offence provides that such an offender cannot be arrested without a warrant;
- (b) any person who commits an offence in his presence notwithstanding that the law creating that offence provides that an offender cannot be arrested without a warrant;
- (c) any person who has in his/her possession property suspected to have been stolen or acts suspiciously thereby creating reasonable doubts that he/she is doing so to commit a serious offence;
- (d) 1) any person who is a deserter of the police force, or the Armed Forces (this particular section is not applicable in Thailand),
2) any person who has escaped from lawful custody or whom he suspects that there is a warrant of arrest issued for his arrest;
- (e) when a person has requested the arrest of another person charging him with the commission of an offence and stating it in a written complaint;
- (f) any person with unlawful possession of house/car breaking implements. The burden of proof of lawful possession of such

implements lies on the suspect.

The power of arrest for private citizens is also provided and this may include magistrates and prosecutors i.e.:

- (a) Any person who commits an offence in their presence at anytime of the day in case of felony and if it is a misdemeanor only by night time;
- (b) A private owner of property, his servants or any person authorized by him can arrest person(s) found committing an offence involving injury or loss to their properties.

An arrest made by private citizens are however to be handed over immediately to the police.

Detention

Period of Detention

In Japan, when the police arrest the suspect, he has to be referred to the public prosecutor within forty-eight hours. The public prosecutor, within twenty-four hours after he accepted the suspect, must decide whether to request a judge for detention or to release him. When the public prosecutor believes it necessary to detain the suspect, he is to request the judge to grant the warrant of detention. The period of detention at this stage is ten days. The judge may extend the period upon request of the public prosecutor, when it is deemed that unavoidable circumstances exist. The total period of such extension is no longer than ten days. The public prosecutor is required to carry out necessary investigations within this period and to decide whether or not to prosecute the suspect; if the prosecution is not initiated within this period, the public prosecutor must immediately release the suspect. The period of detention for the accused is for two months following the date of institution of prosecution. If there is any special need to prolong detention, it can be renewed for successive one

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month period. The renewal of the detention period can be made only once except in the cases where the detention is really necessary. The procedure makes precise distinction between detention of a suspect before institution of prosecution and detention of a defendant.

In Thailand, the police can detain a suspect for not more than seven days after which the court may grant a warrant of detention. The detention period during investigation depends on the punishment provided for the offence. In criminal offences punishable with a maximum penalty of ten years imprisonment, the court may successively grant a warrant of detention for not more than twelve days on each instance but not exceeding a total of forty-eight days. In offences that attract punishments exceeding ten years the same procedure applies but the total number of days shall not exceed eighty-four days. In Nigeria and Fiji, if the investigations are not completed within the period of twenty-four hours, the court may grant a warrant of detention for up to a period of ten days. But in Sri Lanka, the police cannot keep a suspect or an accused person more than twenty-four hours in police custody. If the investigations are not completed, the court will keep the suspected person in remand custody until the police investigations are over. The court has the discretion of releasing or remanding the suspect.

Grounds for Detention

The reasons for detention are basically the same in all the countries. Offenders are detained for the following reasons:

- (a) To ensure the attendance of the offender in court for trial.
- (b) To prevent the offender from interfering with investigations or tampering with evidence.
- (c) If there is reasonable ground to believe that the offender would escape.
- (d) If the offender has no fixed place of abode.

In some countries, offenders are detained for the following reasons:

- (e) To stop the offender from further commission of offence.
- (f) For the offender's own safety, in cases where vengeance is expected or there is an apparent public outrage as to the offender's conduct.

Institutions for Detention

In Japan, there are specified detention houses for the detention of suspects and defendants, but the police cells are also used. Juveniles are kept separately in custody from the adult suspects. Juveniles can also be confined in juvenile classification homes for appropriate protective measures.

In Fiji, Nigeria, Sri Lanka and Thailand, suspects are initially detained in the police cells. Juveniles are kept separately from the adults in different cells. There are variations in Thailand and Sri Lanka. If a warrant of detention is issued, the suspects are remanded in the jail under the correction department, while in Nigeria and Fiji, the police may request the court to issue the warrant of detention for the suspect to be detained in the police cell for further investigation.

Bail

Except Japan, where there are necessities to arrest and detain suspects, the constitutional rights of the suspects should always be in consideration, as it is provided that "Any person detained for any alleged offence, the officers making such arrest and detention must release the suspect on bail or bring him before a court or tribunal of a competent jurisdiction within a reasonable time." Reasonable time in all the countries have been interpreted to mean between 24 and 48 hours. It is within this time that an offender must be brought before a magistrate or a judge with sufficient evidence to require a warrant of detention. The suspect should also be fairly represented either by himself

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or by his counsel.

In Fiji, Nigeria and Sri Lanka, where the police have such powers to grant bail, discretion can be used for all simple offences and misdemeanors and for some felonies; but, where the offence is one that attracts capital punishments only a court of a competent jurisdiction can consider the bail. The bail system is the only provision where an offender can get a provisional release from detention while the alleged offence is being investigated. Bail is a surety taken by a person made responsible for the appearance of an accused person at a certain place and on a certain date to answer charges. This can also be explained simply as a contract whereby an accused person is delivered to his surety or delivered to himself as his own surety for such appearance before the investigating officers or the court as the case may be.

The conditions for bail are generally the same in all the countries. The following conditions are observed before the bail is granted:

- (a) The nature of the charge against the accused person;
- (b) The seriousness of the alleged offence;
- (c) The likelihood of the accused person interfering with evidence;
- (d) The criminal record of the accused person;
- (e) The likelihood of the accused person escaping from the jurisdiction of the court;
- (f) The likelihood of his committing more offences if he is released; and,
- (g) The frequency of the commission of the offence in the state.

In Japan, when prosecution is instituted against a suspect who is already under detention, the detention is continued. After institution of prosecution, however, bail may be granted by the judge or the court on request. Bail is a system for the release of the defendant on condition of payment of the bail money. Prior to institution of prosecution, there is no provision for bail for a suspect.

When the request for release on bail for defendant has been made, the bail must be granted (this is referred to as "mandatory bail") unless the judge or the court is certain that the defendant is charged with a serious offence or there is reasonable ground to believe that the defendant may destroy evidence.

When the request for release on bail has been made, the judge or the court not only examines whether the case is subject to mandatory bail, but also considers whether it is proper to grant discretionary bail. If the judge or the court deems it proper, it grants bail as the case may be.

The judge, other than being the one who will deal with the case at public trial, is in charge of bail of the defendant who is waiting for the first trial date after prosecution. The court decides the bail of those whose trials have started. This principle is to keep the courts free from prejudice concerning the particular case.

The application for bail in courts is generally made after the accused person has been formally charged and his plea has been taken.

In Japan, even before the application for bail, when the request for detention has been made, the judge has not only to examine the evidence but also to inform the suspect of the charge and hear his/her statement in order to decide whether reasonable grounds for detention exist or not.

The application for bail can be made orally by the accused person himself or by his counsel if he is represented. There isn't any rule of law which requires that an application for bail must be in writing.

The court would hear the representation of the prosecution and the defence and then consider or refuse.

Where the judge or the court grants bail, the amount of the bail money is fixed at the discretion of the judge or the court. However, the financial position, the charge and the character of the defendant are taken into consideration. In Nigeria, Fiji and Sri Lan-

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ka, a written undertaking by the surety in the sum as determined by the court would be sufficient, however breach of bail conditions constitute a criminal offence.

In Japan, actual money or some negotiable security is deposited, and where the suspect fails to report at the specified court as summoned, he forfeits partly or wholly the deposit.

In Thailand also money or negotiable security is deposited, but where a suspect is provisionally released on bail, the investigations must be completed as in cases where the release is pending institution of prosecution. Where the investigations are not completed and the prosecutions are not instituted within six months, the surety will be discharged of responsibilities.

In Sri Lanka there are provisions for courts to grant bail to a co-accused person before police arrest, if the facts are reported to the court or one of the suspects is already produced in court. If the police need to record the accused's statement or to interrogate him thereafter, police cannot perform such duties without the permission of appropriate courts.

Pre-Trial Disposition

Japan

In Japan; there are two types of investigation, compulsory and non-compulsory. Non-compulsory investigation is that in which the offender is neither arrested nor detained, but the police conduct the investigation as it relates to the offence alleged. Where they find out that the case is spurious, they drop the charges and close the case; the same applies to trivial cases like larceny, petty frauds and minor embezzlements where refunds or compensations have been made. The police can drop such charges without referring them to the public prosecutor to finalize, but they would make a monthly report for administrative records. The disposition by the police also includes minor traffic offences where administrative fines are applicable.

In Japan, only the public prosecutor insti-

tutes prosecution. The discretion for non-prosecution measures by the public prosecutor are provided as follows:

(a) Insufficiency of Evidence

If the investigating prosecutor finds that there is no sufficient evidence to prosecute or the facts are false, he can drop the case.

(b) Suspension of Prosecution

If, after considering the character, age and situation of the offender, the gravity of the offence, the circumstances under which the offence was committed, and the conditions subsequent to the commission of the offence, prosecution is deemed unnecessary, prosecution need not be instituted. The system of suspension of prosecution reduces the government expenditures and the problem of prison overcrowding.

(c) Other Reasons

For example, where the prosecutor finds that the offender is of unsound mind or may not be competent to stand trial, he can drop the prosecution.

The public prosecutor, with the consent of the accused person, may make a request for summary order simultaneously with the institution of prosecution to the summary court. This, however, is applicable to minor offences which are punishable with a fine of not exceeding 500,000 yen or minor fine. On such a request, the summary court can examine only the documentary and real evidence in the case and impose a fine without going into a public hearing. If the parties are, however, not satisfied, the prosecutor or the defendant may apply for a formal trial within two weeks. If the application is considered legal, then a formal trial in accordance with the usual provisions shall be held. However, on the lapse of the period for application for formal trial, the summary order takes the same effect as an irrevocable judgment. This form of disposal is normally used for more than 90 percent of cases that are prosecuted.

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When a case involving a juvenile is referred to the family court, the court assigns the Family Court Social Investigator (Family Court Probation Officer) who is a specialist in the science of psychology, pedagogy or sociology. The investigator shall undertake a social inquiry into the personality, the personal history, the family background and the environment of the juvenile. The investigator then submits his investigation report which includes recommendations as to the dispositions of the case to the judge. If the family court judge is satisfied with the outcome of the measures taken by the Family Court Social Investigator on the process of investigation, and which are usually admonishing against the juvenile, allowing the juvenile to reconsider himself, encouraging his guardians to guarantee more supervision or making some adjustments to his environment, etc., the judge may dismiss the case without hearing. About 70 percent of juvenile cases are disposed of in this manner.

When the family court finds it unnecessary to prescribe any particular measures on the child, the court can dismiss the case. More than 15 percent of cases are dismissed after hearing.

Fiji, Nigeria and Sri Lanka

In Fiji, Nigeria and Sri Lanka, all criminal cases are initiated and investigated by the police. Usually the report of a commission of criminal offence reaches the police either through the victim, a concerned citizen, a beat policeman or patrolman.

In the case where the reporting authority is a beat policeman, discretion is usually applied in cases that are petty or minor in nature. The officer may ignore some violations; and in others he may admonish the offenders or issue a verbal reprimand. The policeman also gives the community a chance to settle minor disputes by the community leaders, elders or even family members, particularly in cases involving juveniles. Where a case reaches the police station and settlements are not reached before such official entries

are made, the police also have the power during investigation to suspend the investigation, therefore closing the case temporarily or permanently under the following circumstances:

- (a) for lack of evidence to prosecute the case;
- (b) difficulties in locating witnesses i.e. absconding, migrations, etc.;
- (c) where the case is found to be trivial in nature;
- (d) where the case is found to be civil in nature;
- (e) in the case where the complainant withdraws the complaint in writing;
- (f) where the suspect is found to be of unsound mind;
- (g) the police in the case of juveniles may warn and/or reprimand the parents or guardians of the ward.

In the case where the investigation is completed and the suspect arraigned before a court either the police or the prosecutor may stand for the prosecution. However, where the case is serious or complex in nature, entailing legal technicalities, when the police finish investigation, the case file or the docket is referred to the Office of Attorney General who would scrutinize the evidence as may be provided and decide whether or not to institute prosecution. The Attorney General may assign any public prosecutor to handle the case or close the case for the same reasons as the police may close the case. Where a prosecution is instituted, the Attorney General has also such powers to stop the case and withdraw it at any stage of the trial before judgment. This is called the power of "nolle prosequi" and it is provided in the constitution and the statutes. Usually cases are withdrawn in public interest or state interest but, for whatever interest or reason such cases are withdrawn from court, the Attorney General is not bound by any consideration to disclose reasons why a case is withdrawn. Where "nolle prosequi" is entered on a case, the court discharges or ac-

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quits the defendant depending on the amount of evidence already laid before it.

In offences where there is a victim and injury to property if the parties reconcile and the victim in writing applies to withdraw the case the court may in its wisdom close the proceeding. This is however not necessarily binding on the court since all criminal offences are offences against the state, and the victim/complainant is merely a state witness. The court has a power to impose the prescribed punishment and order a compensation on the offender also, after hearing the case.

In the case of juveniles, the cases are usually inquired into by juvenile welfare courts, and except in cases where the juveniles are involved in serious criminal offences or involved in commission of offence with adult offenders, the courts usually dismiss the cases, or after the hearing admonishes or reprimands the parents or guardians to be more watchful of their wards. Where the defendant is a mentally sick person or an imbecile, the court may drop the case and may refer the defendant to a hospital or mental home.

There are also certain special pleas usually referred to as special plea at bar i.e. "autre fois acquit," "autre fois convict or pardon." These pleas concisely defined respectively mean that the accused/defendant has been previously tried and acquitted, convicted or pardoned. Where such a plea is made and the court is convinced of these facts, the case is dropped, because the trial would amount to double jeopardy. Also in certain controversial cases that may stir public displeasure the court may adjourn the case "sine die" meaning that the case is adjourned indefinitely. In Nigeria and Sri Lanka the president and the governors of the states in their respective states during the tenure of their office are free from criminal liability, and diplomatic representatives of sovereign nations are also absolved of criminal liability, while in Fiji only diplomats are not criminally liable.

In Sri Lanka there are community based

investigations which are formally recognized and are used in villages to avoid legal trials in court even for criminal cases i.e. (a) The triple concept committee, which consists of the police, places of worship and the schools, engages in settling disputes and minor criminal violations. (b) Mediation Boards article 72 of 1988 which gives the Minister of Justice power to appoint a panel of mediators in each provincial administrative area. Under this article, mediators are authorized to summon the offender, the victims and parties to an offence before the board to adjudicate and bring about settlements in the community instead of court litigations. The police may refer minor offences for the board to settle and the board can also receive complaints directly from members of the public.

Thailand

In Thailand, the police which investigate petty offences i.e. offences punishable with maximum of one month imprisonment or a fine not exceeding 2,000 baht can impose administrative fine on the offender. If the offender pays the fine, the charges are dropped without having to go through a public trial. Similarly other offences punishable with only fine i.e. some offences within the Excise Act, if the offender voluntarily pays the maximum fine the case is dropped. The public prosecutorial functions are the responsibilities of the public prosecutor and he may issue a non prosecution order in accordance with the principles of law and the application of his own discretion in cases that fall within this category:

- (a) Where the offender or defendant dies.
- (b) In case of compoundable offence, by the withdrawal of the complaint by the complainant or victim of the offence. The cases that fall in this category can be disposed of at any stage during the investigation or the trial when the injured person and the defendant reach a lawful compromise. The injured person will write to withdraw the complaint and the court will

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- order the disposal of the criminal case from the case list.
- (c) By settlement of the offences as may be provided by law.
 - (d) Where a new law comes into force, subsequent to the commission of that offence, i.e. abolition of the act as an offence or where the act does not constitute an offence.
 - (e) By prescription i.e. where the period of limitation for trial elapsed, in case of offences punishable with death, life imprisonment or imprisonment of twenty years if the offender is not prosecuted within twenty years, from the date of commission of the offence, the prosecution shall be discontinued.
 - (f) If an amnesty is granted to the suspect/defendant.
 - (g) In such controversial offences that affect public interest adversely.
 - (h) Where the prosecutor finds there is insufficient evidence to prosecute the case.

The system of suspension of prosecution is not applicable in Thailand. The program was proposed in 1977 by the Office of the Attorney General. It however failed to get through, as it had met with opposition from the Ministry of Justice and up till now it has no legal stand in the criminal justice administration of the country.

Conclusion

The statutes of all the countries represented in the workshop made adequate legal provision to protect the human rights of their citizens. These provisions are in accord with the United Nations Declaration of Human Rights, the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) concerning the treatment of juvenile offenders (for which all the participating countries are signatories to the declaration and rules re-

spectively). Furthermore, the judicial agencies have the discretion to dispose of minor criminal offences without necessarily putting the offenders through judicial processes. These are formal measures in some countries, but informal measures in others even though widely practiced. Their main objectives are to humanize the process, and to reduce prison overcrowding which is now posing a growing economic burden to the state. These measures also assign some responsibility to relatives and the members of the community, at the same time offering the offender a second chance. Once described adequately, these informal measures appear to be in many ways similar to those being proposed elsewhere.

In Sri Lanka, the issue is more standardized where ministerial powers are conferred on community leaders, places of worship and school to deal with minor criminal offences. It is the opinion of all the members of this workshop to encourage these settings and the measures to be formalized and standardized so as to reduce the arbitrariness and possibilities of official corruptions.

In Japan and Thailand, the public prosecutorial functions solely lie in the hands of the public prosecutor. The Japanese system where the public prosecutor could, with the consent of the suspect, dispose of his case with a summary procedure of his choice without going into a public trial really does deserve wider recognition as a measure worth emulating considering the sparing of human suffering, the saving of time and above all the saving of cost. Other recommendations also put forward by the group and accepted by all the participating countries are, punishments in victim-related offences and injury to property, victims should be given a more active role during the process, and not merely used as prosecutorial witnesses to succeed in convicting a state offence. The members of the group agreed giving victims a chance to participate in resolving a matter would go a long way in recreating a better relationship with

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offenders, even if an extra procedural punishment is passed on the offender. It may sound retributive but surely, a victim should be looked upon and be given the consideration for the hurt he has suffered.

The investigation also should as much as possible be conducted on a voluntary basis. This is where the investigation takes place while the suspect is not actually arrested and detained. Compulsory investigation should be discouraged as much as possible.

Recommendations

As the result of our discussion, the general recommendations reached by our group are as follows:

- 1) In order to promote the reintegration of offenders into the society and to avoid the burden of caseload in courts, the investigation agencies should complete investigations as soon as possible and exercise pre-trial dispositions more widely. To facilitate speedy investigations, responsible agencies should be provided with adequate resources.
- 2) The investigation should as much as possible be conducted without detaining the suspect.
- 3) When pre-trial detention is required, the suspect should be brought before the judge within reasonable time.
- 4) The period of pre-trial detention should be as brief as possible, i.e. where the detention cannot be avoided.
- 5) Effective training programmes should be given to law enforcement officers in general; as to powers of arrest so as to reduce wrongful arrests and unnecessary use of authority. Officials in charge of pre-detention should be made to be held individually responsible for any excess.
- 6) Pre-trial dispositions of suspects by agencies such as the police and public prosecutors should be standardized.
- 7) In victim-related offences, the victims should be more involved in resolving

issues that have affected them, rather than addressing them as mere state witnesses.

- 8) The community should be more involved in resolving minor criminal cases, which would lead to reducing the caseload of the courts. Giving the society a chance to resolve such issues would go a long way in reducing the stigmatizing effect: as is practiced in Sri Lanka and many African countries that have vast rural community settings.
- 9) Where all kinds of pre-trial disposition have been considered but are not appropriate and a trial becomes necessary, the public prosecutors and the courts should encourage the speedy trial and dispose of cases so that unnecessary suffering of suspects and witnesses can be avoided. However, the defendant should be given an ample opportunity to present his defence so that his right of defence would not be jeopardized.

Session 2: Contemporary and Further Use of Non-Custodial Measures in Sentencing and Its Enforcement: With Special Reference to Probation

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I. Introduction

In spite of the great development achieved in all fields of human activities, crime still persists as one of the most serious problems of humanity. Experience in the past demonstrates limited results of punitive methods as a way of dealing with criminal behaviour. These measures have also received severe criticism because the principles regarding human rights and recuperation of offenders are not sufficiently addressed.

The issue now is how to deal with the offender without impinging on his human rights and at the same time uphold the greater interest of the society. It is important to note that the theme under study, i.e., non-custodial treatment of offenders, takes into consideration not only the rights of the offenders but also the interest of the social group to which the offenders belong. It is important to bring the offender back to his family and his community.

Suspended sentence, probation and community service order, the central themes of this group work are the most popular sanctions for treatment of offenders. The special attention to probation is a logical consequence of its importance. It is an old and traditional method of non-custodial treatment. There are nevertheless merits for further modification towards improving this important instrument. Community service order, on the other hand is a modern concept for the recuperation of the offender within the integral environment of the society.

In this report, the group reviews the situation in the group members' countries and analyses the possibilities of further use of non-custodial measures taking its starting point from the United Nations Standard Minimum Rules for Non-Custodial Measures ("Tokyo Rules").

II. Existing Non-Custodial Sanctions in Sentencing

The United Nations Standard Minimum Rules for Non-Custodial Measures ("Tokyo Rules") provide basic principles in promoting non-custodial measures and minimum safeguards for persons subjected to non-custodial measures. The Rules were formulated to enable all the nations around the world, irrespective of their political, economic, social and cultural values to have guidelines in the principles and practice in the treatment of offenders subject to non-custodial measures and its successful implementation. The group discussion therefore centred on issues pertinent to ensuring the practical and useful mode of non-custodial sanctions available in our countries which are in line with the Tokyo Rules.

Apart from economic sanctions such as fines and verbal reprimands, non-custodial options at the sentencing stage are available in the group members' countries. Such measures are introduced to divert the criminals from incarceration and to help them rehabilitate and reintegrate themselves into the community.

(1) Discharge

Absolute discharge and conditional discharge are used in the countries like Singapore and Seychelles as an alternative to imprisonment. In Singapore the Statute for Probation of Offenders Act provides that; where the court after considering the circumstances including the nature of the offence and the character of the offender, finds it independent to inflict punishment and that a probation order is not appropriate, the court may impose a conditional discharge on the offender. An offender who is granted conditional discharge is liable to be sentenced for the original offence if he commits another offence during the period of conditional discharge. Conditional discharge may to some extent be an equivalent to the suspension of imposition or execution of sentence in other

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jurisdictions.

Absolute discharge seems to be used when the facts of offence are very trivial in nature, or when the circumstances may seem to make it difficult to blame the offender or when there are mitigating circumstances to a great extent. Absolute discharge is not related to cases that are dismissed for lack of evidence or for which a person is not found guilty.

(2) Suspended Sentence

In countries such as Japan, Brazil, Seychelles and Lesotho, the law provides for the suspension of execution of sentence. This means that if a court passes an imprisonment sentence order for an offence, it can also suspend it, that is to say, it may order that actual incarceration will not take effect unless the offender commits another offence. Suspended sentence is usually applied to first offenders, sentenced to short imprisonment terms. In Japan suspension of execution of sentence is imposed when an offender is sentenced to imprisonment for not more than three years or a fine of not more than 500,000 yen, while in Seychelles, Lesotho and Brazil, suspended sentences are for those offenders sentenced to an imprisonment term of not more than two years. In Brazil, the period of suspension may vary from two to four years and the offender is subjected to comply with conditions such as he shall appear before the judge monthly to inform and justify his activities, keep away from places that are found harmful to his condition and not to leave the city he lives in without the judge's authorization. There are discretionary criterion used by the courts in deciding the suspended sentence for the offender, that is the offender's social and personal condition, criminal record, circumstances of the crime, security of society and victims' rights. The court is authorized to revoke the suspension under certain circumstances if the offender in question commits a new offence. The suspended sentence loses its validity if the offender violates any of the

conditions set by the court.

As an alternative to imprisonment, the suspended sentence may be looked upon as constituting a more specific threat of a penalty than a conditional discharge.

(3) Probation

Probation is a judicial disposition whereby a convicted offender is permitted to remain in the community subject to conditions specified by the court. It involves the conditional suspension of punishment whilst the offender is released under the supervision and guidance of a Probation Officer. Probation as a non-custodial measure has great capacity in meeting the problems of crime as it is humane and paves the way for criminals to be law abiding and functioning citizens. Probation not only helps the offender to maintain family and community ties but also can be scaled in severity to correspond to the gravity of crime by subjecting them to certain conditions which they must comply with.

(4) Community Service Order

Community Service Order (CSO) requires the offender to perform unpaid work for a specified number of hours in the community. Community Service Order brought about a new dimension in the correctional system as it emphasises reparation to the community. More importantly Community Service Order is believed to allow the offender an opportunity for constructive activity through personal service to the community and the possibility of a changed outlook on the part of the offender. As in other types of non-custodial sanctions, there are specific provisions regarding the conditions under which Community Service Order can be performed, for example, the type of offence, and attributes of the offender and nature of work to be performed. Community Service Order is used in Brazil. It is generally applicable to the first-time offender who would otherwise receive a short custodial sentence. Community Service Order is used as a condition for probation as in Seychelles. Failure to attend

community service may result in violation of the probation order.

(5) Non-Custodial Sanctions Pertaining to Juvenile Offenders

The procedure by which juvenile delinquencies are dealt with in the Juvenile Court or Family Court is more inquisitorial than adversarial in that the courts focus more attention on the "welfare" of the juvenile. As the interest and well-being of the juvenile are of primary consideration, the guiding principles in dealing with juveniles in most countries lean towards the provision of guidance, care, protection and re-education more than punishment. However, this does not mean that there is no scope for punishment. What it does mean is that punishment should be positive and should not be regarded as retributive or deterrent.

In Singapore, the concept of treatment orientation is further enhanced by the appointment of a Panel of Advisers to the Juvenile Court. The members of the Panel are appointed by the President and come from all walks of life. Their function is to advise the court with regard to any consideration affecting the treatment of a juvenile brought before it.

In Singapore, several options are available to the Juvenile Court. Under the provisions of the Children and Young Persons Act: a) The Court may discharge the offender in circumstances not amounting to an acquittal. b) The offender may be discharged upon his entering into a bond of good behaviour and to comply with such orders as may be imposed. The parent or guardian may be compelled to execute a bond to exercise proper care and guardianship. c) The offender may be committed to the care of a relative or other fit person as determined by the court. d) The court may make probation order placing the offender under the supervision of a Probation officer.

In Japan, the Family Court is empowered with the following sanctions.

a) Dismissal without Hearing

When a judge handles a case involving a juvenile, he utilises the Family Court Pre-trial Investigator's Report to advise the court; to admonish the juvenile; to allow the juvenile to reconsider his position; to caution his guardians to guarantee supervision; or to make adjustment of the family environment. When the judge makes a decision, he fully considers the measures recommended by the Family Court Pre-trial Investigator.

b) Dismissal after Hearing

Hearing by a judge provides an educative effect for both the juvenile and his or her guardians. When he finds out that a juvenile does not have any special needs requiring protective measures, the case is dismissed after hearing.

c) Tentative Probation by Family Court

Another option that the Family Court can take during the hearing is tentative probation. This measure does not constitute final disposition by the family court judge. It has been adopted to ensure more information is gathered for the final adjudication since the prediction as to each juvenile case sometimes does not fulfill results envisaged at the time of pre-hearing investigation. Both the flexibility and vulnerability of juveniles may also influence their future behaviour when interacting with their social environment.

d) Probationary Supervision

A juvenile probationer is defined as a juvenile who has been placed on probation by the Family Court after hearing. The legally prescribed maximum period of supervision for this category is two years or till the age of 20, whichever is longer.

In Lesotho and Seychelles, probation is widely used by the Juvenile Court in the dispositions of juvenile offenders. A combination of probation and attendance centre is also popularly used in Lesotho if the offence committed has resulted from the abuse of

drugs or alcohol. The offender is required as part of his probation order to make regular visits to the relevant institutions for treatment. In Brazil, a community service order may be imposed on the juvenile offender in special cases e.g. vandalism of public places. The Juvenile Court in Brazil is also empowered to make a compensation order on the juvenile offenders where it relates to victim of property offences.

III. Probation

Probation is one of the traditional community-based treatment programmes for offenders. It developed not as a result of a deliberate legislative or judicial act but was the result of the gradual growth and modification of existing legal practices. It was a solution to excessively harsh punishment as well as prison over-crowding. The use of probation is also found to be more economical than imprisonment.

The philosophy behind probation is that the average offenders are not always dangerous criminals or a menace to society at large and for some offenders the gravity of crime does not call for an imprisonment sentence nor a fine. Probation provides the offenders with an opportunity to prove themselves and re-establish proper forms of behaviour in the community with the assistance of the probation officer.

There are basically four ways in which a court can order probation on an offender. First, a court can sentence an offender directly to probation. In Singapore and Seychelles, probation is used by the courts as a sentencing alternative. However in Lesotho it is only applicable for the offenders under age of 18 years. In instances of breach of the conditions of probation, the court sentences the offender for the original offence for which he was placed on probation. In Seychelles and Singapore probation is granted to any offender except those offenders convicted for serious crimes such as murder and treason.

Secondly, a court can impose a prison sentence but then suspend it by placing the offender under probation supervision. In Japan, probation for adult offender is granted under this procedure. The offender will have to serve the original prison sentence if the suspension of execution of sentence is revoked.

A third alternative allows the court to defer sentencing and place the offender on probation. The original charges against the offender may be dropped if the offender maintains good behaviour. There is a fourth variation whereby the court may sentence the offender to a fine, short jail term or a prison term prior to commencing of the term of probation.

To ensure the continued use of probation and its credibility, this non-custodial measure needs to evolve and progress in such a manner as to meet the demands of the community, the offender and the agencies in the criminal justice system. Pertinent issues such as determining which offenders should receive a sentence of probation, the conditions of probation, the pre-sentence reports, revocation of probation and provision for a suitable infrastructure for the purposes of supervision of offenders were also raised.

(1) Eligibility for Probation

The decision on granting probation to the offender must be made within the limits of statutes governing the eligibility for probation in each jurisdiction. In most countries, probation is not a right but a privilege given to the offender by the court. Apart from the statutory limits, the decision to place an offender on probation is often a discretionary one. It is based on the belief and attitude of both the sentencing judge and probation officer that the offender will improve his or her behaviour. Selecting the right type of offender for probation supervision is not an easy task. Except for Japan, countries like Singapore and Seychelles in practice often select young first-time offenders for probation. Expansion of probation to include

offenders above the age of 25 is gradually increasing in Singapore and Seychelles.

In Japan, it is generally understood that in determining a sentence the court considers three factors, namely the gravity of offence committed by the offender, the possibility of his re-offending and the possibility of his further rehabilitation. However it is rather difficult for judges to obtain information on an offender's personality and on his living situation due to the lack of pre-sentencing investigation system.

The group agreed that the criteria that judges normally look into in deciding probation may differ from probation officer's consideration. However the group feels that there should be mutual understanding of the respective viewpoints.

Apart from considering the nature of the offence, circumstances leading to the offence, the background, the problems facing the offender and his current state of affairs, the probation officers in Lesotho, Seychelles and Singapore make their recommendation for probation on a favourable prognosis of the offender's personal and social background, his willingness to cooperate with the probation officer and the offender's self-expressed desire to undergo supervision and be of good behaviour during the period of probation. In Singapore and Seychelles the offender needs to give his consent to be placed on probation. The group is of the view that the criteria for granting probation should not be upon the generalization about type of offences or the existence of a prior criminal record only, but should be based on the facts and circumstances of each case. In assessing the suitability for an offender to be placed on probation, the sentencing judge considers: 1) whether imprisonment is necessary for the offender in view of his criminal behaviour, 2) the need for society to be protected against further criminal activity of the offender, 3) whether probation would depreciate the seriousness of the crime committed by the offender. It is therefore recommended that there should

be broadness in the criteria for eligibility for probation to allow the courts more discretionary powers in wider use of probation. However, the group is aware that such broad discretionary powers may result in having more offenders placed on non-custodial sanctions (net widening effect).

(2) Pre-Sentence Report

The Tokyo Rules (7.1) provides the broad guideline for this discussion. The Tokyo Rules state that "if the possibility of social inquiry exists, the judicial authority may avail himself of a report prepared by a competent, authorized official or agency. The report should contain information on the offender that is relevant to the person's pattern of offending and current offences. It should also contain information and recommendations that are relevant to the sentencing procedure. The report shall be factual, objective and unbiased, with any expression of opinion clearly defined."

In order to assist the court to decide a course of action that would be in the best interest of both the offender and society at large, the pre-sentence investigation report (PSR) is seen to be of importance. Its main purpose is to provide insight and factual information about the offender to aid the court in making an appropriate disposition. The offender's personality, strengths and weaknesses and general social background are explored. In effect the PSR attempts to gather and interpret information relevant to granting or denying probation. The PSR is normally done by the probation officer. In Japan, the Family Court Investigating Officer is responsible for furnishing the PSR for juvenile delinquents. When a juvenile is detained in the Juvenile Classification Home, the staff in the institution are responsible for submitting the classification report. In Japan, the Ministerial Ordinance provides the guidelines and stipulates information required in such classification report.

In Singapore and Seychelles, it is not mandatory to have a PSR on offenders who ap-

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pear before the court. A PSR is called for by the court after the offender has been found guilty or convicted of an offence. The content of the PSR should be in accordance with some stipulated guidelines. In Singapore, the Probation of Offenders Rules stipulate that the probation officer provides data on the family of the offender, the neighbourhood in which the offender lives, his friends, his school records, his history of employment, delinquency and criminal activities. The probation officer is also required to provide an assessment of the offender and to recommend suitability of the offender for probation. In Japan, the Family Court Investigating Officer investigates the facts and background of the case by the order of the family court judge. Matters covered by such investigations should include the personality, behaviour, personal history, financial conditions, home environment of the juveniles and their significant family members. It is required by law that such investigations should be conducted through scientific method based upon medical science, psychology, sociology, pedagogy and other branches of related knowledge. In Lesotho, PSR or social enquiry report are used on all young offenders who have been found guilty of an offence. The information in a social enquiry report includes the personality, family and social environment of the offender as well as the probation officer's assessment and recommendation for a helpful solution.

In Lesotho and Seychelles, there seems to be a high correlation between the recommendation of the probation officer in a PSR or social enquiry report and the number of probation orders given by the courts. In Singapore, for the year 1991, out of the 1,139 offenders who were recommended for probation, the court placed 1,119 cases (98.2%) on probation. Among those cases not placed on probation, some cases were sentenced to reformatory training or imprisonment, and some were awarded conditional discharge. As regards the 377 cases not recommended for probation, the court's decision differed

with the recommendations of the probation officers in respect of 57 cases which were placed on probation. In Singapore, Seychelles, and Lesotho, the probation officer is given between three to four weeks on an average to do the pre-sentence investigation. This is an arrangement made between the court and the probation service in the respective countries. It was agreed that in most instances the time period given by the courts is sufficient for a thorough pre-sentence investigation.

In Seychelles, intervention work is introduced even at pre-sentence investigation stage. The probation officer ensures that the offender is employed and has a permanent place of residence before he appears again in court for sentencing. It seems that probation is not usually recommended if the offender is a vagrant and shows continuous signs of being so.

In other countries where PSR is a practice, the probation officer may propose intervention work as part of the probation plan for the offender. Pre-sentence investigation is conducted through interviews with the offender, members of his or her family, past and present employers, officials of schools, other relevant social agencies and in some cases psychiatric or medical reports may have to be consulted. The content of PSR may vary, but it generally includes information about the offender, his or her offence, family and other significant social relationships, lifestyle and future plans depending on the circumstances of the cases. Some areas may be examined more intensively than others.

In Lesotho, due to shortage of staff, the probation officer is not necessarily present for the presentation of PSR in courts. In Seychelles, a probation officer is required to be present in court on the sentencing date.

In Singapore, probation officers need not be present in court if probation is recommended unless required to do so by the sentencing judge. PSRs on adult offenders are normally submitted to the courts two days

before the offender's date of sentence and for juvenile offenders they have to be submitted five days before the date of sentence. Information contained in the report will be read to the offender.

The group members in discussing the issue of shortage of staff and the unnecessary time wasted in court considered the use of the telephone for direct communication among the courts, parties and probation officers during sentencing. It is certainly a time-saving recommendation, but considerations as to its implementation need to be carefully given a thought.

The point at which PSR is to be called for by the courts was raised, in that if the PSR be made before the determination of guilt it will cause much embarrassment to the accused person, and he may incriminate himself. The PSR could also be prejudicial to the accused persons. In Brazil and Japan, sentence is passed at the same time as the court pronounces a judgement of guilt, so there is a need to consider ways of procuring the PSR. Problems of disclosure of PSR to the offender was raised at the discussion. To what degree should the information contained in the PSR be disclosed to the offender as in some instances disclosure may lead to possible disruption of family and work relationship, possible damage to relationship with other agencies and threats of retaliation from the offender. However there are good arguments for disclosure of information as it allows for fairness whereby an offender can clarify information, and for the counsel to provide adequate representation for his client. The group felt that the middle ground between complete disclosure and complete secrecy would be a better choice. The court can provide an oral summary of information that might interfere with rehabilitation if read by the offender, or if the court believes that it may cause serious repercussion by breaching the confidentiality of certain sources.

The issue of intrusion of privacy was discussed in relation to the pre-sentence inves-

tigation. In the course of pre-sentence investigation, some accused persons may feel their privacy is being intruded upon by the probation officer, his family, past employers and others who will be interviewed. This issue may not be so critical now as probation officers are viewed with the good virtue of rendering help to the society.

(3) Probation Conditions

The basic issue in the probation process is the requirements imposed by the courts to control the conduct of the offender upon placement on probation. The condition for probation is important for the enforcement function of supervision as well as the treatment needs of the offender. These conditions serve as a guide to the probation officer when supervising the offender. To the offender, probation is a testing period during which he must show the capacity to adjust to the community as a law abiding citizen. The probation condition attempts to instill behaviour consistent with reintegration into the community. To the probation officer, the probation conditions lay out the minimum standard of conduct and treatment that he must enforce.

The Tokyo Rules states that "If the competent authority shall determine the conditions to be observed by the offender, it should take into account both the needs of the society and the needs and rights of the offender and victim."

The essence of these provisions in the Tokyo Rules is being observed by the group member countries. There are provisions in law that require certain conditions to be applied in every probation case and the sentencing judge is given the discretion to impose additional conditions. In Seychelles, Singapore, and Lesotho the provision of additional conditions besides the prescribed conditions is a common practice. In Japan, the sentencing judge has no authority to impose additional conditions on adult probationers. The Probation Service in Japan has issued standard guidelines for probation offi-

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cers to ensure conformity in the general condition of probation.

It was agreed that when considering the criteria for additional conditions, the following requirements be considered:

- 1) That they are to be realistic, specific, practical, and within the purview of the law;
- 2) That they are tailored to meet the needs of the offender;
- 3) That they will be properly administered by the probation officer.

Some of the common conditions of probation are:

- 1) Obtain permission to;
 - a) change job or residence,
 - b) leave the jurisdiction,
- 2) Report to probation officer;
- 3) Maintain steady employment;
- 4) Avoid disreputable places and associates;
- 5) Keep reasonable hours;
- 6) Avoid abuse of drugs.

In recent years there has been a growing interest in and concern for the victims of crime. To address this issue, provisions such as restitution have been included as a condition of probation conditions or guidelines. With restitution, the probationer is required to compensate the victim.

Recent development in Singapore, and Lesotho probation service is the involvement of the probationers in rendering services to the community. Projects such as performance of simple, menial tasks at a welfare institution, orphanage and hospital are being carried out by the probationers. The idea behind such projects is to give to the offender a sense of self-worth and pride in the dignity of labour.

In Singapore, the Probation Offenders Act allows for the amendment of the condition of the probation order (Section 6 of the Probation of Offender Act). This provision gives leverage to the court to waive or impose additional condition to the probation order dur-

ing the supervision period. Such provision was considered useful by the other group members whereby the judge is given powers to amend the conditions on the basis of need.

(4) Revocation of Probation

During the probation period, a violation of the rules of probation or commission of a new crime results in probation being revoked. In jurisdictions where probation is actually a form of suspension of execution of sentence, in the event of any violation, the offender may have to serve his suspended imprisonment term. In practice, in Japan, probation of an adult offender is rarely revoked for reasons of a technical violation of the conditions e.g. when the probationer changes his residence without notifying the probation officer, he violates one of the conditions but his probation will not be revoked unless he commits a new offence or there is a serious violation of his probation condition during the period of absconding from supervision. For adult probationers, the Director of the probation office files an application for revocation to the criminal court through the public prosecutor, and for juvenile probationers notification of violation is made to the Family court, seeking a new disposition. In Seychelles and Singapore, for technical violation of probation requirement, the probationer will be brought to the court where he could be fined or he could be sentenced for the original offence for which he was granted probation. Violation hearings are conducted in an open court and the probationer may be represented by his counsel.

The guidelines provided by the Tokyo Rules are being strictly adhered to in relation to issues regarding discipline and breach of conditions.

(5) Supervision of Probationers

As embodied in the Tokyo Rule (10.1), "the purpose of Supervision is to reduce re-offending and to assist the offender's reintegration into society in a way which mini-

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mizes the likelihood of a return to crime." Similarly Probation aims at securing the good conduct of the probationer, helping him to maintain a law abiding behaviour and providing him with the necessary support and guidance to cope with his situational and personal problems which led or may have led to his criminal deviance. In supervision, the probation officer is required to maintain a balance of two different roles, that is, controlling the offender and providing social services. In the first function, the probation officer is to monitor the probationer's activities and ensure that the probationer abides by the conditions of probation set forth by the court. The provision of social services by probation is essentially a helping function which attempts to deal directly with the offender's problem through counselling or indirectly by serving as a referral source. Invariably probation officers have to help the offender cope with practical situational circumstances such as employment, housing and family dislocation.

The underlying principle of probation is the individualized consideration of how to deal with the criminal offender. The application of time and efforts is an organized and realistic approach to ensure assistance is available to every probationer. A classification system based on the nature and frequency of supervision could lead to a proper allocation of resources. In Japan, the probationers are classified into two categories depending on the nature and specific needs of the problems; this form of classification system was implemented in 1971. The first categories are those requiring a more intensive treatment, and the second group represents those with less serious problems. The cases in this group are however, subject to review from time to time for possible reclassification.

There is also another dimension to classification, where the probationers are categorised under ten different cases namely: 1) Sniffing thinner; 2) Stimulant drug; 3) Organized criminal group members; 4) Sex-

ual offenders; 5) Junior high school students; 6) No-occupation juveniles; 7) Violence to the family members; 8) In-school assault; 9) Dangerous driving (Hot-rodder) group members; 10) Mentally disordered.

In the absence of an organized classification framework, the rudimentary form of classification could be utilised. The probation officer would normally divide his caseload into categories on how often he needs to see each client. This division may not be official or formal but merely a mental note that a probationer does not need much assistance as compared to others. This form of classification is necessary considering the size of the caseload. It is possible because the probation officer does have sufficient knowledge about the probationers. Such a process is usually reflected in the frequency with which the probation officer has the probationer reporting in, or the frequency at which he goes out to see the probationer. This mode of supervision is also practised by the Probation Service in Seychelles and Lesotho. In Singapore however, there is a guideline in the Probation Offenders Rules that requires the probationer to report to the probation office once a week for the first month in which he is placed on probation. The frequency of subsequent contact depends on the progress and stability of the offender.

It is a standard practice in most countries that the offender placed on probation reports immediately to the probation officer. In the office, the probation officer shall explain to the probationer the effect of the probation order including the conditions imposed and the possibility of a reward for good conduct. In Singapore and Lesotho there are provisions for the early discharge from probation. In Japan, neither the court nor the director of the probation office can discharge him from probation. Pardon, which is actually in very limited use is the only available means for terminating probation. The Regional Parole Board, however, has the authority to provisionally suspend probation upon the re-

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quest of the director of the probation office. For juvenile probationer, the Director of the Probation office is vested with the authority to decide on early discharge. At the first meeting between the offender and the officer, individual supervision programme for the probationer is normally worked out. The availability of a pre-sentence report in this instance would be important as the personal data on the offender's social background as well as a possible treatment plan would have been already put forth by the investigating probation officer. In the absence of PSR, the social background can be still assessed and plans developed to maximize the chance of successful reintegration. Family, school or career goals are possible indicators for developing a reintegration programme.

There is a conscious approach in the probation service to develop a pro-active supervision strategy. Much emphasis is laid upon the importance of the support of the family and community in the treatment of offenders. Besides the one to one casework technique, there is a move towards using group dynamics to create individual awareness, thus developing individual potential to enhance probationers' involvement in the community. The use of group work techniques in the probation service in Japan and Singapore focus on prescribing ways to tackle adjustment problems commonly faced by the probationers. In Singapore, the probationers are required to go through modules on friendship and refusal skills, decision-making and family relationship which are aimed at improving the probationer's social and coping skills as well as his interpersonal relationships. In Japan, it is compulsory for the juvenile traffic offenders to go through group counselling sessions for serious traffic offences.

It is a known fact that the family is the universal social institution that nurtures, protects and shapes the individual from infancy to independence. The dysfunctional, inadequate or broken family may seem to be the principle cause for delinquency particu-

larly in the case of juveniles and adolescents. The effort to strengthen the family function is one of the important aspects of probation work. Two approaches are often used in family therapy. The first approach is using specific family members as an intervention tool on behalf of the offender with regard to personality conflicts.

This is in recognition of the family as social environment from which the individual emerged. The other approach is aimed at target group for treatment with the objective of treating the entire family to become a healthy functioning unit. Efforts are made to strengthen family ties and to help the family become effective in the community. The extent of probation officer's work with the family is again dependent on the basic needs of individual cases. In Seychelles and Lesotho, much emphasis is placed on the institution of family in prevention of crime among juveniles and adolescents. In Singapore, and some probation offices all over Japan, structured parent support activities are conducted to assist the probationer's parents towards effective discharging of their parental functions.

Engaging in constructive activities through job or school placement is essential in ensuring the continued attempt of the probationer to be a part of the mainstream society. Probation does not only help the educational pursuits of the offender, but also provides the necessary support to enable the school drop-outs to make a fresh start. For offenders who are not eligible for further education, probation officer's main task is to assist the offender in acquiring a suitable job. Being an economically contributing member of the community increases the offender's perception of his self-worth in the eyes of others and indeed of himself. This aspect of treatment sometimes becomes part of the conditions of the probation order in some jurisdictions. Besides performing an indirect referral service for the probationers in employment matters, a possibility of developing an employment data bank could be a way

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towards assisting the unemployed probationers. The probation service could compile a list of prospective employers on a regular basis and make it available to the job-seeking probationers. The employment data bank however, would need to be updated from time to time.

To ensure the efficient and effective use of probation resources, strategies are adopted by the probation services to assign cases or clients to probation officers. A variety of techniques are applied to assign caseloads such as by type of offence, probationers personality trait or geographical areas of the probationers residence. In Japan, Seychelles and Lesotho, allocation of cases to probation officer is based on the officer's specialization or on geographical areas. One or two probation officers may be assigned to supervise a specific locality in the area. In Singapore, emphasis on caseload allocation is language compatibility and equitable distribution of caseload among the officers. Attempt at specialization in tasks has not been popular with the probation officers.

It is difficult at this stage to decide on the optimum level of caseload for a probation officer to ensure effectiveness. The number of probation cases is dependent upon not only the courts but also the crime dynamics per year. The initiative and the ingenuity of the probation officer is demanded upon at all times, especially in instances where staff resources are limited.

In recent years, it has become more common for probation officers to use the resources of the community to carry out the treatment function while they serve as supervision coordinators. In Japan there has always been a widespread use of volunteer probation officers (VPO) in the supervision of cases. In 1991, 48,000 VPOs in Japan supervised about 80,000 clients. In Singapore, VPOs supervised about 20.9% of the supervision caseload in 1991. Lesotho has yet to introduce the VPO scheme but as it is, traditional form of community involvement is present in the form of village chiefs who are

entrusted to report to probation officers on the progress of the case in his area. In Japan and Singapore, the VPOs are required to keep in touch with the probationer and his family by means of visits and interviews generally twice a month or so depending on the requirements of the case. The VPO then submits a monthly, written progress report on each offender under his supervision. The VPO is also required to report to the probation officer of any unusual incident that has happened to the offender.

Apart from the direct involvement of community as VPOs, the treatment of offenders invariably involves the use of the community resources, for example, a probation officer on discovering that his probationer has a drinking or a drug problem may help to find a detoxification center that is willing to accept the case. Similarly, probation officers may work with teachers and other school officials to help a young offender stay in school. In Lesotho, for example, probationers may be subjected to drug or alcohol abuse treatment at attendance centers as part of their probation order.

The Tokyo Rules provide guidelines on the recruitment and training of staff. In countries such as Singapore, the ratio of probation officers for each ethnic grouping is proportionate to the number of persons of each ethnic group who are placed on probation. This is to ensure that the needs of each ethnic group could be fully met without causing much friction in the interaction between probation officers and client language, religious or cultural differences. In countries that have a homogenous population, language and cultural differences would not be an issue in forging a meaningful relationship with the offender and probation officer.

Although the age of the probation officer should not be a discriminating factor in the recruitment of staff, the group is of the view that ideally a young juvenile probationer should be supervised by a young probation officer.

It is considered imperative that there

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should be continuous training and skills development programme for probation officers to ensure that they keep up with the latest technique in managing their clients and with current issues in the area of treatment of criminal behaviour. A skilled probation officer is not only one who is trained in the fields of human behaviour and related social sciences but is one who keeps up with the ever changing pattern of criminal trends and delinquent behaviour as well as the ability to empathise with the probationer and his parents, to be objective in discharging his duties and to be creative in devising ways to improve his techniques in developing rapport and effectively reaching out to the probationer.

It is imperative that for the community to view probation as an alternative non-custodial measure for offenders, adequate and sufficient infrastructure should be provided for it. An effectively organised and committed probation service could go a long way in gaining public confidence and trust in its attempt to help the offender to be a law-abiding citizen and be successfully reintegrated into the community.

IV. Community Service Order

Community Service Order (CSO) is the performance of supervised work for the community for a specified number of hours. In UK, Australia, Holland and Denmark, CSO is used as an alternative to imprisonment. Community Service is a form of penal action to an offender, in that he has to perform some forced labour for the community. It also reflects an element of restitution whereby the offender makes amends to the society via the performance of work in the community. In addition, CSO is believed to bring about a sense of discipline and a positive change to the attitude of the offender.

Apart from Brazil, CSO is yet to be introduced in the other group member countries. In Brazil, CSO according to Article 46 of the Penal Code, provides that the convict per-

form unpaid tasks in social welfare institutions, hospitals, schools, orphanages and similar establishments in the community or state. Such task shall be performed weekly for 8 hours on Saturdays, Sundays and public holidays, or on weekdays if they do not interfere with the convict's day to day work. The supervision of the work of the convict on CSO is performed by the Director/person in charge of the organization to which the offender is attached. The Director of the relevant organization would report to the court of the successful completion of the convicts' work, or absence from CSO work. There is no related welfare or probation office that deals with the supervision of CSO in Brazil.

In Seychelles, CSO is introduced as part of the probation order. The CSO is supervised by a probation officer whose task is to monitor the work undertaken by the offender placed on community service order by the court, and to record the performance of the offender. The community work is either performed by individual offender or in groups, depending on projects available. The community service is normally performed in institutions or by repairing houses of the aged.

In Brazil, the following requirements must be met before an offender can be placed on CSO:

- 1) shall receive an imprisonment penalty of less than one year, except if the crime is not intentional;
- 2) shall not be a recidivist;
- 3) the culpability, the social behaviour and personality of the offender, and also the motives and circumstances shall indicate whether substitution may be appropriate. These requirements therefore in effect, are applicable to first offenders who have to serve an imprisonment sentence of less than one year.

It can be pointed out that the imposition of CSO as part of the probation condition means that the offender receives a more severe penalty for his offences than if he had

Summary of Non-Custodial Sanctions in Sentencing

Topic	Tokyo Rules	Japan	Brazil	Seychelles	Singapore	Lesotho
Non-Custodial Sanctions in Sentencing	a) verbal sanction	i) fines	i) fines	i) fines	i) fines	i) fines
	b) conditional discharge	ii) suspended execution of sentence	ii) restrictive rights sentence	ii) absolute discharge	ii) conditional discharge	ii) suspended execution of sentence
	c) status penalties	iii) probation	a) community service order	iii) conditional discharge	iii) absolute discharge	
	d) economic sanctions and monetary penalties	Juvenile Offenders	b) temporary suppression of rights	iv) probation	iv) probation	Juvenile Offenders
	e) confiscation	i) dismissal of case without hearing/after hearing	c) prohibition of practicing any public office	v) verbal sanctions	Juvenile Offenders	Juvenile Offenders
	f) suspended or deferred sentence	ii) tentative provation	d) prohibition on jobs	Juvenile Offenders	i) conditional/ absolute discharge	i) probation ii) warning
	g) restitution or compensation	iii) referral to the chief of the Child Guidance Centre	e) suspension of driving licence	i) verbal sanctions	ii) bond	iii) corporal punishment
	h) probation and judicial disposition	iv) probation	f) suspended sentence	ii) probation	iii) fit person's order	iv) attendance centres
	i) community service order		Juvenile Offenders		iv) probation	
	j) attendance centre					
	k) house arrest			i) verbal sanctions ii) compensation order		

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been sentenced to probation. In terms of evaluating the effectiveness of CSO or probation as tools in reintegrating the offender, one could hardly determine which tool is more successful in helping the offender. Nevertheless from another viewpoint, CSO as part of the probation order has its benefit in regard to the offender being seen to be punished in the community while at the same he receives guidance and help from the probation officer.

In countries that have yet to introduce CSO, careful consideration must be made regarding the reaction of the community for the possibility of the scheme to be introduced. The community should be given the opportunity to express their views for or against such measures. The proper compilation of such views and the subsequent modification and response can be done through surveys. This would also afford the community a better understanding of the usefulness of such schemes. Positive publicity and enlightenment should be given to the programme so as to allay the fear and gather the support and cooperation of the community that wishes to operate the programme.

In addition, a network of information systems needs to be set up to determine the agencies that effectively supervise such services. In planning for possible services that could be provided by CSO, one has to ensure that it is not in competition with the entrepreneur market so as not to pose a risk to the offender. Thus in reviewing whether or not CSO should be a sentencing option in respective countries, one has to determine the objective for which CSO is introduced. In countries that have less problems with prison over-crowding, CSO could be an extensive use of non-custodial measures affording the offender an opportunity of compensating the community for his act.

V. Conclusion

Although non-custodial measures for offenders are taking many forms today, sus-

pending sentence and probation continue to be the more prevalent form of community based treatment in the group member countries. Different issues relating to the procedure and process in the implementation of probation were discussed.

The broad principles on the non-custodial treatment of offenders referring particularly to probation supervision as outlined in the Tokyo Rules has been noted by the group member countries. The extent to which they have been applied varies from country to country, but in the main those efforts have endeavoured to maximise the application of these principles. While limitations are inherent in the legislative framework, many countries represented in this group workshop have indicated their willingness to apply as far as possible many of the issues to effect maximum use of non-custodial measures.

The practical issues that were discussed include probation orders, suspension of execution of sentence and the need for pre-sentence report, classification system for case supervision, and Community Service Orders. The group believes that continued discussion and the raising of consciousness on the benefits of these programmes will eventually become common practice within the various criminal justice systems.

Session 3: Remission, Parole, Pardon and Others

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Introduction

The topic assigned to Group Workshop 3 suggests some measures for non-institutional treatment of offenders already existing and practiced in some foreign countries including Japan, and the introduction or proposals of new diversionary treatment methods which are designed to keep the offender in touch with his family, work-place, normal social life and other community resources.

After detailed, candid and intelligent individual presentations of the members of Group Workshop 3 on the current practice of these measures in their respective countries, it was learned that parole appears to be the most common, if not popular, among the five countries represented. But, while the term parole is used in four countries such as Japan, Korea, Pakistan and the Philippines, in Malaysia, it is called Release on Licence, a different term but similar concept.

In this report, we shall present:

- (A) the existing forms of parole, pardon and remission in that order;
- (B) the application of these measures (which include the procedure and criteria for the selection of those offenders who shall qualify for early release); and
- (C) supervision of provisionally released offenders.

Also included in this report is the introduction of new measures for non-custodial treatment of offenders at the post-sentencing stage.

Parole

A. Existing Forms

In Japan and Korea, there are two kinds of parole. One for juvenile offenders and the other for adult offenders. Whereas, in Ma-

laysia, Pakistan and the Philippines, they have only one type of parole. For Pakistan and the Philippines, parole is equally available to qualified offenders regardless of age; but for Malaysia, parole (or release on licence) is applicable only to juveniles.

There is not much complication in the parole systems practiced in the said five countries. Except as to the approving authority on applications, or recommendations for parole for and in behalf of an eligible inmate, the process by which it is being carried out is almost the same.

Japan's Regional Parole Board grants parole to adult and juvenile offenders upon application/recommendation in his behalf by the head of the institution where such recommendee is confined; Malaysia's Director General of Prisons has the absolute discretion to order the release on licence of a juvenile after receiving recommendations from the Institution Discharge Board of the training school itself; in Korea, the Parole Board decides on the reports/recommendations of the Parole Examination Committee of the juvenile training school in the case of parole of qualified juveniles, while in the case of adults, the Security Department of the Correction Bureau makes the final decision with the approval of the Minister of Justice. In the case of Pakistan, the Home Secretary who is the highest provincial government official has the sole authority to consider a prisoner for parole on recommendations of the Reclamation and Probation's Director; and in the case of the Philippines, only the Board of Pardons and Parole has the power to grant or deny applications for parole with or without recommendations from the Director of Corrections.

B. Applications of Parole System

1. Qualifications/Criteria for Selection

The application of the different types of parole varies according to the following factors: (a) age of offender; (b) period of prison confinement; (c) remorseful attitude of in-

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mate; (d) his attainment of the progressive stage at its peak; (e) rehabilitation expectancy; (f) the generic requirement of good behaviour; (g) his readiness for release; (h) the reasonable probability that his release will not be incompatible with the welfare of society; and (i) acceptance of his parole by the society.

At this juncture, it is necessary for comparison purposes to present only the significant differences on the manner of selection of prisoners regarding the span of time he has to serve in prison.

Ordinary adult offenders in Japan and Korea are required to serve no less than one third of their determinate sentence or 10 years for those serving life sentences.

In the case of their juvenile offenders, Korea differs from Japan in that the former requires five years service for life sentence while the latter requires seven years.

A juvenile in Malaysia must serve 12 months of his detention term in order to meet qualification requirement.

Prison service requirement for a prisoner in the Philippines is completion of the minimum of his indeterminate sentence.

This particular requirement is diversified in Pakistan depending on the term of imprisonment imposed. Those sentenced to three years imprisonment can qualify for parole at anytime during their institutional confinement; those with a 3-year to 7-year term need one and a half years of service; exceeding seven but not more than 10-year sentence require completion of one third; over 10 years but not more than 14 are obliged to finish one half; and for life convicts, 12 years is required for parole eligibility.

2. Disqualifications/Non-Availment

It is understood that those who fail to meet the eligibility requirements are naturally disqualified and cannot avail themselves of the benefits of early release on parole. There are, however, statutory prohibitions in the applications thereof.

Among these, restrictions are provided by the systems of parole in Pakistan and in the Philippines.

Pakistan disqualifies: (a) habitual offender; (b) prisoner who is mentally disturbed and emotionally unstable; (c) those prone to commit sexual offenses and violence; (d) those convicted of crimes involving moral turpitude; (e) those convicted of crimes against the state and/or conspiracy to commit the same; and (f) those convicted of kidnapping, abduction and dacoity.

Exclusions or non-availability of parole for prisoners in the Philippines refer to: (a) life-termers; (b) habitual delinquents; (c) escapees; (d) violators of conditional pardon; (e) those suffering from mental disorders; (f) those convicted of crimes against national security and public order such as, treason, conspiracy or proposal to commit treason, rebellion, espionage and piracy; (g) those serving a maximum prison term of one year or less; (h) non-confinement of national prisoners in the national penitentiary; and (i) those whose conviction is not yet final and executory.

3. Procedure

On the procedural aspect of parole application, worthy of disseminating is the incongruity of the five different systems of parole. However, in each of these schemes, we find the word "recommendation." But while recommendation is an essential element for parole consideration in Japan, Malaysia, Korea and Pakistan, it is not so in the Philippines because parole may be extended with or without recommendation.

Under the Japanese system, a prisoner has no right to individually file an application for parole nor the right to refuse it once it is granted to him except in exceptional cases. This is a variation from the rest of the systems enforced in other countries. The application is initiated by the head of the institution who likewise submits his recommendation. Investigations and interviews by a parole officer on the candidate's institutional record precedes the inquiries and clarifi-

cations conducted by a member of the Parole Board before a decision is reached. This recommendatory process is also followed in Korea, Malaysia and Pakistan. After a thorough study of an aspirant's case by the Parole Examination Committee (for Korea), the Institution Discharge Board (for Malaysia), and the Reclamation and Probation Department (for Pakistan), favourable recommendations usually come next.

As earlier stated, parole may be granted to a qualified Philippine prisoner without necessitating recommendation or application. The Board of Pardons and Parole is empowered by law to consider a prisoner for parole on its own initiative.

C. Supervision of Parolees

1. Conditions

There are two kinds of parole conditions in Japan namely: general conditions and special conditions. The first one is determined partly by law and the second, partly through administrative action.

Some of the given general conditions are: (a) special residence requirement; (b) must have lawful occupation; (c) restrictions of bad conduct and criminogenic companionship; and (d) prior consent for change of residence or authority to travel.

Special conditions for parolee's compliance have the character of inconstancy depending on his individual needs.

A Malaysia juvenile may be released on conditions only the Director General of Prisons may impose.

Conditional release of prisoners in Korea, Pakistan and the Philippines is generally founded on maintenance of good behavior, non-committal of crimes, regular contact with his supervisor, the residence requirement, support of family, refrain from frequenting place of disreputable and harmful character.

2. Officials Involved in Parole Supervision and Period of Surveillance

The period of parole supervision in most countries is up to the expiration of a prisoner's sentence. However, for parolees serving life sentences, they are obliged to undergo supervision for a longer period or even an unlimited time as in Japan. In Pakistan, surveillance period is up to completion of 25 years including remission for life sentenced parolees.

Juvenile parolees in Japan are, in principle, supervised until they reach the age of twenty with possible early discharge in case of good behaviour.

Probation officers supervise the juvenile and adult parolees in Japan and the Philippines, and the juvenile parolees of Korea. However, Korea's adult parolees are under the supervision of the Police Chief; Parole Officers supervise Pakistan parolees; and Welfare Officers oversee parolee in Malaysia.

3. Revocation

The general rule in the jurisdiction of the four foreign countries excluding Japan is that the power to grant carries with it the power to deny, revoke or invalidate previously granted conditional release on parole. Therefore, the deciding authorities, offices, and Boards mentioned in the early part of this report are the same authorities, offices and Boards that exercise this power of revocation or cancellation. This is not true in the case of Japan. While adult and juvenile parole is granted solely by the Parole Board, revocation of juvenile parole is not vested in the same Board but only in the Family Court.

Pardon

A. Existing Forms

It was disclosed at the group discussion on this particular subject of Pardon that only Pakistan does not already have Pardon system in its jurisdiction. The other four countries which have this system either practice it actively or rarely. Only on special occasions of national significance is pardon given to pris-

oners in Japan, Korea and Malaysia. In the Philippines, pardon system is very much active in that it is exercised anytime at the pleasure of the pardoning authority.

In Japan, pardon is granted by its Cabinet. General Pardon is issued in the form of Cabinet Ordinance while Individual Pardon is extended upon the recommendation of the National Offenders Rehabilitation Commission. The Individual Pardon conferred by the Cabinet is attested by the Emperor.

Individual pardon in Malaysia is granted by the State Pardon Board which is headed by a Sultan or the State Governor whereas, collective pardon is granted by the *Yang Di Pertuan Agong* (the King).

In Korea, the grant of general pardon needs the consent of its parliament while special pardon requires approval by the Cabinet. In any case, however, only the President can initiate pardon or amnesty.

Only the President of the Philippines, in the exercise of his Pardoning power pursuant to the Constitution, can grant pardon, absolute or conditional, to an offender with or without recommendation from the Board of Pardons and Parole. However, in practice, the President does not grant pardon without the appropriate recommendation from the Board of Pardons and Parole.

There are at least two given classifications of pardon in each of the four countries. Japan has General Pardon and Individual Pardon; Korea has General Pardon and Special Pardon; Malaysia has Individual Pardon and Collective Pardon; and for the Philippines, Absolute Pardon and Conditional Pardon.

Of these general classifications of Pardons, the following forms of pardons are granted only during special occasions: General Pardon in Japan and Korea, and Collective Pardon in Malaysia.

Japan's Individual Pardon is further sub-classified into: (a) Special Amnesty; (b) Commutation of Sentence; (c) Remission of Execution; and (d) Restoration of Rights.

It was learned that (a), (b) and (c) forms of

individual pardon can bring about early termination of probation or parole. Remission of Execution is the only means by which the period of parole of a life term is terminated. Since in Japan, in principle, in the case of a life sentenced prisoner, his parole period should be continued until his death unless he is given remission of execution. Restoration of Rights, on the other hand, operates to relax, in whole or in part, restrictions and obliterations of the legal license because of conviction.

Special Pardon in Korea and the two forms of Pardon in Malaysia, as earlier stated, are of a similar concept in that they are all granted without conditions so much so that the grantee becomes completely a free man.

In the Philippines, absolute pardon works only to wipe out the offender's derogatory record and the restoration of his civil and political rights. Conditional pardon, on the other hand, is a measure intended to give prisoners early conditional release. This is granted with the view to prevent unnecessary and excessive deprivation of personal liberty.

B. Application of Pardon System

1. Qualification/Criteria for Selection

In general, offenders who are qualified for parole are also qualified for pardon except for some minor differences, such as on the point of prison service especially in the Malaysian and Philippine systems of pardon. Malaysia requires its prisoners to serve seven years or more of their prison term while under the Philippine system, a prisoner is required to serve one half of his minimum or definite sentence or a portion thereof in specified cases.

Absolute pardon in the Philippines requires that ten years must have elapsed from the date of petitioner's release from confinement or five years from the date of expiration of his maximum sentence, whichever is more beneficial to him. However, the Board may consider a petition for absolute pardon

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in special cases such as, when petitioner is seeking reinstatement in the government service, needs medical treatment which is not available locally, will take a government or Bar examination, or is emigrating.

2. Disqualifications

Again it is understood that offenders who do not qualify for parole and who also fail to meet additional requirements for availing of the benefits or pardon are, for all intents and purposes, also disqualified from the grant of any of the forms of pardon.

3. Procedure

There is uniformity of procedure that is being followed in each of the four pardon systems herein discussed. This is the process of recommendation. In other words, the granting authority in each of the four jurisdictions uses the pardoning power only when they are presented with such a recommendation.

C. Supervision of Pardonees

1. Conditions

As previously indicated, pardons in Korea and Malaysia are absolute. The same is true in the case of Japan. Pardon in these countries means full freedom not only from further incarceration but also from restrictions imposed against an individual. This is not so in the case of the Philippines only with regard to conditional pardon.

Conditional pardon in the Philippines provides for similar conditions as that granted to a parolee. To avoid redundancy, reference should be made to the discussion of the conditions of parole.

2. Officials Involved in Parole Supervision and Period of Surveillance

Supervision over Philippine pardonees is lodged in the Parole and Probation Officers in addition to their undertaking of supervising probationers. This is mandated by a new law which took effect in the early part of

1990.

3. Revocation

A conditional pardon may be revoked or cancelled only by the President of the Philippines upon recommendation by the Board of Pardons and Parole based on serious violations of the conditions thereof and on the grounds of willful or malicious concealment of material information from the Board either before or after release.

Remission

A. Existing Forms

Remission consists of the early release of an offender and is regarded as an effective measure for the treatment and rehabilitation of offenders still in prison.

Viewed in the concept of reducing imposed prison term or sentence, remission is best illustrated, although a little bit cumbersome, in the case of Pakistan. Designed to encourage good conduct, discipline and industry, this system is also applicable and practiced in Malaysia and the Philippines (in the form of good conduct time allowance). Unfortunately, there is no remission in Japan and Korea.

B. Applications of Remission

1. Qualifications/Disqualifications

All prisoners in the Philippines are entitled to remission. In Malaysia, all convicted prisoners can also avail this method except, (a) detained debtors; (b) condemned prisoners; (c) prisoners convicted on his majesty's pleasures; (d) those serving an imprisonment of one month or less; and (e) those convicted for natural life. In Pakistan, convicts, under certain limitations are entitled to remission.

2. Manner of Application and Revocation

In Malaysia and the Philippines, remission is simple. A qualified Malaysian prisoner is given sentence reduction of not exceeding

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one third of this sentence. In any given time, on breach of prison discipline, the Director General of Prisons can deduct up to three months from a prisoner's limited sentence, and the Superintendent of Prisons can deduct up to one month.

Prisoners in the Philippines uniformly get equivalent reductions depending upon the actual time they have served in prison. This is at least one month for every year of prison service.

In Pakistan, remission is classified into: (a) Ordinary; (b) Special; and (c) Extraordinary special remission.

Ordinary remission which is limited to deduction of up to one third of the sentence, is further divided into: (a) Conduct remission; and (b) Work remission. Conduct remission is normally two days per month and if the prisoner maintains good behaviour for a year, that is, he does not commit a crime, then an additional 15 days annual good conduct remission (AGCR) will be awarded. Work remission, subject to performance of task ranges from 3—6 days per month according to the assignment of task. This particular remission does not exceed one third of a prisoner's sentence.

Those who cannot avail ordinary remission are the following:

- (a) those with less than four months sentence;
- (b) simple imprisonment, that is, without forced labour; and
- (c) those adjudicated by the court to pay fines.

Special Remission is granted by the Superintendent of Prisons (up to 30 days per year of service), Inspector General (up to 60 days per year) and the Provincial Government (also up to 60 days per year). This form of remission is forfeitable on the ground of misbehaviour. It may also be granted apart from ordinary remission but shall not exceed the one third limit.

Extraordinary Special Remission is grant-

ed on the condition of blood donation, sterilization and passing a government examination. The characteristics of this particular form of remission are that, it can exceed the one-third limit and is granted to a prisoner based on his voluntary subjection to any of these conditions. Furthermore, this is non-forfeitable. Remission based on blood donation and/or sterilization is equivalent to 30 days at any instance, and for passing government examination, the prisoner's sentence reduction ranges from 2—6 months according to the length of sentence.

It was emphasized that a prisoner who commits a breach of the prison discipline forfeits himself of a portion of ordinary or special remission according to the gravity of prison offence.

New Measures for Non-Custodial Treatment of Offenders at the Post-Sentencing Stage

Only Japan and Korea have introduced new measures for non-custodial treatment of offenders at the post-sentencing stage. Each of these two countries has adopted the work release and educational release programs.

A. Work Release

1. Korean System

Introduced in Korea in the year 1988, this work release system has been implemented in ordinary prisons and recently, it was expanded to a much broader scale. It gives a prisoner an opportunity to work and earn for himself outside of prison walls.

The purposes of work release in Korea are the following:

- (a) Acquisition of work habit and improvement of job skills;
- (b) Massive utilization of manpower for private industry;
- (c) Promotion of optimism among prisoners for an early release on exemplary conduct; and

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- (d) Employment assurance or support after release.

The prisoner who is qualified for parole is also qualified for this program provided that he passes the following standards:

- (a) He must be between the age of 18—55;
- (b) He must show good behaviour;
- (c) Probability of escape is remote;
- (d) He must be physically and mentally stable; and
- (e) He must be adaptable to work in industrial places.

Incidentally, work release program applies only to enterprises engaged in the manufacturing and construction business and the location of the place of work must be within a commutable distance. It must also be a Model Enterprise, that is, it is recommended by the Ministry of Commerce and Industry or the Construction Association of Korea.

Those prisoners who are allowed to work outside prison receive 90% of their wages which are deposited and saved in their bank account.

The introduction of this work release program in Korea is intended to improve the society's perception of correctional administration. It is regarded as an attempt to solve the problem of industrial manpower shortage. Moreover, it is also considered as a measure to prevent the increase of recidivism.

2. Japanese System

There are only a few differences in the system of work release practiced in Japan and Korea. The difference lies in terms of benefits. While prisoners on work release in Japan are unescorted and fully paid, in Korea prisoners are escorted and are paid less (only 90% of their salary). Japan's system therefore is more liberal than the Korean system on this score. Another point of comparison is the age qualification. The age requirement under the system of Japan is from 18—50 while in Korea, from 18—55. Except for

these disparities, the work release system of these two countries are similar in all respects.

In Japan, the work release program is practiced only in Ichihara Prison, an institution for traffic offenders.

B. Study Release

1. Korean System

In order for a prisoner to be eligible for this program, he must be qualified to enter a college or university. His educational and behavioural record is scrutinized and screened by the prison officials and once he passes this screening, the Warden will allow his release for educational purposes.

This particular program is practiced only in one school, that is, the Korea Broadcasting University. The grantee of this program can enroll in any subject offered by this university and classes are held via TV or Radio. Twice a year, he is required to attend the class in the university for ten days each. He is provided in prison with radio cassettes and other audio-visual equipment and stationery placed in a special reserved room. His school expenses are, in principle, paid by him but sometimes it is paid by volunteer social or religious workers.

2. Japanese System

Study release program was recently introduced in Japan in 1991 to allow juveniles, who are expecting to be released within 2—3 months time, to enter school. The juveniles referred to here are those who are admitted in the Juvenile Training School. Eligible to avail the benefits of this program are juveniles who are capable of rehabilitation and able to continue to study at their former schools.

These newly introduced programs of work release and study release are proposed as additional measures for non-custodial treatment of offenders at the post-sentencing stage. Although it is admitted that there are some flaws in their application, the group is

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unanimous in adopting them as different and diversified systems of treatment and rehabilitation of offenders with a view towards facilitating the reintegration of offenders into the mainstream of society.

Conclusion

The fact that these systems of parole, pardon and remission having been in existence for a long period of time in countries that practice these systems, is indicative of the immeasurable usefulness they bring not only on the government side but more importantly on the part of the offender and his family. There is no doubt that the purpose for which these systems exist is directed towards the upliftment and redemption of valuable human resources to be put to economic use. Needless to say, offenders are given chances to reintegrate into and mingle with the free society.

This group workshop report must therefore be looked upon as a guide or reference for those countries desirous of humanizing their correctional system. Although admittedly, there are minor defects in the report as it is presented in summary form, the very concept or idea on how these three systems work and are implemented is easily comprehensible and capable of being emulated.

Importance for the development and improvement of the systems of parole, pardon and remission, as well as the newly introduced work release and study release programs, should be speedily addressed in order to make their implementation more effective and productive by the countries utilizing these systems.

Finally, it is worth noting that "corrections without community involvement is an exercise in futility."

Session 4: Mechanisms for Effective Development of Non-Custodial Measures

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I. Introduction

Examining the extent and effectiveness to which the non-custodial measures are being applied in various countries is not practical in this single presentation. Given the obvious limitations, the paper explores aspects of community involvement in non-custodial measures through non-government organizations and volunteers. Issues to be addressed relate to staff training, co-ordination of criminal justice agencies, and the victim's rights. These issues will therefore be discussed in the context of existing systems and regulations, current practices and problems. Possible impediment to the introduction of more extensive use of these measures will also be touched upon. Finally, efforts will be made to offer some possible strategies within the context of specific issues being discussed.

Both industrialised and developing countries gave little attention to the community as a resource in crime prevention and offender's rehabilitation. Although Japan has had community involvement for some time now, generally the involvement of volunteers and non-government organizations has only recently been accorded wide prominence in other countries. The future will, no doubt, see crime prevention and offender's rehabil-

itation as a shared responsibility between governments and the societies they represent. Increased realization of this trend will enable criminal justice systems to dispense a greater degree of the abstract term called "justice"; thereby earning higher levels of respect they currently deserve.

Economic necessity forced developed countries to acknowledge the benefits of non-custodial measures for offender treatment. Tax payers' money could no longer be used without guilt or public questioning to increase institutional capacity for custodial measures. Not only are the prison facilities expensive to build, and administer, but also compel the criminal justice system to fill them with occupants. Jails must stay but only for serious offenders who are a threat to society and therefore need concentrated corrective institutional training programme.

II. Need for Non-Custodial Measures

Following outmoded incarceration practices of the developed countries has been a common convenient practice for the developing world. Little attention was paid to a greater use of non-custodial measures as alternative sentencing options. In part it was inevitable for the developing countries, as former colonies, to maintain status quo with their colonizers. Given the social environment, political climate and economic dependence at that time, there weren't many options available to choose from.

Realization has at last dawned on the positive nature of non-custodial measures: (1) Generally they relieve prison over-crowding; and (2) Have future hopes in minimising criminal behaviour, (3) Incarceration is expensive to national budgets; and (4) Does more harm to the bulk of prison population which is comprised of minor offenders.

The society and community are where the offender comes from and to which he must eventually return. No longer can a government afford to continue applying custodial measures and thus shouldering the respon-

sibilities of crime treatment programmes on it's own.

Inherent in the United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) is the desire of the majority of nations to treat offenders humanely, as members of the society. These rules provide a guide to the use of non-custodial measures either to divert the offenders from entering into the criminal justice process or rehabilitating them, back from lives of crime. Imprisonment is to be used only for those offenders who deserve to go there to be punished, and to correct deviant behaviors or to segregate them from the society.

However the application of these rules will depend on the cultural background, existing economic and social conditions plus the criminal justice policies of the respective governments. Although their practical application will vary, round the world, the guidance these principles have will be an inspiration for governments and nations.

1. *Social and Cultural Context*

Of paramount importance to the discussion is the sociological context from which these measures have firm foundations for development. Understanding the mechanism of social control within various communities and different societies is inevitable if we are to fully appreciate non-custodial measures and implement them. Certainly there is the argument that non-custodial measures are cheap to administer and involve a shared responsibility between the community and the government. A more humane and national view is that the community must assume some responsibility to redirect their offending members. The offender further has both a personal interest and an obligation to follow the established norms. These mechanisms of social control and reciprocal obligations are the foundations upon which different societies are identified, acceptable modes of behaviours are defined and regulated. The member has to follow certain rules in exchange for protection, security and

personal well-being.

It can be said that the same principle applies in relation to the criminal justice systems governing the individuals. The offender has obligations to the society he belongs to in exchange for certain benefits. Following the written law as regulated by the criminal justice system is therefore obligatory in exchange for protection the same system provides. Applying non-custodial measures to those deserving offenders will lead to the maintenance of social order, and hence will provide greater level of equilibrium between the community, the offender, the victim, and the written law.

2. Using Existing Local Social Control Mechanisms

Many countries have realised the need to re-examine their societies for solutions to minimise crime, and increase the level of effective offender rehabilitation. The value systems identifying countries, societies and communities as distinct entities need to be identified and enumerated in the written law to a level where they become practices within the criminal justice systems. Mechanisms of social control exist in all societies, developed or developing. In developing countries these social controls are manifested in tribalism and ethnic identity. The search for appropriate non-custodial measures in the developed countries is in itself an acknowledgment that mechanisms of social control exist in their communities; therefore they ought to be formalised.

Budgetary constraints have forced developed countries to stay away from custodial measures. In developing countries insufficient funds prevent expansion of prison facilities thus justifying the dependency syndrome of following inherited criminal justice systems. Under given limitations of financial resources, in developing countries, the use of non-custodial measures is inevitable. Inadequate budgets to cater for prison overcrowding or development of alternative non-custodial measures is no longer an issue.

Indeed the 21st century will see penal policy shifting greater emphasis to non-custodial measures. Japan has set the stage for community involvement in non-custodial measures. Extensive use of volunteer probation officers and non-government organizations must have surely contributed toward the country's lowest crime rate in the world; and yet it is the most industrially developed nation. Community involvement obviously contributed substantially towards this positive crime trend.

Japan is a caring homogenous society. Its criminal justice system is based on long history of traditional values and customs which continue to mould the Japanese personality. Unlike many other countries, all Japanese have one common belief, the same customary practices plus a single language; and all these sociological factors unifying the population as one nation.

Let this statement not be construed as an appeasement. To understand their present successes, it is necessary to appreciate the foundations upon which it has stood tall and high. Present advanced programmes in custodial and non-custodial measures, including computerization, are simply acquisitions along the way. The benefits of economic advancement increased their capacity to enhance the efficiency and effectiveness of what already existed with them.

Non-custodial measures exist in all countries. However the extent to which these measures are being applied, and the degree of success they have met with, varies. Common to all these nation states is the notion that mechanisms of social control need to be considered while determining the type of sanctions necessary to maintain social order. These measures are wide in scope and complex in nature. Some countries apply them in limited way, but outside of the formal legal process, in appreciation of and respect to the existing cultural values. The onus of responsibility is on the governments to incorporate these mechanisms of social control, in the legislative framework and thereby es-

establishing their roots in authority for future successful growth. Indeed, with increased awareness of such an approach many social mechanisms, of control and justice, will take the form of statutes, within the near future.

3. Involvement of Volunteers and Non-Government Organizations

Examining the existing systems and regulations relating to non-custodial measures is therefore now appropriate. Many countries have legislated non-custodial measures for the treatment of offenders but their implementation has been quite difficult either due to limitations of law, or lack of innovative efforts. Legislations exist in African, Asian, Pacific and Latin American countries but the involvement of the community, through volunteers or non-government organizations (NGOs), has not been fully catered for in statutes to provide administrative authority for their involvement at the implementation stage. However, Japan, Singapore and Papua New Guinea are a few of those countries which have done much better in this aspect and their current practices shall be explored as below.

(1) Japan's Experience with Non-Custodial Measures

Japan introduced non-custodial measures for the treatment of offenders long before the Western Countries began shifting their penal policy towards greater community involvement. The use of non-custodial measures could be traced back to a time much earlier than their contact with the Western world. "In 697 Emperor Shohmu released a robber and gave him some clothes." (from the paper by Tsuneo Furuhashi "Rehabilitation Services in Japan"). The Japanese government established, by legislation, the institution of half-way house providing ex-offenders with job training, education and after-care. A system of parole was also introduced in the late 19th century.

During this period the government lacked the financial resources for the treatment of

offenders. Of significant importance here is the fact that the government then requested religious groups and volunteer organizations to provide whatever help was necessary for the rehabilitation of these offenders. The immense positive support from these organizations and the community at large gave strong foundation to the present day non-custodial measures in Japan.

Encouraged by the positive government policy, community support from the Japanese citizenry increased tremendously between 1884 and 1917. In 1884 a separate facility for juveniles was established and 1888 saw the development of the first protection facility for released offenders which was again basically a result of volunteer efforts. The origin of the present day volunteer probation officers system can be traced back to 1913 (from the paper by Tsuneo Furuhashi).

Recognizing the immense contribution from the community, the government provided complimentary encouragement through the legislative framework. Old laws which relied heavily on custodial measures were amended to accommodate changes taking place and new legislations emphasising community involvement in offender treatment were enacted. These changes culminated in the legal recognition of community as a partner in offender treatment programmes through the enactment of two legislations in 1950; The Volunteer Probation Officers Law and The Law for Aftercare of Discharged Offenders. Japan established the Rehabilitation Bureau, under the Ministry of Justice, to direct and co-ordinate government and community efforts in offender rehabilitation and offender treatment in the proper way. Today NGOs' assistance and individual volunteer support are accorded formal recognition as a necessary component of the criminal justice system.

Currently there are quite a number of effective social programmes which are heavily involved in the implementation of non-custodial measures.

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- (a) A great example of group interest and community solidarity is the system of Volunteer Probation Officers (VPOs). These VPOs are the ground personnel supporting offender rehabilitation programmes. They are engaged in activities which promote crime prevention.
- (b) Even after offenders are imprisoned the society continues to remember them. This positive attitude is shown through the care and support provided by the half-way houses, which are managed largely on volunteer efforts through the Rehabilitation Aid Associations.
- (c) Thirdly the National Women's Association for Rehabilitation Aid renders support to a specific group in the community; the women offenders and all other offenders.
- (d) Similarly, the Big Brothers and Sisters Association direct their efforts to befriend members of their peer group, the juvenile delinquents.

The next two programmes of probation and parole are familiar concepts to non-custodial measures. Whilst in many jurisdictions probation is a sentence given only by a court, a Japanese Public Prosecutor can also suspend prosecution and suggest an offender to be under probation office's after-care service programme.

(2) Singapore's Experience of Volunteer Involvement in Non-Custodial Measures

The use of non-custodial measures in Singapore commenced after the Second World War. With the introduction of Children And Young Persons Ordinance in 1949 a Probation section was established under the department of Social Welfare. This was in response to crime and delinquency resulting from physical and emotional deprivation which were the aftermath of the war. In 1951 the legislature enacted "Probation of Offenders" law extending probation to include almost all juveniles and adults. Between 1953 and 1984 a number of legislative

changes were introduced to increase non-custodial measures for offenders. Those changes reflected the growing community involvement in offender treatment programmes such as reformative training, corrective training, preventive detention and parole (by "Criminal Justice System in Singapore," UNAFEI).

Amendment to "Probation of Offenders" law was made in 1975 bestowing legal authority to volunteer probation officers to supervise probationers. Previously, volunteers were involved in offender supervision but they were not accorded legal recognition. Courts have legal authority to order restitution or compensation as a condition for probation or order offenders to probation hostels. They do not order community work nor send offenders to referral institutions such as private counselling centres which is a responsibility undertaken by the Probation Service.

(3) Papua New Guinea's Experience

Independent since 1975 Papua New Guinea is a third world country. It is tribal in nature with many cultures and over 786 languages. In the past rigid enforcement of the British criminal justice system was necessary to pacify the peoples. It was only after independence when indigenous people assumed political and legislative authority that the criminal justice system began experiencing positive changes.

During the last fifteen years of independence emphasis was placed on economic development. This uneven development policy was accompanied by the social ills of crime and disorder. It is a common legacy of most of the developing countries. Although urban crime in Papua New Guinea was on the increase the 95% of the population in rural areas was less dependent on punitive treatment measures. The bulk of the population wanted more emphasis on customary ways to address law and disorder problems in their won communities. In response to majority desire and at the same

time recognition of custom, the government introduced the Village Court system.

The purpose of these village courts is to hear and determine offences according to custom, especially for minor offenders. They deal with over 95% of rural crime but on a national scale the ratio would be approximately 50% of the country's crime. This system has prevented many rural offenders, who are largely ignorant of the introduced criminal justice system, from entering a foreign institution called "prison." Custodial measures would not have helped these ignorant people and would only have separated them from their own communities.

In 1979 Probation legislation for adults was enacted, providing the courts with an alternative non-custodial sentencing option. Important aspect of this legislation lies in the provision, for the courts, to use discretion while sentencing the offenders. Apart from the statutory probation order, courts were given authority to impose other special conditions, depending on the circumstances of each case.

A court sentence can be awarded to suit the crime, but at the same time, rehabilitative sanctions can be tailored and given along with the punishment. On many occasions special conditions are imposed in addition to probation orders including compensation payment, restitution, repatriation to the village, community work order, undergoing specific treatment programmes, restricting movement after certain hours, or any other condition acceptable to the prevalent customs. Sentencing offenders to imprisonment followed by a probation supervision period is also being practiced.

Encouraged by the success of probation supervision orders the government enacted new legislations in 1991. They included; Parole, Criminal Compensation, and Juvenile Court's Service. Administrative responsibility for these laws has been given to the Probation and Parole Service under Attorney General's department.

The high consistent success rate of over

94% as indicated in the Probation Service Annual Reports since 1986, is a result of community involvement, through volunteer probation officers. This recognition of volunteer support is acknowledged through legislation providing the authority to engage VPOs. Volunteers who are also entitled to worker's compensation under worker's compensation law, are appointed from the community where the offender resides. The criteria for appointing these volunteers is very much similar to Japan and Singapore.

(4) Current Practices in Other Countries

Mechanisms of social control exist in all communities. These social control measures manifest themselves in the expected social behaviour, religions, customs, specific written rules of a group or written laws emanating from the national constitutions. On a national scale the common practice nowadays is to legislate whatever behaviour is generally acceptable to the majority of its citizens. This then becomes the mode of conduct for everybody. Punishment against breach of the laws is also legislated. However, on many occasions these laws fail to account for the social control measures at the local level. In the end these laws which are well intended have become unintentionally a source for social discontent within a community, tribe or family. For example sending a group of five married men to jail for stealing a cow does more harm to the community when the matter could have been easily settled locally through a mediated compensation settlement.

In many countries anti-social behaviour could be treated at the local level. Minor offenders in most tribal societies particularly in rural areas are being treated by the community leaders whether they be village chiefs or wise elders. For example in Zimbabwe traditional law emphasised reparations. When all criminal trials were removed from village court's jurisdiction, reparation to the majority became non-existent except to those who can afford civil suit.

The village Panchayat (committee) system

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attend to, and deal with, 50% of Indian crime. Although the system deals with less serious offences, in reality they divert half the offender population away from the criminal justice system. Offenders are dealt with locally through mediation and dispute settlement followed by compensation to victim or repentance. This system involving village elders, influential people and responsible community members is also practiced in urban centres.

The Village Panchayat system of India, the conciliation boards in Sri Lanka, Zimbabwe and PNG Village Courts plus the nature of dispute settlement in many other tribal societies of Africa all recognise the existence of communities which have traditions, customs and indigenous ways to deal with offending members who don't conform to social rules—commonly referred to in English language as “criminals.”

Even in the Japanese criminal justice system a serious offender could still be diverted away from the court process and ultimately from the stigma of a prisoner with a jail term. In practice, the Public Prosecutor can decide, in the interest of justice, fairness and community's desire whether to prosecute a case or not within the limits of the Law, or out of court settlement between the aggrieved parties. For example in the case of an employee stealing from the employer; if the parties agree, the stolen money is returned in full within a fixed period of time; the public prosecutor could decide the suspension of prosecution on that case without the matter going to the court.

Similarly New Zealand has a diversion scheme for juvenile offenders. Primarily this system was introduced in recognition of indigenous Moari people's customs and traditional dispute settlement of the Pacific Islanders. The juvenile court officers mediate a round-table settlement between the victim and offender including the parents or guardians. Where a settlement is reached either by compensation, restitution or working certain number of hours for the victims, the case

is never brought before a juvenile court. In the event of a disagreement the matter is taken to a juvenile court for determination.

Generally volunteer organizations comprised of willing individuals exist in all countries, to assist government efforts in crime prevention and offender's rehabilitation. These organizations can be identified by the various objectives they fulfill such as: health and welfare of youth; prevention of drug abuse; crime prevention; national home guard schemes; after care programmes for released offenders; neighbourhood watch communities or special police officer's system augmenting the regular police force; and volunteers. These groups are concerned with consoling and counselling victims of rape and other sexual assault crimes or assisting offenders away from behaviour unacceptable to the society.

It is a heartening aspect that in all the countries there exists community's willingness to help better their societies. This is seen in the various traditional social control mechanisms and numerous semi-government and non-government volunteer organizations which have mushroomed over recent years to combat social disorder problems. Their objectives are either to address causation factors of crime or prevent recidivism of those who have already offended against society. However, placing specific emphasis on non-custodial measures for offenders as provided for under the “Tokyo Rules” appears to be an uphill task for many countries.

In many developing countries religious organizations are there which are contributing to crime prevention. India, for example, has many institutions, religious or otherwise, which take care of the poor, helpless and the destitute men and women, many of them having crime potentials. Without such social support, crime rate in India would have been higher than what it is today. Similarly some religious groups in Indonesia also provide material support to the poor and the needy. In Zimbabwe volunteer initiative is seen in a programme to help rape and other sexual-

ly assaulted victims. The Zimbabwe programme is yet to get government support.

4. *Present Difficulties*

Crime exists in all countries. To address this issue governments' policies emphasise economic development to generate income earning opportunities and thus increase economic employment level. The effect of economic employment will be to improve quality of life and minimise crimes and social disorders. In developing countries governments continually endeavour to create a firm economic base. National budgets continue to reflect these policies while agencies in the law and order sector such as Police, Correctional Service, Courts and other agencies of the criminal justice system are given low priority.

Priority emphasis on economic development is necessary as well as unavoidable. Asking governments to redirect their primary concerns to crime prevention and non-custodial offender treatment measures would be a fruitless exercise. Many countries have law and order policies but these are accorded less prominence especially in budget allocations. With inadequate funding, agencies in the law and order sector find it difficult to implement new initiatives. They have to maintain existing operations only. Without a firm financial base, initiating new non-custodial measures for the treatment and rehabilitation of offenders becomes a difficult though not an impossible task. Qualified personnel and other essential resources are initial costs, to be incurred, in order to build up the capacity to support the new programmes.

Assuming funds were available, the next hurdle which needs to be overcome is located in the legislative area. Old laws need to be amended to accommodate non-custodial measures or new statutes need to be enacted to legally formalise initiatives such as Parole, Adult and Juvenile probation supervision, volunteer probation officers, community work orders or criminal compensation.

Convincing politicians of the benefits of such legislations is a "Task" by itself. This is further compounded by the conservative groups who feel that changes bring negative repercussions; and they are therefore content with the existing laws and practices.

Besides appropriate legal changes, community attitudes also need to be brought in order. The community needs to be informed of these changes and a concerted effort made to gain their essential support required for the success of these programmes. They are accustomed to custodial measures i.e. imprisonment. People's minds have been attuned to accepting without question that punishment through imprisonment is the only option to treat crime and rehabilitate the offender. It is hard to teach an old dog new tricks. Therefore it is much more difficult to make old people realise that they also have a duty, in changing the deviant behaviour of their community members.

Crime prevention and offender rehabilitation as governmental responsibilities is generally an accepted notion of a community. The concept that the above responsibility has to be shared between the government and the community leads to mixed feelings and uncertainties. Non-custodial measures would either be viewed non-punishment or governments would be accused of letting loose dangerous criminals on the streets to continue disturbing the social order. These stereotype attitudes need to be changed.

There is one more bridge to cross regarding policy and legal impediments to the introduction, or extensive use of non-custodial measures. Furthermore the criminal justice system needs to be convinced so as to accept non-custodial measures as sentencing dispositions specially when new measures are introduced for the first time. Once the system realises that non-custodial measures widen their scope of sentencing discretion, they will endeavour to apply a sentence reflecting "justice" and fairness to the victim, offender, society and the law itself.

The advantages of non-custodial measures

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were touched upon in a general way earlier. It is, however, useful to elaborate them further particularly at the implementation level. In applying these measures recognition is given to the local nature of the conflict. Whether it is a case of stealing from a neighbour, employee, or mutual quarrel, or a trivial incident of disturbing community peace, of wife beating or drug abuse, the issue has to be resolved locally to ensure social harmony. In this sense, a non-custodial sentence can be tailored to suit the crime. Secondly, involvement of non-government organizations and volunteers, i.e.; volunteer probation officers ensures less frightening formalities to those offenders who are willing to change their behaviours. The effective influence of a zealous volunteer officer is more likely to play upon the offender's mind to get his behaviour modified.

Thirdly, the economic benefits of these measures are quite obvious. Less offenders in jails minimise the operational costs and more importantly increase the level of prison's staff attention on serious criminals who really need to be treated. Finally the non-custodial measure will not suffer through official staff transfer, i.e. a probation officer transferred from one office to another; as the offender continues to serve his time under supervision in the community through the VPO.

Although there are great advantages to non-custodial measures, awareness of the possible difficulties in involving volunteers and non-government organizations is also necessary. If a volunteer is supervising more than one offender, attention should be given to avoid inequality of treatment. Giving favoured attention to one offender and overlooking the other could lead to problems. Secondly, while referring offenders to volunteers, due attention shall have to be given to their interpersonal relations. For example if both parties were political or business friends/enemies in the past then such a new relationship may not serve the useful purpose of a non-custodial measure. Lastly, the

involvement of volunteers could lead to decreased professional standards in offender supervision aspects plus inadequate attention to those requiring specialised treatment such as alcohol or a drug treatment programme.

Volunteer institutions, like Half Way Houses or Rehabilitation Aid Hostels, often fall short of finances. Even if the government subsidy is available in such cases, it is never sufficient enough and even where governmental support is given it has its own basis and conditions for these grants. Moreover, these institutions require expertise in management and public relations. Though trained and willing personnel are generally available to serve the aims of these programmes, they may not be capable enough to run the institutions at the required level of efficiency. Sometimes, the neighbours reject the presense of criminals in a Half Way Houses, in their locality. However, a good explanation, to the neighbours, about the humanitarian and reformative aspect of such institutions and a good public relations effort can satisfy the locality and gain their co-operation.

Governments continue to be suspicious and doubtful of volunteers and volunteer agencies particularly in their ability to deliver the quantity and quality of the expected services. These doubts are manifested in the nature of funding arrangements which are based on specific formula rather than a long-term contractual agreement.

On the other hand volunteers and non-government organizations may not be keen enough to accept too much government interference. Being volunteers, they don't want to be overworked and their activities scrutinised for the purposes of public accountability. To encourage volunteer involvement, government policies towards assisting non-government efforts need to be both liberalized and quantified.

A fair assessment of the roles, of both government and the volunteers, is necessary. Further a clear understanding between the government and the volunteers will lead to

increased co-operation, thus ensure extensive involvement of community in the implementation of non-custodial measures.

III. Staff Training

Criminal justice personnel in all countries are trained professionals. The various training programmes reflect the knowledge and skills required of a specific discipline. Staff training has therefore placed emphasis on the roles and responsibilities of the respective organizations. Educating their personnel on non-custodial measures is virtually nonexistent in most countries. This situation is compounded further by the lack of programmes to educate the community that resorting to formal authority to restore social order locally is not necessarily the only option.

An integrated approach to staff training in all aspects of the criminal justice system is paramount to effective maximum utilization of non-custodial measures. The existence of Police Colleges, Correctional Officers Training Institutes and Legal Training Institutes attest to this fact. Additional training facilities should be provided to teach relatively new disciplines defined non-custodial measures.

The concept of an integrated training approach covering all spheres of the criminal justice system and various offender treatment programmes may very well appeal to many governments. An integrated training approach such as this would provide staff a total view of the criminal justice system and their respective roles towards making it effective. Introducing non-custodial measures with some reference to community involvement in this context may lead ultimately to a better understanding of the criminal justice system's objectives.

1. Existing Systems

It is not impossible for governments to adopt an integrated approach to staff development and training. Certainly problems

crop up when one deviates from the normal practice of exclusively professional training. One concern relates to lack of necessary resources such as funds and personnel while the other lies in the possible opposition from the various disciplines such as police, lawyers and prison officers. These difficulties will be discussed later but for the moment citing the limited examples of integrated approach is called for.

The United Nations Asia and Far East Institute for the Prevention of Crime provides the international model for an integrated approach to staff training and development.

The participants come from all agencies within the criminal justice systems around the world. And, the course content enables all the participants an opportunity to learn about how other agencies operate in relation to the total purpose of the criminal justice system.

India is another case where integrated approach to staff training is undertaken. There, all staff within the criminal justice system are trained in one training institute sharing common exposure to roles of each other while at the same time pursuing their chosen professional curricula. Officers are also given an insight into psychology, human behavior, and counselling of both victims and offenders.

In Japan the staff training of prosecutors, correctional personnel and probation officers is under the responsibility of Research and Training Institute and several Bureaus under the Ministry of Justice. However, police personnel are trained under the National Police Agency. In the judiciary the Supreme Court co-ordinates through its institutions the training programmes and contents for the judges, other court personnel and legal trainees. Staff training programmes are designed to reflect a particular profession and yet encompass the roles of other related agencies.

Indonesia's case is similar to Japan. Indonesia has a Center of Educational Training within the Department of Justice. This agen-

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cy co-ordinates and develops staff training for all court personnel including judges plus correctional, probation and parole officers. However police personnel and public prosecutors are not within the Justice Department's jurisdiction therefore it is not involved in their training programme.

In-service training and refresher courses for staff appear to be a common practise everywhere. However, in most instances such training is in line with their professional career. Sending officers for training in non-custodial measures outside of the agency's objective is uncommon. Only a UNAFEI course of an international appeal could be approved by respective authorities for one officer to attend.

2. Possible Impediments

Indeed, in many countries emphasis on staff training has in the main been given to specific areas of interest. Police training emphasises the role and responsibility of the disciplined force in maintaining social order plus the methods to deal with offenders as thus the training of public prosecutors, judges, and magistrates. However their orientation towards the use of non-custodial measures needs more emphasis. Furthermore co-ordinated training of all criminal justice personnel on non-custodial measures is virtually non-existent in many countries.

It is acknowledged that many criminal justice agencies invite personnel from the other related agencies to give some exposure to the roles of their specific organizations. Whether it be a one-day lecture as guest speaker or a short practical attachment to a specific office, such an approach should not be regarded as co-ordinated. These arrangements should be treated as ad-hoc involvement of agencies occurring only as an afterthought and given only a limited time in the overall training programme.

A major need exists to introduce an inter-disciplinary approach to enable maximum utilization of non-custodial measures. These non-custodial measures exist in the legisla-

tions of most countries. Lack of knowledge on how and when to apply them may have led to their limited use hence giving rise to uncertainties. It is admitted that one of the primary duties of the police is to maintain social order and deter or detect crime. Likewise police and public prosecutors investigate the crime. To compliment those duties non-custodial measures should be introduced during the basic training course programme to give a broad view of the criminal justice system and the individual agencies' role in relation to the total harmony of the society.

It is the lack of orientation towards the application which proves to be a main impediment. In order to overcome this situation the training schedule of criminal justice agencies should be designed in such a manner as to ensure greater use of non-custodial measures. There are some instances where some judges do not have the required orientation to apply non-custodial measures. In such cases specific efforts need to be made to re-orient them.

Instructors in various training institutes need to initiate inter-disciplinary approaches to staff training. To ensure an effective and bipartisan view of the programme other agencies need to be involved in objective planning of the course, its content and participant representation. Inclusion of non-custodial measures at a meaningful level could lead to optimum realisation of the inter-disciplinary approach.

Admittedly many countries can do more to enhance an interdisciplinary approach in staff training. While UNAFEI, Japan and India's experiences are ideals to follow, lack of financial resources would be a problem in many developing countries. Secondly, there would be opposition from those who would want to see their present system continue. Where such conservative groups eventually yield to the changing trends, getting qualified personnel to design training programmes emphasising non-custodial measures would be a further hindrance to an integrated approach. It would be a less labourious task to

initiate an integrated training programme directed at personnel in specific agencies such as police, prison officers, public prosecutors and probation officers.

IV. Co-ordination of Agencies

It is co-ordination only that ensures an orderly action or movement in any sphere of life. Without co-ordination it is almost impossible to implement a scheme or achieve a goal. It is therefore of paramount importance to the success of non-custodial measures that all endeavours towards this end are well co-ordinated in an effective manner. Failing co-ordination, the goals shall remain elusive forever, even though the efforts of individual agencies are maintained at the highest standard.

1. Agencies

Ordinarily there are five agencies in most criminal justice systems. These include Police, Prosecution, Judiciary, Prison and Probation. With more emphasis on non-custodial measures the number of agents will increase depending on the extent of community involvement. To priorities these agents in the order of importance would not be correct because they are all a necessary link towards reaching the goal. No doubt every agent shall have a different role but all their efforts are directed to the same goal.

However, the system being community based, due care shall have to be given to the local way of behaving and practice. The social values shall have to be respected by all the agents not only at the time of deliberating a particular disposition to be adopted but also during the course of a specific treatment programme along with the methods being applied.

2. Co-ordination by Education and Orientation

In the absence of state "might" for enforcement, co-ordination efforts shall have to depend more on education and orientation rather than on orders and instructions. A sys-

tematic educational scheme, as well as a theme, shall have to be evolved after careful analysis. The scheme will ensure sufficient experimentation before being finally implemented. It follows therefore that the society will be adequately informed on the advantages of community involvement. Convincing the community, and its constituents, to share the responsibility through volunteer support and assistance, will assist the treatment programmes for offenders, thus reducing high financial and personnel expenditure.

Further, the co-ordination endeavours shall have to orient the police, prosecution and the judiciary to adopt community treatment sentencing alternatives as priority dispositions when deciding on the fate of an offender. When deliberating on a particular non-custodial measure the judges should be fully aware that the society and its affected constituents are in agreement with the treatment dispositions being considered. Needless to emphasise the fact, that before adopting and implementing the treatment disposition, enough and effective arrangement to carry out the disposition in practice must be made available with all the professional and technical or financial agencies.

3. Greater Need for Co-ordination

There are many professional and non-professional agencies involved in the implementation of these programmes. The administrative system must realize and encourage the greater need for co-ordination among the respective agencies. The job of co-ordination may tend to get a bit tough and challenging due to the varied nature of the other agencies working under different controls and direction. It may be an easier task if the professional agencies are under a single control as it is in India, where all professional agencies are under one ministry. Co-ordination may be a bit simple, even if all the agencies are not working under the direct supervision of one head, for a smaller nation. However for bigger nations where different agencies are under different controls, greater efforts

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for co-ordination are required especially when nepotism or dishonesty is widespread in any of the agencies.

4. *Difficult Aims*

The declared aims of the criminal justice system based on community involvement are difficult to achieve by their elusive and evasive character. The human society created a mighty force, known as state to deal with the criminals and ensure a harmonious society. The state force since its very inception has been trying to prevent crime. However, in most instance its success rate has been much less than satisfactory with crime rate steadily increasing all over the globe. The aim of reforming the offender has also proved to be as elusive as the above one. Despite these efforts of both the institutional and non-institutional treatment programmes the rate of reformation has not been even satisfactory. The aim of rehabilitating the offender in the same society which he has violated against looks to be a bit unnatural. However, the tolerance rate of the society is always higher and an individual can always exploit this social behaviour.

Keeping the above factors in view, needless to say the job of co-ordination in this particular field is difficult and complex. It is therefore necessary that effective and appropriate co-ordination efforts are catered for in the system.

(1) Co-ordination Mechanism

Every nation shall have to find and evolve a co-ordination mechanism of its own suitable to its own administrative culture and professional ethos. No single mechanism can be suggested to be applied by one and every nation. In Japan, despite the varied controls of the various agencies, a mutual understanding coupled with professional pride has proved to be successful in co-ordinating the task. On the other hand, in India despite the fact that the various agencies belong to one control, a permanent mechanism of co-ordination has been built into the system by

placing the different agencies under the functional control of the District Management.

(2) Aims at Different Levels of Co-ordination

Co-ordination shall have to be established at different levels to ensure that different objectives are addressed in order to fulfill the Final Aim. The top political level co-ordination would require the fulfillment of certain objectives. It shall have to be ensured that the legislation, conforms with the national and social ethos giving due care to the cultural, social and economic fabric of the society. Secondly, along with the legislative changes, adequate finance to implement these programmes needs to be secured together with the other material requirements. Further, a proper and adequate national policy to educate the society, seek their co-ordination and involve them in the actual implementation of the scheme needs to be provided for. Finally, a co-ordinated political force would greatly enhance the involvement of each and every administrative agency.

Likewise the top level administrative structures also require co-ordination. These administrative structures need to disseminate clear and firm policies to the field organizations. This will ensure that the whole organization including the field agents are fully aware of the programmes and the responsibilities they entail. In reciprocity the field agents require access to senior administrators for guidance and assistance. A system of supervision needs to be instituted to continually assess the field work and ensure the programmes are being implemented according to plan. Finally, the middle and grass roots level co-ordination shall ensure effective implementation of the measures with utmost zeal.

In the final analysis implementation of non-custodial measures depends on the outlook of a nation to evolve a system of co-ordination which suits its administrative structure. With suitable direction at the co-ordination level the endeavours of various

agencies will be guided in overcoming numerous difficulties and thus achieve the necessary goals for the betterment of the human society and its individuals. The better the co-ordination, the better the results.

V. Victims' Rights

Whether it is the offender, the victim, or the society is accorded priority at any given time depends on the nature of the offence and the extent to which such misbehaviour disadvantages the society. Generally this principle is inherent at all levels of the community, family, clan, tribe, society, an urban community and the nation states. The intention of the criminal justice systems is to resurrect those lost rights firstly of the victim and then the offender, for the common goods. To ensure a better realization of that intention more concerted efforts are required towards orienting the criminal justice personnel on the rights of victims and the application of non-custodial measures which lend themselves to effective offender treatment programmes and a harmonious society.

In practice many criminal justice systems overly emphasise offenders' rights and give less consideration to the victim. On the other hand if there were no victims of crime there would be no police, courts, prisons and no mention of non-custodial measures. It is therefore in the interest of criminal justice totality, that staff training programmes within the respective agencies emphasise the need for co-ordinated efforts towards achieving the maximum degree of "justice" as perceived by the victim, his or her local community and the offender.

1. Limitation of Individual Rights and Freedom

Being a member of a group entitles an individual to certain rights. Likewise both the victim and the offender are accorded these rights when appropriate sanctions are considered against an offender. Breach of societal norms provide an opportunity for these

rights to be placed in a hierarchical order though not necessarily in the victim's interest.

In any level of a community, individual rights are regulated and freedom is limited. Certainly members have a right to life, survival, prosperity and enjoyment. Freedom does not entitle an individual to interfere with other members' rights. Limitation to these rights surface clearly when conflicts arise. The systematic definitions of these limitations are found in such terminology as crime, criminal, offender and victim. When infringement of rights occurs initial efforts focus on avoiding open conflict.

Mediation is encouraged towards reaching a peaceful settlement. The onus is therefore on the person at fault to right the wrong. Where bodily injury occurs or property ownership is diminished the emphasis is placed on restoration of those values. To prevent recidivism additional sanctions are imposed upon the wrong person who may not necessarily be the offender.

In the final analysis, emphasis is placed on individual behaviour, not bringing dis-social order to the society. Where social order is at stake the society rallies behind the victim or the offender. The paramount consideration is initially the protection of the society. Determining guilt or innocence is given second priority but does entail certain costs to the offending member. These costs are in the form of compensation or restitution to either acknowledge group support or as an expression of repentance. Once again the reciprocal obligations between the society as a whole and the members who give it the identity becomes exposed. Similar experiences exist in most societies but they are more dominant in traditional tribal cultures.

On the level of nation states individual rights and freedom are also regulated. The extent to which this is done depends on a number of factors, including culture, economic conditions and political climate. Individual rights are protected by law with specific government organs as enforcement

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agents. The written law sets out the rules by which an individual conducts himself plus specific sanctions against misbehaviour. These laws protect the individual rights of both the victim and the offender as members of the society. To ensure these rights are systematically protected the criminal justice system has been established as a procedural tool.

Many citizens expect the arbitration process inherent within the criminal justice system to mete out "justice" to both the offender and the victim. To the victims of crime such expectations instill unrealistic hopes that the criminal justice system will restore their original rights. What is forgotten though is that the criminal justice system has to also consider the offender's rights and mood of the total society in relation to specific offences. The system generally endeavours to maintain the social equilibrium of the nation.

Unfortunately at times emphasis is placed on the offender's rights, after the circumstances of an offence are determined by courts who then apply the written law. The process is such that sometimes the innocent persons are punished or the actual offenders given a non-guilty verdict. Where guilt is established the courts then give the prescribed treatment, either a custodial sentence or a community oriented rehabilitation programme.

Questions have been raised on who the real victim is in the criminal proceedings; is it the offended party, offender, state, or the local community? Initially it is the offended individual but by the time the criminal justice system has taken its course none of the parties involved come out a supreme winner. Many jurisdictions emphasise the interest of the state and the application of law rather than the victim and social harmony at the local level. The interest of the local community where the offender will return is given lesser importance than that of the state and the legal system.

In many instances victims are given very

little attention. They simply become the reason for the existence of the criminal justice system which does not accord a greater importance to the victim above that of the offender. Why then resort to the criminal justice system to mediate a peaceful settlement when the system itself does not restore to the victim the original rights? At times the offended party becomes more a victim of the criminal justice system than the offender. Similarly there are occasions where the local social order is given little or no consideration.

Indeed there is worldwide consciousness on the rights of victims within the criminal justice systems. This international consciousness is evident in the United Nations' "declaration of basic principles of justice for victims of crime and abuse of power" during its 7th Congress on the Prevention of Crime and the Treatment of Offenders. Certainly victim's rights are acknowledged and established under the law in various countries.

Unfortunately in many circumstances the written laws do not define fully the extent to which the victim's rights should be applied. These rights include as evidenced in Zimbabwe:

- (1) the right to seek police action;
- (2) if injured in a crime of violence, free medical aid;
- (3) be informed on the progress or lack of it during investigation;
- (4) after trial the right to property held as court exhibit;
- (5) right not to report an offence against him or her to police;
- (6) right to remain anonymous in regard to publication of particulars.

Even when an offender is processed through the criminal justice system the victim's rights play a vital role in determining whether or not the case proceeds. The case against an offender can be withdrawn where a victim agrees to an out of court settlement

through compensation or restitution. On the other hand the victim can also withdraw a case at his/her own intuition without having to account for such an action. However, in the interest of the society's desire and justice to the offender the prosecution may at times forgo the victim's right to withdraw a case. Within the courts, victims have the right to remain anonymous in so far as publishing personal particulars is concerned. Many legislations also provide for reimbursement of costs to victims when attending trials plus compensation or restitution for damages. In violent crimes victims further have the right to sue the offender for damages.

2. *Difficulties*

Whilst these rights are embodied in various legislations their practical application leaves a lot to be desired. In many instances victims are not informed on the progress of a case or lack of it. During investigation the victim's feelings are rarely respected. In the case of rape victims their rights to decent questioning in court plus trial in camera are virtually nonexistent in many countries. The court systems also do not give an opportunity to the victim to remain silent. On the contrary they provide a wide opportunity for the offender to further give mental torture to the victim.

Determining the guilt or innocence of the offender appears to be the primary objective of many criminal justice systems. It should be noted though that such a minimum consideration for the victim's right is not entirely a matter of choice. Whether or not victims' rights are given paramount consideration lies deep in the legislative framework being interpreted by the various criminal justice agencies. Presently information is lacking on any country having a single legislation covering all the victims rights ranging from the time an offence is reported to when the offender is finally dealt with by the law plus specific costs to the victims, based on each and every nature of an offence.

Various Criminal Code legislations provide specific punishment or rehabilitative measures. For example a rape offence has along with it a specific punishment such as an imprisonment term and a non-custodial sentence. Similarly a stealing offence may have a court fine sentence in-default a set period of time in jail. It is almost impossible to insert into these same legislations victims' rights in respect to the amount of compensation, restitution or claiming monetary assistance from the state. In extreme case of a bread-winner being murdered the state does nothing to help a victim's family. For crimes of violence victims are rarely awarded compensation and no monetary assistance to cover litigation costs.

While many countries have various legal aid systems to assist an offender the same cannot be said for the victims. However many countries do have other victim support schemes mainly conducted by volunteers and volunteer agencies. These support schemes are increasing with some involvement from government social welfare agencies. To enable wide publicity of the schemes and their having a meaningful impact on the victim population, the volunteer staff require more information on the victim's rights plus training on how to deal with specific victim's needs. With sufficient co-ordination and wide publicity on the nature of their services, these victims' rights agencies offer will no doubt enhance greater effectiveness of the work they do.

Unlike many other countries the Japanese criminal justice system does allow fair consideration of the victim's rights. This is particularly evident in the discretionary power of the public prosecutor to suspend prosecution in preference to an out of court settlement between the offender and the victim. The emphasis here is on creating a social harmony at the local level. State compensation to victims of accidental crime also exists in legislation particularly to assist the severely injured victims or the families of a deceased person. Let it be noted that Papua

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New Guinea also has a specific legislation on Criminal Compensation where courts are given the legal authority to award compensation to victims of crime but limited to a certain amount. However the legislation avoided state's responsibility to the victim in so far as paying compensation is concerned.

Laws generally warn victims not to take justice into their own hands and therefore discourage immediate retaliation. However the same laws do not bestow "justice" as perceived by the victim. Whether or not the offender is rehabilitated depends on the community's desire to accept its offending member back hence assist him or her to avoid further undesirable and unacceptable behaviour. In communities and tribal societies where social relationships remain prominent the willingness of the victim to accept amends is even more important if the offender and victim are to live together in harmony. It is therefore necessary for social equilibrium in the community that the rights of the victim be accorded higher profile when applying custodial or non-custodial measures to the offending members of the society.

VI. Conclusion

Maximum application of non-custodial measures for the treatment of offenders is a desired goal for many countries. Most criminal justice systems aspire to reach the high standard of community involvement enjoyed by the offenders and victims in Japan. However the path to achieve the desired goal is long rough, tough and painful. While social conditions exist in both developed and developing countries for non-custodial measures to be given greater emphasis, numerous factors need careful consideration before the criminal justice systems are adjusted to impart greater degree of "justice" as perceived by all the parties involved.

It has been noted that the Japanese criminal justice system has its foundation on its social structure, formally. Upholding the

written law is secondary to the goal of achieving social harmony at the people's level. The economic benefits the country enjoyed enabled the Japanese Government to further improve and enhance the effectiveness of these non-custodial measures. This paper has attempted to show that being rich is not necessarily the only pre-condition to maximising the use of non-custodial measures.

The difficulties are indeed numerous if other countries are to achieve the standard set by the Japanese. Many elements of the society need to be brought into line before non-custodial measures can be accorded greater acknowledgment and application. The difficulties are deeply rooted in the political situation, legislative framework and readjusting the society to take a greater role in crime prevention and offender rehabilitation efforts, rather than giving all the responsibility and blame to the governments.

Even if such conditions exist the personnel within the criminal justice system need to be made aware of the benefits of community involvement. Not only do the staff require appropriate training and orientation to ensure effective implementation of these measures, the criminal justice agencies also need a systematic high level of co-ordination to enable an integrated approach to crime prevention. For the citizenry to better appreciate their criminal justice systems the community's interest to maintain its social order locally should also be given greater consideration by the criminal justice system. The success of crime prevention efforts further lies in the criminal justice system itself being more sensitive to the community's interest, and the rights of both the victim and the offender.

It is noted that the lack of financial resources does pose a problem for countries to extensively develop the non-custodial measures. However despite those obvious limitations, it is still not impossible for them to reach the aspired standard; where there is a will, there is a way.