RESOURCE MATERIAL SERIES No. 80

UNAFEI

Fuchu, Tokyo, Japan **March 2010**

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INTRODUCTORY NOTE

It is with pride that the United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI) offers to the international community the Resource Material Series No. 80.

This volume contains the work produced in the 142nd International Training Course, conducted from 11 May to 19 June 2009; the Twelfth International Training Course on the Criminal Justice Response to Corruption, conducted from 13 July to 7 August 2009; and the 143rd International Training Course, conducted from 28 September to 5 November 2009. The main theme of the 142nd Course was "Effective Countermeasures against Overcrowding of Correctional Facilities". The main theme of the 143rd Course was "Ethics and Codes of Conduct for Judges, Prosecutors and Law Enforcement Officials".

With regard to the 142nd Course, according to a recent World Prison Population List survey, more than 9.25 million persons are detained in penal institutions worldwide, and the number of prisoners has been increasing in many places. Overcrowding brings about obstacles in the living environments of inmates, discipline and order of correctional facilities, and appropriate provision of correctional treatment.

Although not formally binding, the United Nations' Member States have strived to fully use and apply the UN Rules and Basic Principles pertaining to appropriate administration and management of correctional facilities, but the population growth of correctional facilities has made it increasingly difficult for some Member States to adhere to them.

Effective countermeasures against overcrowding of correctional facilities should include diversion, alternatives to incarceration, effective administration of correctional facilities, correctional programmes effective for the prevention of re-offending, and other measures, in order to successfully address the issue. These countermeasures shall harmonize with the substantive objectives of the entire criminal justice system.

With regard to the Twelfth International Training Course on the Criminal Justice Response to Corruption, it is recognized that corruption imposes a wide range of harmful effects on society. In particular, corruption by public officials seriously undermines their integrity and neutrality in performing their official duties. This can lead to public distrust of the government and its institutions and may lead to its eventual collapse. Corruption is a problem that constantly needs to be challenged and this is the reason UNAFEI holds an annual multiple country course specifically on corruption control.

In recognition of the harm corruption can cause, especially in developing countries, and the fact that it can transcend national borders, the General Assembly of the United Nations adopted the UN Convention against Corruption in 2003. The Convention came into force in December 2005 and requires States Parties to implement a number of measures to tackle corruption in a comprehensive way, including measures directed at prevention, criminalization, international co-operation, and asset recovery. It is hoped that all countries, including our participants' countries, will become party to this Convention and fully implement it, thereby taking a closer step towards freeing the world from the grip of corruption.

With regard to the 143rd Course, corruption in the judiciary, prosecutorial authorities and law enforcement authorities deteriorates the morale of the people and their trust in the justice system. Although many forms of corruption are difficult to detect and prosecute, judicial corruption is especially so.

The United Nations and other international organizations have for a long time made efforts

to promote judicial integrity, and have adopted several relevant documents. United Nations Convention against Corruption is fundamental amongst them. In view of the ongoing need to ensure integrity of the judiciaries, prosecution services and law enforcement agencies of the Member States, and the importance of such efforts as stressed by the various UN instruments, UNAFEI, as an institute of the UN Crime Prevention and Criminal Justice Programme Network, decided to hold this Course.

In this issue, in regard to the 142nd International Training Course, the Twelfth International Training Course on the Criminal Justice Response to Corruption, and 143rd International Training Course, papers contributed by visiting experts, selected individual presentation papers from among the participants, and the Reports of the Courses are published. I regret that not all the papers submitted by the participants of each Course could be published.

I would like to pay tribute to the contributions of the Government of Japan, particularly the Ministry of Justice, the Japan International Cooperation Agency, and the Asia Crime Prevention Foundation for providing indispensable and unwavering support to UNAFEI's international training programmes.

Finally I would like to express my heartfelt gratitude to all who so unselfishly assisted in the publication of this series; in particular, the editor of Resource Material Series No. 80, Ms. Grace Lord.

March 2010

Masaki Sasaki
Director of UNAFEI

PART ONE

RESOURCE MATERIAL SERIES
No. 80

Work Product of the 142nd International Training Course

"Effective Countermeasures against Overcrowding of Correctional Facilities"

UNAFEI

VISITING EXPERTS' PAPERS

EFFECTIVE COUNTERMEASURES AGAINST OVERCROWDING OF CORRECTIONAL FACILITIES

*Rob Allen**

I. INTRODUCTION

In many parts of the world prisons are little short of a humanitarian disaster. Overcrowding violates fundamental human rights, such as the right to life and to security of the person and freedom from cruel, inhuman or degrading treatment or punishment. It reduces the opportunity for a person to engage in any meaningful programme of rehabilitation. It poses potentially dangerous public health hazards (overcrowded accommodation acts as an incubator for infectious diseases such as TB and HIV/AIDS). It seriously affects the ability to control crime and violence within the prison walls. It creates a dangerous environment for prison staff and makes it impossible to deliver UN defined minimum standards of detention requiring adequate light, air, decency and privacy.

These lectures are based on my experience over the last five years as director of the International Centre for Prison Studies (ICPS). ICPS is based in the school of law at King's College London and was set up twelve years ago. Our aims are two fold: first to undertake research into the use and practice of imprisonment and to publish data, studies and other material which will be useful to people who work in the prison and criminal justice system.

Second to undertake practical projects to assist prison administrations to increase the extent to which prisons comply with the international norms and standards – particularly the human rights standards produced by the United Nations and other international and regional bodies. ICPS has undertaken projects in many parts of the world- in South and Central America, North Africa, and in both Russia and the former soviet countries in Eastern Europe. We currently have projects in Argentina, Algeria, Libya, Turkmenistan, China and Mongolia as well as work in the UK to identify lessons from other countries that could be of use. Our philosophy and way of working are centred not around imposing a pre-defined model – least of all the model of imprisonment developed in the UK – but rather on assisting governments, prison administrators, governors and staff to develop ways of working which meet international standards in ways which are appropriate to the culture, traditions and resources available. Our key texts include *A Human Rights Approach to Prison Management: Guidance Notes on Prison Reform* and *the World Prison Population List.* Our work draws heavily not on practice in the UK but the international law, norms and standards and international experience in meeting them. All our material is on www.prisonstudies.org where you will also find World Prison Brief an online database of information about prison populations in 200 countries. It is this database that I will be drawing on in the first part of this paper.

A. Trends in the World Prison Population (Including Remand Prisons)

More than 9.8 million people are held in penal institutions throughout the world, according to our latest analysis conducted at the start of this year in our *World Prison Population List*. (Walmsley 2009) This is an increase of 300,000 since our previous analysis two years ago. If prisoners in 'administrative detention' in China are included the total is over 10.6 million.

The analysis looks at the prison population and the rate per 100,000 of the national population (the prison population rate) in 218 countries and territories. (Figures are unavailable for only seven countries – Bhutan, Equatorial Guinea, Eritrea, Guinea Bissau, North Korea, Somalia and the Palestinian territories.) Almost half of the world's prisoners are in the United States (2.29 million), China (1.57 million sentenced prisoners), or Russia (0.89 million) – countries which account for just over a quarter of the world's population.

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The United States' prison total constitutes a rate of 756 per 100,000 of the national population, making it pro rata by far the biggest user of prison in the world. Almost three fifths of countries (59 per cent) have rates below 150 per 100,000. The overall world prison population rate (based on 9.8 million prisoners and a world population of 6,750 million) is 145 per 100,000.

B. Variation

The list shows that prison population rates vary considerably between different regions of the world, and between different parts of the same continent. For example in Africa the median rate for western African countries is 35 per 100,000 whereas for southern African countries it is 231. In Asia, the median rate for south central Asian countries (mainly the Indian sub-continent) is 53 whereas for (ex-Soviet) central Asian countries it is 184. Here in Japan the rate is 63 per 100,000 compared to 108 in the Philippines, 192 in Malaysia and 257 in Thailand. In the Americas: the median rate for south American countries is 154 whereas for Caribbean countries it is 324.5. Rates vary within the Caribbean from 588 in St Kitts to 78 in Haiti; in Central America 468 in Belize to 57 in Guatemala; and in South America from 365 in French Guiana to 79 in Venezuela.

In Europe the median rate for southern and western European countries is 95 whereas for the countries spanning Europe and Asia (e.g. Russia and Turkey) it is 229. The average rate in Nordic countries is lower than those in Western Europe.

In Oceania (including Australia and New Zealand) the median rate is 102.5.

C. Trends over Time

The report found that a rise in prison populations is evident in every continent. Updated information on countries included in previous editions of the shows that prison populations have risen in 71 per cent of these countries (in 64 per cent of countries in Africa, 83 per cent in the Americas, 76 per cent in Asia, 68 per cent in Europe and 60 per cent in Oceania). In the Americas for example, according to our data prison populations have risen in the last few years in all but three of the 26 countries of Latin America and the Caribbean where the Inter American Development bank finances programmes and projects.

Particularly large rises have recently occurred in Europe, in Turkey and Georgia (both up more than 50 per cent since mid 2006). The largest recent falls in prison population in Europe are in Romania (down 2 per cent since September 2006) and the Netherlands (down 22 per cent since mid 2006, although changes in counting practices may play a part in explaining this). Notable rises elsewhere include those since mid 2006 in Chile (up 28 per cent), Brazil (up 18 per cent) and Indonesia (up 17 per cent).

D. Pre Trial Detention

One important feature of prison populations concerns the proportion of pre trial prisoners. We looked at the global situation two years ago and found that two and a quarter million people were then known to be held in pre-trial detention and other forms of remand imprisonment throughout the world. It is estimated that a further quarter of a million are so held in the countries on which such information is not available. The total includes some 476,000 in the United States; 250,000 in India; 136,000 in Russia; 122,000 in Brazil; 95,000 in Mexico; 60,000 in the Philippines; 57,000 in Pakistan; 52,000 in Turkey; 48,000 in both Bangladesh and South Africa; 47,000 in Indonesia; 43,000 in Thailand; 33,000 in Ukraine and 32,000 in Argentina. It has been estimated that there are about 100,000 in China.

In a majority of countries (59%) the proportion of the total prison population who are in pre-trial/remand imprisonment is between 10% and 40%. But in almost half of African countries a majority of the prison population are pre-trial/remand prisoners. By contrast, almost half the countries in Oceania have less than 10% of their prison populations in pre-trial/remand imprisonment. The countries with the highest proportion of the total prison population in pre-trial/remand imprisonment are: Liberia, where the prison administration reports that 97% are so held, Mali (89%), Haiti (84%), Andorra (77%), Niger (c.76%), Bolivia (75%), Mozambique (73%), Timor-Leste (71%), Democratic Republic of Congo and India (both 70%), Bangladesh, Paraguay and Peru (all 68%).

In a majority of countries (60%) the pre-trial/remand population rate is below 40 per 100,000 of the national population. However, in the Americas 80% of countries exceed that level. Panama has the highest

rate in the world, some 213 per 100,000, followed by Bahamas (198), Suriname (196), the United States (158), St. Kitts & Nevis (153), United Arab Emirates (135), Guam (129), Anguilla (124), Uruguay (115), Barbados (114), Trinidad & Tobago (108), Guyana (106), Libya (105), Lebanon (104), Honduras (102), South Africa (101) and Belize (100).

There have been falls in several countries, notably Chile with changes to criminal procedure and options available at the pre-trial stage.

E. Women

Moving on to women in prison, more than half a million women and girls are held in penal institutions throughout the world, either as pre-trial detainees (remand prisoners) or having been convicted and sentenced. About a third of these are in the United States of America (183,400), and a similar number are in China (71,280 plus women and girls in pre-trial detention or 'administrative detention'), the Russian Federation (55,400) and Thailand (28,450). No other country reports a female prison population as high as 15,000, the next highest being in India (13,350), Ukraine (11,830), Brazil (11,000), Vietnam (10,990), Mexico (10,070) and Philippines (6,860). Every other prison system has fewer than 6,000.

Female prisoners generally (in about 80% of prison systems) constitute between 2 and 9% of the total prison population. Just twelve systems have a higher percentage than that. The highest is in Hong Kong-China (22%), followed by Myanmar (18%), Thailand (17%), Kuwait (15%), Qatar and Vietnam (both 12%), Ecuador, Netherlands Antilles and Singapore (all 11%), Aruba (Netherlands), Bermuda (UK) and Laos (all 10%) and Macau-China (9.2%). The median level is 4.3%.

There are continental variations in the prevalence of women and girls within the total prison population. In African countries they constitute a much smaller percentage of the total (the median is 2.65%) than in the Americas and Asia where the median level is twice as high (5.3% and 5.4% respectively). The median levels in Europe and Oceania are 4.4% and 4.3% respectively.

F. Foreign Nationals

Two final components about which data is available. First is the proportion of foreign nationals in prison. In Asia this ranges from 46.5% in Malaysia to 7.3% here in Japan to less than 1% in several countries. In Europe, seven out of ten prisoners in Switzerland and Luxembourg are foreign nationals.

Second, the question of occupancy levels and hence overcrowding. Our data suggests that the most overcrowded prison system in the world is the Caribbean island of Grenada where population is 375% of capacity - almost four prisoners per space. Of course overcrowding can be higher still in particular prisons or parts of prisons, usually the pre trial part. In Guatemala, with a low prison population rate and a modest overall occupancy rate has particular prisons with gross levels of overcrowding- or did so when I visited in 2006. In Asia the most over–occupied system is in Bangladesh at 300%.

Before turning to the question of counter measures, it is worth a word about explanations for the variations in prison rates. A good deal of research and analysis has concluded that the proposition that imprisonment rates are related to crime levels is not supported by the evidence. Prison populations vary because criminal justice policies vary. Some countries have for example shorter sentences, no life imprisonment, special measures for juveniles and young adults and more diversion. So the question becomes, what explains a country's choice of policies?

Recent studies suggest a combination of factors characterize states with steadily rising imprisonment rates which are higher than comparable countries. These factors are related to the economic model of the country and include income inequality, level of spending on welfare, levels of fear of crime, social trust and trust in the criminal justice institutions. Also suggested have been cultural factors such as levels of punitiveness and also differences in political structure. However, whilst these explanations make it clear what the pressures are to increase imprisonment rates, they do not explain why some countries are able to resist those pressures. Information on what has happened in Canada, Finland, the Netherlands and Germany suggests it would be easier to control imprisonment in a less centralized system, with a different message about the benefits of a high imprisonment rate to the country and much greater input into the policy and media debate from the academic community.

II. COUNTERMEASURES AGAINST PRISON OVERCROWDING PRACTICED WORLDWIDE

A. Introduction

Possible solutions to the problem of prison overcrowding boil down to two. First to reduce or stabilize prison numbers or second to build more prison places. The bulk of this paper is about how to achieve the first of these. Of course some countries are busy expanding their capacity, sometimes with the help of private companies or even private capital. What is crucial in a democratic society is that a transparent debate is held about the costs and benefits of such expansion – something which has not always happened in the past.

In 1999 the Council of Europe made recommendations concerning prison overcrowding and prison population inflation, the most significant of which is that the extension of the prison estate should be exceptional. Instead policies should focus on decriminalizing offences, developing alternatives to prosecution, alternatives to pre trial detention and community sentences; on avoiding long terms of imprisonment and emphasizing parole and early release. The rise in prison numbers in many (but not all) European countries suggests that the recommendation has not had as much effect as it should, particularly in Western Europe. Other recent recommendations have been in the same vein such as the 2006 recommendation on pre trial detention stress that remands in custody should be used when strictly necessary and the 2008 rules for juveniles emphasize that deprivation of liberty of a juvenile shall be a measure of last resort and imposed for the shortest period.

Two European countries Scotland and Norway have established commissions to consider the proper role which prison should play as a measure of last resort and find ways of developing alternative policies for dealing with crime and anti-social behaviour. This is not just about alternative sentences. These may be able to play a role, but unless used properly, so-called alternatives to custody can paradoxically serve to fuel rather than reduce prison numbers. It is more about an alternative approach to the crime problem, which uses the levers of education, social, and health policy, combined with mediation and other forms of restorative justice.

Even in the USA, states have become concerned about the rising costs of imprisonment. In California, prison costs exceed those spent on higher education. The idea of Justice Reinvestment (JR) has been developed in some US states to advance fiscally-sound, data driven criminal justice policies to break the cycle of recidivism, avert prison expenditures and make communities safer. Originally coined by George Soros's Open Society Institute, JR is now being taken forward by the Council of State Governments, alarmed by the fact that over the last twenty years state spending on corrections has grown at a rate faster than nearly any other state budget item. According to National Association of State Budget Officers, states spent $44 billion in tax revenue on corrections in 2007 compared with $10.6 billion in 1987, while higher education expenses went up by only 21 percent.

Despite increasing corrections expenditures, recidivism rates remain high with half of all persons released from prison returning within three years The approach has four key elements: first to analyse the prison population and spending in the communities to which people in prison often return; second to provide policymakers with options to generate savings and increase public safety; third to quantify savings and reinvest in select high-stakes communities and fourth to measure the impact and enhance accountability.

Faced with a budget crunch, California Gov. Arnold Schwarzenegger said freeing about 22,000 nonviolent criminals 20 months early would save around $1.1 billion over two years. Early release programmes in Rhode Island could save the state $8 billion over five years and lawmakers in Kentucky say house arrests could save at least $30 million.

Among other practical examples of JR in the US are in:

Connecticut where persons sentenced to at least two years were required to serve no more than 85 percent of their sentence, the length of stay for people returned to prison for a technical violation was reduced, and the number of technical violations admissions was reduced by 25 percent by seeking to increase compliance among probationers and parolees.

Texas where residential and in-prison substance abuse and mental health treatment capacity was expanded enhancing the use of parole and diversion programmes.

Kansas where the creation of a performance-based grant programme for community corrections programs to design local strategies aims to reduce revocations by 20 percent; a 60-day program credit was introduced to increase the number of people who successfully complete educational, vocational, and treatment programs prior to release; and earned time credits were restored for good behavior for nonviolent offenders.

B. Specific Measures to Counter Overcrowding

The remainder of this section looks at three ways of reducing overcrowding; first by reducing pre-trial detention; second by reducing the use of prison as a sanction and third bythrough systems of early release.

1. Reducing Pre Trial Detention

There is also a body of international law governing the use of pre trial detention. 'Everyone charged with a penal offence has the right to be presumed innocent until provided guilty' according to the Universal Declaration of Human Rights. 'It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial' says Article 9 (3) of the International Covenant on Civil and Political Rights. 'Except in special cases provided for by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority decides otherwise in the interest of the administration of justice, to release pending trial subject to the conditions that may be imposed in accordance with the law. Such authority shall help the necessity of detention under review according to the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment'. The application of pre-trial detention and its length should be reduced to the minimum compatible with the interests of justice' according to recommendation No R (99) 22 concerning prison overcrowding and prison population inflation (Council of Europe 1999).

(i) Reform of Criminal Procedure

Several jurisdictions in Latin America have replaced an inquisitorial system of justice with a system based on the presumption of innocence, the public prosecutor and oral trials. Elements of these reforms have taken place in Chile, Venezuela and the states of Nuevo Leon and Oaxaca in Mexico. One impact has been the speeding up of trials and the reduction of the use of pre trial detention. The percentage of Chile's prison population who were awaiting trial fell from 44% in 1998 to 24% in 2007.

The reforms have proved controversial in some quarters. Police and prosecutors object that in countries where people live without forms of identity and no fixed address, risk of flight is high. On the other hand the reform has done little to reduce the overall use of prison. Chile's prison population rose from 35,000 in 2001 to 51,000 in 2008.

A more positive picture emerges from the Russian federation which saw a sustained fall in the prison population from 1998 to 2004 although it has started to rise again since. The fall in the prison population is due to three main factors. Most important has been the reform of the criminal procedure code (which entered into force in 2002) which provided for judicial control over investigations and prosecutions, the mandatory provision of defence counsel and the order of house arrest as an alternative to pre trial detention. Most significantly among its provisions was that the decision to place suspects in pre-trial detention became a matter for the courts rather than the prosecutor.

Second legislative changes have reduced the lengths of periods for pre trial detention and some prison sentences especially for women and juveniles. In addition, from 2003, time spent in custody pending trial has been deducted from the prison term. Third the Ministry of Justice has introduced some alternative sentences, such as community work and restriction on freedom of movement. There have also been periodic amnesties.

(ii) Improving the Operation of the System/Para-legal Advisory Service

In many low-income countries, high levels of pre trial detention reflect the failings of the criminal justice process. There may be insufficient prosecutors, courts, judges and defence lawyers. Courts may fail to grant bail, set the bond too high, grant unnecessary adjournments, fail to manage their case load or enforce time

limits. Sometimes there is nothing in the way of pre-trial hearings, incentives to encourage early guilty pleas or systems for taking time spent in custody into account when sentencing. Prisons may fail to alert the courts who is in prison, can be reluctant to release or turn away people who are not held lawfully, do not always facilitate the admission of legal advisers, and fail to open up to partnerships with external agencies.

A census in Chicago in 2006 found that out of 100,000 passing through jail in 2006, 15% were released after the case was dropped- they were either not guilty, there was no probable cause or they were the 'wrong defendant', 34% were released on cash bond and 18.6% ended up in a state prison. With better processes some of the 81,000 need not have been to prison at all.

In Malawi and now in Bangladesh a programme of deploying paralegals has been developed to help expedite cases through the system. Paralegals can screen cases in prisons, police and courts; filter the caseload; advise and assist those in conflict with the law; link all the actors and facilitate communication and co-ordination and refer the serious and complex case to the legal expert. Programmes have contributed to the elimination of unnecessary detention, speedy processing of cases, diversion of young offenders, reduction of backlogs, and reduction of the remand population.

Rigorously enforcing time limits on pre trial detention can also have a major impact. In Ecuador the prison population fell from 18000 to 12000 in part because greater enforcement of the rules that cases had to be completed within 6 months (12 months for more serious ones)

2. Reducing Prison Sentences

(i) Sentencing Reform

In a number of countries, laws have been enacted to restrain the imposition of prison sentences or the length of such sentences. Canada's criminal code for example says that "An offender should not be deprived of his liberty if less restrictive sanctions may be appropriate in the circumstances; and all available sanctions other than imprisonment [...] should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders". (Section 718.2 (d) and (e). Other jurisdictions have taken steps to ensure that sanctions are proportionate to the seriousness of the current offence, limiting the aggravating features of previous offending and/or convictions. Requiring courts to give reasons before imposing custody can also help to limit the imposition of prison.

A review by the Washington based Sentencing Project found that 17 states in the USA enacted sentencing and corrections reforms in 2008. Highlights from the report include Arizona which established a probation revocation and crime reduction performance incentive system to encourage counties to reduce commitments to prison; Kentucky which amended parole release policies and expanded home incarceration for persons convicted of certain offences, created a committee to study the state's penal code and made recommendations for reform, and rescinded certain requirements for persons seeking to have voting rights restored after the completion of sentence; and Mississippi which amended parole release policies, and expanded eligibility for compassionate release.

Some countries have sought to reduce the number of short prison sentences by abolishing sentences of under three or six months (Western Australia, Denmark) but evidence of impact is mixed.

(ii) Alternative Sentences

Many countries have developed a range of alternative sentencing dispositions that can be used instead of short prison sentences. As the Council of Europe put it in their Recommendation of 2000 on Community Sanctions and Measures Rec R(2000) 22: "the implementation of penal sanctions within the community rather than through a process of isolation from it may well offer in the long term better protection for society, including of course the safeguarding of the interests of victims".

Alternatives to prison are covered by international rules: the UN Standard Minimum Rules (the Tokyo Rules) and the Council of Europe Recommendation R (92) 16. The main requirements of these rules are:

- all aspects of the imposition of community sanctions and measures must be laid down in law when an offender sentenced to a community sanction or measure fails to carry out any condition or obligation the sentence shall not be automatically converted to a sentence of imprisonment;
- offenders shall have the right to appeal against decisions of the implementing authority;

- the privacy and dignity of offenders sentenced to a community sanction or measure should be respected at all times;
- existing social security rights shall not be jeopardized.

These rules cast doubt on the legitimacy of so called "creative sentencing" in which some American judges have imposed bespoke penalties on offenders which seek to provide a direct link with the offence. For example in Ohio, where a woman who had abandoned some kittens in a cold forest was sentenced to spend a night out side in the cold herself.

Further information about the UK experience will be given below. But alternatives are fairly widespread in richer and middle income countries.

Brazil introduced fast track oral hearings in special courts in 1995, which allowed for settlement of cases with community punishment where the term of imprisonment would have been one year or less. Initially take up was low because of lack of confidence by judges. Recent reports suggest a 400% increase in the use of alternatives since 2002 thanks to new laws on alternative sentencing such as Law 11,343 of 2006, which offers alternatives for drug users (but longer sentences for traffickers). Punishment for possession for personal use no longer includes prison but consists of a warning, community service or an educational programme of five months for a first offender or ten months for a repeat offender. Law 11,340 (*Lei Maria da Penha*) authorizes judges to impose programmes of re-education and rehabilitation on perpetrators of domestic violence.

Community service is organized at the state level but co-ordinated by a central agency CENAPA (*Central de Apoio e Acompaanhamento a Penas e Medidas Alternativas*). In December 2007 there were as many offenders subject to community service as in prison – about 420,000 although reports suggest that 80,000 of those in prison could have been eligible for alternatives. There is variation between states with Rio de Janeiro and San Paolo making considerable use of alternatives, Parana and Minas Gerais less so. Lack of suitable staff (including *defensores*) and continuing lack of confidence on the part of judges. are the key problems which need addressing.

Other countries have developed alternatives – conditional sentences which are served at home. In Canada this is possible for prison sentences of up to two years. Suspension of prison sentences is often a possibility.

(iii) Penal Mediation

Penal Mediation, sometimes known as restorative justice, brings the victim and the offender together with a neutral third party in an interactive process to understand the crime and to develop a plan for responding to its impact. Non-governmental organizations and universities in Argentina, Mexico, Brazil, and Costa Rica developed pilot projects and pushed for enabling legislation during the 1990s. In 1998, the University of Buenos Aires Law School and the National Ministry of Justice established a pilot project, Proyecto RAC, which allowed either the victim or the offender to request mediation. After a criminal complaint is filed, the project staff assesses the conflict decides whether there is scope for mediation, conciliation or a *conferencia de conciliación con moderador* (CCM). Evidence is lacking about the effectiveness of the programme.

Colombia allows for penal conciliation. Article 38 of the Codigo Procesal Penal provides for the use of conciliation with adult offenders in cases such as simple assault and in property crimes with a value equal to less than 200 times the monthly minimum wage and where violence was not used.

In Chile reparative agreements are negotiated settlements between a victim and offender with approval from the presiding judge. The process allows both victim and offender to have a voice in the resolution of the crime, while meeting the victim's need for reparation and requiring the offender to take responsibility for his/her actions. At the same time, the reparative agreement avoids the negative social and economic impact of incarceration for the offender and his or her family, thereby aiding reintegration. An agreement can include a payment to the victim, symbolic reparation through community service or gifts to local institutions, or both. In Chile, the reparative agreement was included in the Nuevo Codigo Proceso Penal and is used in some property crimes, fraud, or minor assaults

These processes have antecedents in indigenous traditions. Indigenous conciliators serve as judges or justices of the peace to help peacefully resolve conflicts so that social cohesion is not lost. Legislation in Colombia, Ecuador, Bolivia, Peru, and Guatemala recognizes the use of these indigenous practices in criminal matters. They have also been developed in some European jurisdictions such as Austria.

(iv) Drug Treatment

In many countries, prison populations can be heavily affected by policies towards drug use and trafficking. Much of the enormous growth in American prison numbers can be explained by the war on drugs with mandatory minimum sentences for several offences. Many countries in Asia have a zero tolerance approach to drug use as well as trafficking, resulting in long minimum prison sentences and in several countries the death penalty is mandatory for trafficking. Possession of certain quantities is deemed to signify trafficking. Reliable data is difficult to obtain for some countries such as China where in addition to prisons run by the ministry of justice, administrative detention and re-education through labour institutions have been established which include many drug users.[2]

Indonesian drug laws prescribe the death penalty for narcotics trafficking and up 20 years in prison for marijuana offences. Simple possession results in prison terms of one to five years. In the Philippines, the law prescribes the death penalty for drug traffickers caught with at least 0.3 ounce of opium, morphine, heroin, cocaine, marijuana resin, or at least 17 ounces of marijuana. The Philippines has imposed a moratorium on the death penalty, but drug offenders are still punished harshly if caught – the minimum sentence is 12 years in prison for possession of 17 ounces of illegal drugs.

As in Europe women appear to be overrepresented among drug offenders in prison. Drug offenders constitute about 22% (14,847) of Japan's male prison population and 35% (1,410) of its female prison population.[3]

In some countries alongside a tough approach to trafficking, an approach based on rehabilitation and treatment has been introduced either within a prison setting or in other institutions. Thailand's prison population after a very rapid rise fell sharply between 2003 and 2007. This was in part due to the enforcement of a new law on the rehabilitation of drug addicts, which treats them as patients rather than criminals. According to the Ministry of Justice up to 20% of drug related offenders have been diverted from prison each year,[4] but there have been questions raised about the type of treatment available with Human Rights Watch calling on the government to end punitive treatment of drug abusers.[5] Forced counseling and military style drill are reportedly used in treatment settings.

3. Early Release

The third mechanism for tackling overcrowding relates to mechanisms for early release. Some countries have from time to time resorted to amnesties – Italy, South Africa and Algeria among them in recent years. Ecuador has introduced a one off programme of pardons (*indultos*) for which two categories of prisoner have been able to apply – those with terminal illnesses and also first time offenders convicted of drug trafficking of quantities less than two kilos. There are some criteria relating to the length of time served and behaviour but most of those who have applied have been approved.

Ecuador also introduced a policy of enabling prisoners to earn remission – *rebaja de penas* –. This is in the process of being implemented – 80 had been released when I visited at the end of last year. I attended a lively discussion last year between the Prisoners Committee in Prison 1 (Maximum security) and representatives from the Ministry of Justice. This focussed on how the new system would apply to the cases of current prisoners; and what impact disciplinary offences would have on the right to early release, which is to be based on merit.

Such systems are of course commonplace in many jurisdictions. Resorting too readily to early release

[2] See ICPS International Experience in Reform of Penal Management Systems
http://www.kcl.ac.uk/depsta/law/research/icps/downloads/International_Experience.pdf
[3] http://www.apcca.org/Pubs/26th/26th%20APCCA%20Conference%20Report.pdf
[4] Speech by Mr Wanchai Rouanavong at the Opening of the 9th ICPA Conference October 2007.
[5] Press release 12 November 2008. http://www.hrw.org/en/news/2008/11/12/thailand-new-anti-drug-campaign-risks-abuses

can of course have a cost in terms of public confidence in the system and also in terms of the integrity and proportionality of the sentencing process. An innovative model has been developed in Venezuela which is in the process of establishing 25 Community Treatment Centres in which prisoners who have served half their sentence can pass the rest of their term. Prisoners, who must have behaved well in prison and been assessed as suitable, spend the night, weekend and holidays at the centre but during the day go out to work. The centres, which are in effect types of Open Prison contain opportunities for residents to undertake education and training and to participate in cultural and sporting activities.

Specific evaluations are lacking as yet but the initiative has promise as a way of reducing the most negative aspects of imprisonment and improving reintegration and the reduction of re-offending.

III. CONCLUSIONS

ICPS experience is that in any discussion of reducing overcrowding, it is necessary to look at alternatives to prison in its widest context rather than in the narrow sense of measures which courts can impose instead of pre-trial detention or short custodial sentences. A report we undertook about the feasibility of alternatives in Afghanistan, where there is a sharply rising prison population concluded last year that the framework for implementing alternatives needs to consider:

- limiting the circumstances under which suspects can be arrested and held in pre-trial detention;
- reducing the length of time suspects are held in pre-trial detention;
- ensuring proper, affordable legal or paralegal representation is available to all defendants;
- finding ways of reducing delay in the criminal process;
- ensuring prisoners are released no later than their due date;
- introducing measures to release from prison during their sentence those lesser offenders whose imprisonment is related to the failure of a relative to produce the money for recompense to the victim;
- finding responses to health or welfare problems outside the criminal justice process;
- developing a functioning early release system for more serious offenders;
- encouraging the use of the traditional system as an option for cases that do not reach an agreed threshold of seriousness;
- mobilizing a civil society movement concerned to improve the workings of the penal system;
- putting in place special measures for women and juveniles.

We had serious reservations about whether the country was at a stage where formal alternatives such as community service or community based supervision could be implemented or be cost-effective.

The kind of measures more likely to succeed are contained in the 10 point plan at Annex A, which I helped to draft for an organization we work closely with called Penal Reform International.

A. Effective Countermeasures against Prison Overcrowding practiced in the UK

Last Friday the prison population in England and Wales stood at 82,940 some 40,000 higher than in 1992. It is perhaps not the obvious place to look for effective countermeasures against prison overcrowding. The government plans to spend £2.3 billion on capital costs for 10,500 new prison places by 2014. The Conservative party have published plans to create 5,000 places over and above these. As well as a harsh political and media climate, the policy in England and Wales may reflect weaker systems of prosecutorial diversion; lack of judicial oversight; and shortages of treatment provision for juveniles, drug addicts and mentally ill. There are however things to learn from the UK not least from the two smaller jurisdictions of Scotland and Northern Ireland where things are taking a different turn.

In England and Wales in 2007, of the 312,258 offenders sentenced for indictable or more serious offences

- 16% were fined;
- 34% were given a community sentence;
- 33% were given prison sentences of which 8% were suspended; and
- 18 % were dealt with in another way.[5]

[5] Ministry of Justice (2008) *Sentencing Statistics, 2007, England and Wales*. London: MoJ.

As far as community sentences are concerned, the key legislative basis is the Criminal Justice Act 2003, which building on a hundred year tradition of community based supervision of offenders by the probation service, introduced a new community order which courts can impose in place of a short prison sentence. The order places one or more requirements on an offender such as undertaking unpaid work for the benefit of the community (community payback); house arrest monitored by way of electronic surveillance; drug treatment enforced by regular testing and reporting back to courts on progress.

Some experts question whether these sentences act to reduce prison numbers. Some say that they produce net widening and displace fines and other alternative sanctions rather than prisons; and that in the event of failure to comply offenders can be returned to court and sent to prison despite the original offence being unlikely to lead to imprisonment. Nonetheless England and Wales has seen a fall in the use of short prison sentences. Experience suggests that if the orders are sensibly implemented and efforts are made to inform both judges and the public about what they involve, then they can have a positive impact.

It is important to consider the context in the UK. Despite the Council of Europe Recommendation discussed earlier which proposed decriminalization, it has recently emerged that since 1997 we have created more than a thousand new imprisonable offences - not just criminal offences but the type of criminal offences for which a prison sentence can be imposed.

On the other hand we have a range of alternatives to prosecution. These have long been available for juveniles and reprimands and final warnings are widely used with under 18s. The law allows "conditional cautions" for adults, which means that in minor cases if offenders agree to make some reparation or undertake some rehabilitation, they will not be prosecuted.

Moving on to the range of sentencing options, as you will know in England judges and magistrates have a wide discretion about the sentence in a particular case. There are some mandatory sentencing arrangements e.g. burglars convicted for a third time must receive a prison sentence of at least three years. But normally, parliament sets a maximum sentence for each kind of crime.

At the bottom end of the tariff are fines and discharges are widely used at the lower end of offence seriousness.

When a case is deemed serious enough to merit what is called a community penalty, courts can impose a community order, which contain elements of Rehabilitation or treatment, community work, curfew and Surveillance.

Community orders are run by the probation service and have in recent years the content of programmes has drawn heavily on psychological research about what works in reducing offending. We have recently introduced a drug rehabilitation requirement which requires offenders to come off drugs and undergo tests whose results are reported to the courts.

Community work is also supervised in England by the probation service but the beneficiaries of the eight million hours of unpaid work done by offenders each year are schools, hospitals, charities, and environmental projects. In some low income countries community work is organized by the NGO sector.

Electronic surveillance involves a tag or bracelet fitted to an offender's ankle. Currently the surveillance is used to ensure that an offender stays at home during the hours of a curfew but soon it is expected that the technology will be used to monitor the whereabouts of an offender throughout the day. So-called tagging is used at a much higher rate in the UK than in other European countries- more than 20 times as much as in France and five times as much as the Netherlands.

In addition there are options for courts to remove rights (driving licences, attending football games), order compensation to victims and suspend sentences. There is also growing interest in restorative justice in which offenders are encouraged to accept responsibility for what they have done and apologise and make good to the victim.

With all of these alternatives available, you might conclude that the courts around the world cannot be making much use of them given the rising use of prison. In fact in 2007 the most common disposal for indictable offences was community sentences accounting for 33.7 per cent of all sentences imposed in that year. This is an increase of 5.3 percentage points since 1997. The use of suspended sentences has also increased particularly since the introduction of the new suspended sentence order in 2005; this sentence accounted for 8.7 per cent of sentences in 2007, up from 0.7 per cent of sentences in 2004. The use of fines as a disposal for indictable offences has steadily decreased from 27.6 per cent in 1997 to 15.8 per cent in 2007. The immediate custody rate for indictable offences has remained relatively stable over the past decade rising slightly from 22.5 per cent in 1997 to 23.7 per cent in 2007. This phenomenon is called net widening. Community sentences have not replaced custody but replaced other alternatives to prison particularly the fine.

The government became concerned about these developments and asked a businessman Patrick Carter to undertake a review of what we now call the correctional services. He concluded that tougher sentences have a limited impact on crime - he estimated that the increase in prison accounted for 5% of the 30% fall in crime since 1997. He recommended a strategy of diverting low risk offenders out of the courts, income related fines to boost their use, demanding community sentences, more surveillance of persistent offenders, with prison reserved for serious, dangerous and highly persistent offenders.

He also recommended that outcomes would be improved by a new National Offender Management Service bringing together the prison and probation services in one organization. The government have accepted his findings. Separately from the Carter review, a new Criminal Justice Act was passed with new elements. These include a Sentencing Guidelines Council to produce comprehensive guidelines on the expected sentence for offences. One new generic community sentence whose components will be decided by the courts plus new sentences of Custody Plus (short prison plus community supervision), Custody minus (a suspended sentence) and intermittent or weekend prison.

The experience of the law has not been altogether happy. The plan to impose a ceiling of 80,000 on the prison population was never attempted, and the prison numbers rose beyond capacity, with hundreds placed in police cells. An emergency measure had to be introduced too allow certain offenders to be released fourteen days before their expected date in order. The custody plus sentence was never implemented and the intermittent custody option did not get beyond the pilot phase. Lord Carter was invited to do a further inquiry which controversially recommended more prison places, mostly in large Titan prisons. The government initially accepted this but whether because of the outcry from professionals that such large prisons are not sensible, or whether because of the pressure on finances, new places are to be built but in smaller (1500 place) units – still bigger than anything currently in operation.

Carter also suggested a Sentencing Commission should be introduced to make the demand for prison places more predictable. The legislation is currently in the UK Parliament and many judges are unhappy that they will be faced with prescriptive guidelines.

In Scotland, a different kind of Commission was set up last year to consider the future direction of policy. The government there want to reduce Scotland's prison population from 8,000 to 6,000 but have not yet produced a convincing road map of how to do it.

I want to finish by suggesting some lessons from the UK experience. First is the obvious point about targeting community punishment so that it is used as an alternative to prison and not a lower tariff option.

Second, there is a need to work hard to ensure that as many offenders as possible comply with community sentences. This is not simply a question of tougher and tougher enforcement. A growing number of offenders are going to jail for failing to comply with community sentences. This is a particularly troubling trend if the original offence is not worthy of prison. Close working relationships with courts are crucial, as are efforts to involve members of the local community in the supervision of offenders.

Third, our experience of effectiveness is that psychological programmes are not as effective as they promised to be. Basic and vocational skills, reasonably remunerated work, stable accommodation and

supportive relationships which encourage law abiding behaviour are just as important. Supervision and assistance after release from prison may be particularly important and there is growing evidence about the possibilities of restorative justice.

Fourth, the answers to crime lie well beyond the criminal justice system. Supporting parents, helping youngsters at risk stay in school, preventing and treating drug misuse, and reducing the availability of firearms are policy measures more likely to impact on crime in the long term than changes to sentencing. In England we have 83000 prisoners about half of the men and two thirds of the women have used hard drugs in the period before imprisonment. Yet we have just over 2000 residential drug treatment beds in the while country. Developing alternative infrastructure outside prison must be a priority for these and other vulnerable groups who we deal with in our prisons. For example in Scandinavia there tends to be much more in the way of drug treatment and mental health provision in the community than in the UK.

Finally the politics of crime and punishment is very important. The electorate are not as punitive as everybody seems to think. Asked a simple question, a majority will *always* tell pollsters that sentencing is too soft, whatever the objective sentencing levels are. This is largely because the public systematically underestimate the severity of sentencing. When respondents are properly informed about sentencing levels, and given detailed information about cases, a different picture emerges. Work undertaken for Rethinking Crime and Punishment (www.rethinking.org.uk) has shown that when given options, the public do not rank prison highly as a way of dealing with crime. Most think that offenders come out of prison worse than they go in, only two per cent would choose to spend a notional ten million pounds on prison places and when asked how to deal with prison overcrowding, building more prisons is the least popular option, with the support of only a quarter of people. Over half think residential drug treatment and tougher community punishments are the way forward. Only one in ten people think putting more offenders in prison would do most to reduce crime in Britain. Better parenting, more police, better school discipline and more constructive activities for young people all score much more highly. This suggests that public punitiveness is largely a myth and public confidence need not stand in the way of a bolder strategy of replacing imprisonment with more constructive alternatives. Appendix A contains a plan of how this can be done.

APPENDIX A

TEN POINT PLAN

1. Inform Public Opinion

Increasing use of imprisonment is often blamed on public demand for punishment. Yet the public are often misinformed about how the system operates and will support effective non-custodial measures. Keeping the public better informed, involving them more in the criminal justice process and encouraging a more rational and less emotive debate about crime and punishment are all-important tasks. There is a need to alter the perception of prison in the public mind so that rather than seeing it as the answer to crime, people come to view it as playing a very limited and specialist role in respect only of the most dangerous and incorrigible offenders.

2. Look at the Justice System as a Whole

A sentence of imprisonment is the result of a long chain of decisions involving police, prosecutors, courts and corrections. Other agencies such as probation, health and welfare also play a key role. Co-ordinating and streamlining the work of agencies at a practical level needs to be a priority so that cases are not delayed unnecessarily. At a policy level the various ministries involved need to work closely together in order to ensure that the aim of using imprisonment as a last resort is understood by everyone involved in the system. Some former colonial systems just do not work and result in large prison populations. Changes to these systems, including revision of out-dated and alien penal and procedural codes and the decriminalization of certain offences would also result in fewer offences being committed, leading to less sanctions and so, fewer prisoners.

3. Increase Space

Building new capacity can be necessary when prisons are dilapidated and crumbling; but there is no evidence that building additional prison places as a long term strategy for reducing overcrowding can succeed. Prisons are expensive to build and maintain. There is no evidence either that private finance initiatives provide a cost effective option. Better use can be made of existing structures, areas of the prison can be reclassified, more time can be allowed for prisoners to spend outside the cell, classification of prisoners means that those who require less supervision can be transferred to more open prison establishments.

4. Divert Minor Cases away from the Criminal Justice System

Many cases can be effectively dealt with outside the formal criminal justice system. Informal and traditional systems may be much more effective, provided that they respect the requirements of human rights. Within the formal system, warnings, cautions or other informal responses by the police or prosecutor may be appropriate for most minor offences. In more serious cases where offenders are prepared to offer compensation to victims or otherwise make amends to the community, prosecution may not be in the public interest. Systems should be in place for diverting particular groups of offenders into more appropriate forums.

5. Reduce Pre-trial Detention

In some countries as much as three quarters of the prison population may be awaiting trial. People can spend months or years on remand only to find that their case is dropped or that they are acquitted. There is a need for: systems to maximize the use of unconditional or conditional release such as bail programmes; strictly enforced time limits; efforts to speed up the process; and regular reviews of remand cases. These measures can help ensure that pre trial detention is used as a last resort and for the shortest possible time.

6. Develop Constructive Alternatives to Custodial Sentences

Courts need access to community-based sanctions as an alternative to short prison sentences as well as the ability to suspend sentences. The Zimbabwe model of community service enables offenders to restore the harm they have done by unpaid work for the benefit of local people rather than wasting scarce resources in prison. These can be combined with education and rehabilitation programmes designed to equip offenders to make a positive contribution. Ordinary members of the public should be encouraged to play a role in community sentences.

7. Reduce Sentence Lengths and ensure Consistent Sentencing Practice

Guidance to sentencers should be produced which tackles inconsistent sentencing practice and takes account of the costs of different sentences and their relative effectiveness. Many systems are characterised by disparities between different courts and different judges. Efforts should be made to achieve consistency around the norm of the less punitive courts. Minimum sentences should be avoided. Substantial use should be made of supervised or conditional release particularly for non-violent offenders. Where people have been imprisoned during political conflict, amnesties or early release should be considered as part of the process of achieving reconciliation.

8. Develop Special Arrangements for Youth Offenders that Keep them Out

The number of juveniles sent to prison should be kept to an absolute minimum in line with the UN Convention on the Rights of the Child. Juvenile justice systems need to comply with the Convention and consider the case for raising the minimum age for the adjudication of children, introducing alternatives to formal adjudication, especially restorative justice (as above point 2), and the adequacy of the range of alternatives to custodial sentences.

9. Treat rather than Punish Drug Addicts, Mentally Disordered and Terminally Ill Offenders

Courts should be able to order treatment for drug misusing offenders, whose crimes are often committed to feed their addiction. The health care and social welfare system should develop the necessary programmes for non-violent offenders. Hospitals or asylums are the right settings for mentally disordered people who need to be in an institution. The village is the humane place in which to allow the terminally ill to pass away. Mechanisms at police stations and at court should divert such offenders out of the criminal justice system.

10. Ensure the System is Fair to All

Imprisonment impacts disproportionately on the poor, the dispossessed and minorities who face discrimination outside. Monitoring should take place at every stage of the criminal justice system to ensure that discrimination does not take place and that the efforts to reduce imprisonment suggested in this plan are made in respect of all members of the community.

OFFENDER REHABILITATION, COMMUNITY ENGAGEMENT, AND PREVENTING RE-OFFENDING IN SINGAPORE

*Peter Joo Hee Ng**

I. THE SINGAPORE CONTEXT

A. Singapore the City-State

Singapore is an island city-state located at the southern tip of the Malayan Peninsula, lying south of Malaysia and north of Indonesia's Riau Islands. At just 710 km^2 (274 $miles^2$), it is the smallest nation in Southeast Asia. (In comparison, combined, the five boroughs of New York City are slightly larger at 790 km^2.) Unsurprisingly, Singapore is also the most densely populated country in the world.

In 1819, the British East India Company, led by Sir Stamford Raffles, established a trading post on the island, which was used as a port along the spice route. Singapore became one of the most important commercial and military centres of the British Empire, and the hub of British power in Southeast Asia. During the Second World War, the British colony was occupied by the Japanese after the Battle of Singapore, which Winston Churchill called "Britain's greatest defeat". Singapore reverted to British rule in 1945, immediately after the war.

Eighteen years later, in 1963, the city-state, having achieved independence from Britain, merged with Malaya, Sabah and Sarawak to form the Malayan Federation. However, the merger proved unsuccessful. Less than two years later, it seceded from federation and became an independent republic on 9 August 1965, and was admitted to the United Nations on 21 September of that year.

Since independence, Singapore's national income has risen dramatically. Foreign direct investment and industrialization created a modern economy focused on industry, financial services, education and urban planning. According to the International Monetary Fund, Singapore was the fifth wealthiest country in the world in 2007, in terms of GDP (PPP) per capita. In December 2008, the foreign exchange reserves of this small island nation stood at around $174 billion (source: Monetary Authority of Singapore, www.mas.gov.sg). In 2009, the Economist Intelligence Unit ranked Singapore the tenth most expensive city in the world in which to live — the third in Asia, after Tokyo and Osaka.

With approximately five million residents in 2008, Singapore's population is highly diverse. People claiming Chinese heritage form a majority (75%), with large populations of people of Malay (14%), Indian (9%) and other ethnic origins. English is the official and working language. Mandarin Chinese, Malay, and Tamil are also widely spoken.

Singapore is a parliamentary republic, patterned after the British Westminster model. Its legal system is based on English Common Law traditions. Singapore is well known for her corruption-free national, public and corporate governance. Transparency International's 2008 Corruption Perception Index ranks Singapore as the fourth least-corrupt country in the world, after Denmark, New Zealand and Sweden (joint first), and before Switerland (fifth), Germany (14^{th}), the United Kingdom (16^{th}), Japan (18^{th}) and the USA (joint 18^{th}).

Singapore has a highly developed market-based economy, and is consistently rated as one of the most business-friendly economies in the world. Her economy depends heavily on exports and refining imported goods, especially in manufacturing, with significant electronics, petroleum refining, chemicals, mechanical engineering and pharmaceutical industrial sectors. Singapore has one of the busiest ports and airports in the world, and is an important global financial centre. It operates the fourth largest foreign exchange trading centre after London, New York City and Tokyo.

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B. Police and Crime Rate

The overall level of crime in Singapore is low. With 670 cases of reported crime per 100,000 population in 2008 (source: Singapore Police Force, www.spf.gov.sg), the crime rate in Singapore is one of the lowest in the world. Incidents of violent crime are rare in Singapore. In 2008, there were 0.54 murders and 90 violent crimes, per 100,000 population. Again, very low numbers, and certainly one of the lowest in the developed world. Conscientious law enforcement together with very strict drug and gun laws, which include capital punishment, mean that drug abuse and firearms are limited in the country.

The Singaporean Police is consistently professional and any report involving a crime incident will be handled in accordance with prescribed standards. Police assistance can be readily obtained by dialling the standard emergency number. Every district within Singapore has a dedicated neighbourhood police centre, and any neighbourhood police centre will accept the filing of a police report, not just the district where the crime took place.

Selected International Comparisons of Murder & Incarceration Rates
(source: UN Human Development Report, www.unodp.org)

	Murders/ 100,000 Population (latest available, 2000-2004)	Prisoners/ 100,000 Population (2007)
Singapore	0.5 (2008)	250
Japan	1.0 (2007)	62
Australia	1.3	126
France	1.6	85
Canada	1.9	107
UK	2.1	124
USA	5.6	738

C. The Singapore Prison Service

Singapore's penal history can be traced to 1925 with the setting up of penal settlements to house convicts transported from British India. The Singapore Prison Service was institutionalised as a department on its own in 1946 when Mr GE Bayly became its first Commissioner.

1. Changi Prison

Built in 1936 as a civilian prison, Changi Prison was the last prison constructed by the British in Singapore. During World World Two, following the fall of Singapore in February 1942, the Japanese military detained about 3,000 civilians in Changi Prison, which was built to house only 600 prisoners. The Japanese also used the Selarang Barracks, near the Prison, as a prisoner-of-war camp, holding some 50,000 Allied — predominantly British and Australian — soldiers. Although POWs were rarely if ever held in the civilian prison, the name "Changi" became synonymous, erroneously, in the UK, Australia, and elsewhere with the POW camp.

2. The Singapore Prison Service Today

Since Singapore's independence, the Singapore Prison Serivce has undergone tremendous changes as she remade herself, time and again, into what is what is today a highly progressive prison administration.

The Singapore Prison Service, in her modern guise, is a department within the Ministry of Home Affairs. Together with the Police, Immigrations, Civil Defence and Central Narcotics Departments, we make up what is popularly known as the *Home Team*, a collection of governmental agencies dedicated to safeguarding the safety and internal security of Singapore.

Today, the Singapore Prison Service operates a total of 13 penal institutions and drug rehabilitation centres, and provides safe and secure custody for about 12,000 inmates.

3. Purposes of Imprisonment

Put in the simplest terms, the Singapore Prison Service exists to protect society and to make Singapore a safer place for all. This is our mission. The Service also aspires to become an exemplary Prison Service; to run a model prison system, and to be a shining light in the world of prison systems.

In order for us to achieve our mission, and move closer to our vision, it is essential that all in the Service possess a clear understanding of the basic purposes for putting people in prison. The Singapore Prison Service subscribes to four purposes of imprisonment.

First is *Punishment.* The Singapore Prison Service administers the custodial sentences, and the corporal and capital punishment meted out by Singaporean Courts. Imprisonment is punishment. As such, Singaporean prisons are, first and foremost, spartan, and the regime of incarceration, strict.

Second is *Incapacitation*. By incarcerating criminals, especially the hard-core and long-termed imprisoned, the Service denies them an opportunity to re-offend.

Third is *Deterrence*. Life in prison must never be better than life outside. By running a strict and stringent regime, The Singapore Prison Service deters those in custody from wanting to re-offend after release, and the like-minded outside prison from doing similar harm.

And the fourth is *Reformation*. For those willing and able to turn their backs on a criminal career, the Singapore Prison Service offer rehabilitative programming and aftercare support to help them reintegrate into our communities after release and live crime-free lives.

Punishment, incapacitation, deterrence and reformation, they all prevent crime and reduce harm. One less crime means one less victim of crime, and one less harm committed. Clearly, the more successful the Singapore Prison Service is at our work, the more society is protected, and the safer Singapore becomes.

4. Business Model

The Singapore Prison Service has three core business areas: (a) Executing Justice, (b) Reducing Reoffending, and (c) Preventing Offending.

The first business area, *Executing Justice*, is our bread and butter. Here, we serve mainly the Courts and other law enforcement agencies. We execute the sentences and corporal punishment ordered by Singapore's Criminal Courts, and also provide effective and efficient remand services to fellow law enforcements bodies. The Courts see us as reliable partners, and Judges are fully confident that convicted persons sent on to Singaporean prisons will always be treated humanely and dealt with in an entirely professional manner. The Police and other law enforcement agencies which rely on us to hold their remand suspects do so in full confidence that their detainees are safe, secure and properly treated.

The Singapore Prison Service's second business area is that of *Reducing Re-Offending*. Reforming the ex-offender, so that he does not offend again, involves both rehabilitation and reintegration.

The time in prison avails us with a golden opportunity for rehabilitation. For the deserving and suitably motivated, the time spent in detention can be profitably deployed into unlearning previously destructive behaviours, learning a trade or skill, or resuming formal education. Indeed, serving time should never be a waste of time.

Every year, more than 10,000 prison inmates complete their prison sentences and return to Singaporean communities. If the Singapore Prison Service is able, through our various programmes both inside and outside prison walls, to dissuade them from re-offending, we can prevent many thousands of new crimes every year.

The Singapore Prison Service also aims to *Prevent Offending*, our third business area, in two ways. One, by not waiting for the person-at-risk, who is a potential prisoner, to commit a crime that lands him in prison before we start on his rehabilitation, but by intervening further upstream and preventing him from earning his prison sentence in the first place. And two, by leveraging on the considerable criminal knowledge that

we have in our prisons, the Singapore Prison Service helps the Police and other law enforcement solve and prevent crime.

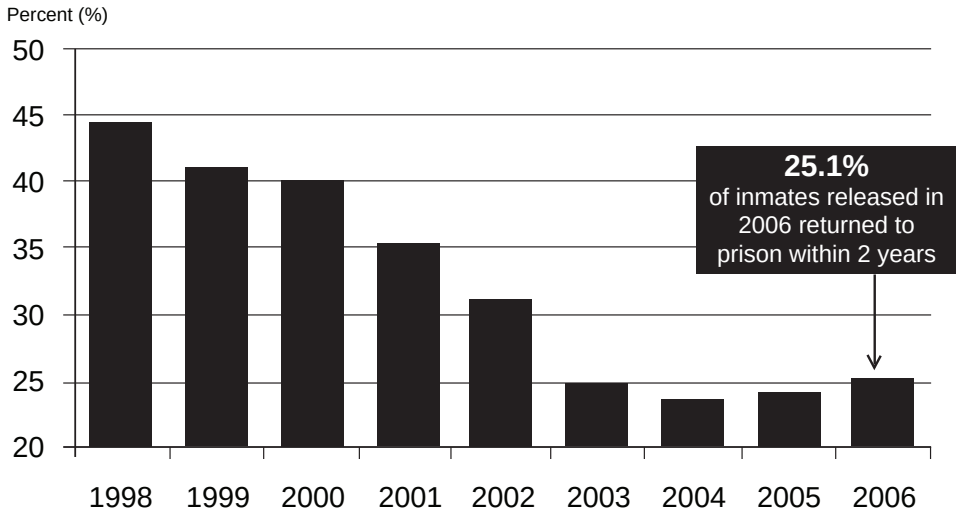
Again, just as with executing justice and reducing re-offending, the more successful the Singapore Prison Service is at preventing offending, the safer Singapore becomes.

II. REDUCING RE-OFFENDING

Reducing re-offending is a core business of the Singapore Prison Service. The reformation of offenders so that they do not re-offend after release, through rehabilitation and reintegration, is perhaps the most difficult and challenging task for any correctional service. Thankfully, the Singapore Prison Service has enjoyed some success in this area in recent times, and continues to make practice innovation.

It certainly takes a village to turn an ex-offender from a potential re-offender into a "never-again-offender". We recognise that nothing short of an integrated and multi-faceted approach is required to reduce re-offending, one that involves not just the offenders and the Prison Service, but also other government and non-governmental organisations, the community, as well as families of offenders. This has been the operating philosophy for reducing recidivism in Singapore.

Recidivism, defined as the percentage of every cohort released who re-offend and subsequently return to prison, is a key performance indicator for the Singapore Prison Service. We use a 2-year rate, and have been tracking it since 1998. Encouragingly, we are witnessing a sustained improvement in the recidivism rate. It has fallen to an all-time low of 23.7% for the cohort released in 2004, from what was 44% for the batch released in 1998.



Prison Recidivism Rate, Singapore, 1998-2009
(source: Singapore Prison Service)

A. Home and Work

There is really no secret to reducing recidivism. It is well known, and universally accepted, that family ties and gainful employment are the two key ingredients stopping an offender from re-offending.

An offender who has family that still cares about him, who visit him in prison; an offender who has family that he cares about, children or parents, or siblings perhaps; will have a much higher chance of not re-offending. We also know that the longer an ex-offender is able to remain in gainful employment after release, the better his chance of not returning to criminal behaviour.

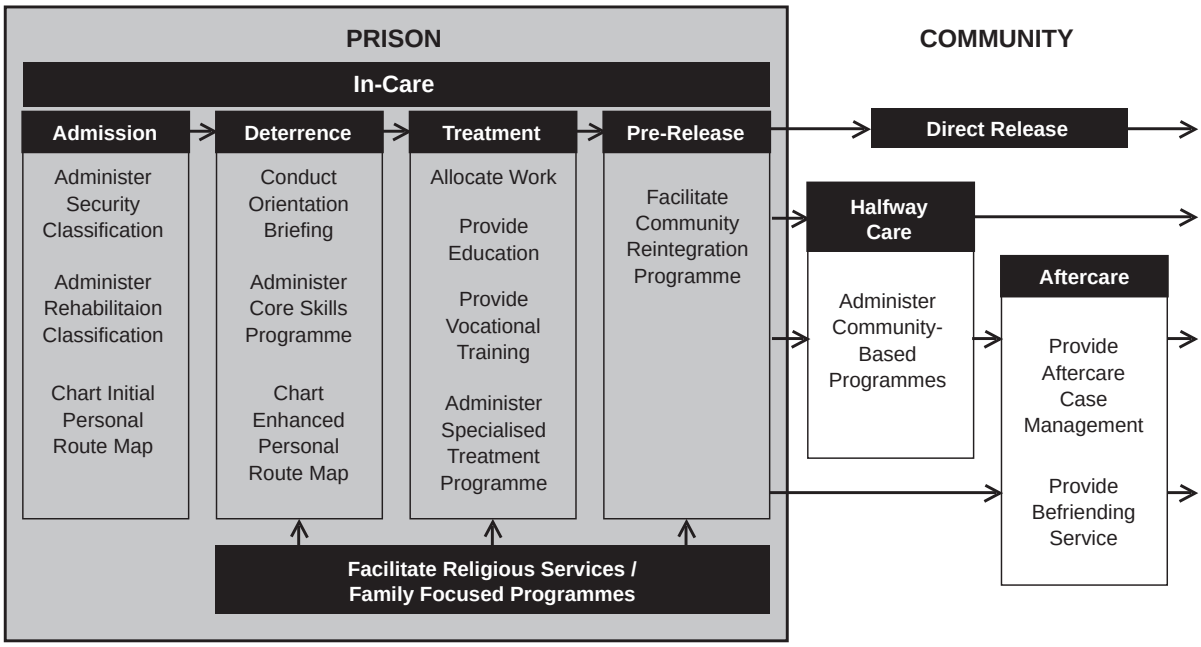
The Singapore Prison Service therefore targets our rehabilitation and re-entry efforts at these two areas — Home and Work. We go upstream, and as much as possible, help keep the family bonds of the offender

intact. We encourage visits and letter writing, and try to minimise the impact of incarceration on the members of his family, who are of course innocent. Also, keeping the children of the incarcerated in school is especially important if we are not to perpetuate a vicious cycle across generations.

At the same time, we go downstream to prepare the offender for employment while he is still serving time, and if necessary, to place the offender in a job even before he is released.

B. The Rehabilitation Framework

The Singapore Prison Service's *Rehabilitation Framework*, first developed in 2000, guides us in our offender reformation effort. The Framework articulates a structured and comprehensive approach for all rehabilitation efforts, and ensures that our limited resources are optimized by allocating programmes based on risks and needs.



The Framework dictates that we seek to maximize inmate reintegration potential through the building of social ties and the delivery of programmes targeted at improving offender attitudes and skills. We also aim to ensure aftercare support for ex-offenders through the seamless transfer of care of offenders and integrated support of offenders in the community.

Working closely with other government organizations and community partners, rehabilitation begin from the time offenders first enter the prison system, and continue even after their release. With such a *Through-Care* approach in mind, The SPS' rehabilitation framework consists of three distinct phases, namely, *In-Care, Halfway Care* and *Aftercare.*

1. <u>In-Care Phase – The Period in Prison</u>

During the period in custody, which we call the *In-Care* phase, offenders are enrolled in rehabilitation programmes which address criminogenic risks and needs. Formal prison programming aims to encourage change by targeting the offenders' belief and value systems, motivation levels and criminogenic needs. To prepare offenders for reintegration, we also aim to help them forge strong family bonds and increase their employability.

All offenders entering the Singapore prison system are subjected to classification at admission. At this point, every one is given an initial security, as well as a rehabilitation, grading, both dependent on assessments of the risks and rehabilitative needs presented. The rehabilitation classification so derived then informs a *Personal Route Map* that will be charted for every offender. The Personal Route Map details the appropriate rehabilitative programmes and treatment plan, and is tailored to individual needs.

(i) Treatment Stage – Specialized Treatment Programmes

During *treatment stage*, offenders are equipped with relevant skills and knowledge to enhance their reintegration potential.

The Singapore Prison Service administers a suite of *Specialised Treatment Programmes*, developed and delivered by prison counsellors and psychologists, which target criminogenic risks such as substance abuse, violent behaviour, sexual offending and criminal thinking. Delivered either individually or through group sessions, these programmes aim to increase offenders' motivation to change, to help them to understand the roots of their offending behaviours, and to equip them with the necessary skills to avoid relapse.

(ii) Work, Vocational Training and Employment

Gainful employment after release is an important protective factor against recidivism. Recognising this, the Singapore Prison Service invests heavily in preparing the offender for post-release employment even while he is still serving time, and if necessary, will place the offender in a job even before he or she is released.

To do all these, the Singapore Prison Service relies on the Singapore Corporation of Rehabilitative Enterprises (SCORE), numerous individual volunteers and social service organizations in what must necessarily be a collective community effort.

SCORE is an independent statutory body, and Prisons' main partner, for providing vocational training and employment services to inmates and ex-offenders. SCORE's energies are focused on enhancing the employability of offenders and preparing them for the eventual reintegration into the national workforce.

Although prisoners in Singapore are not compelled to work during incarceration, many do. In our prisons, work is used to instil the sense of responsibility, discipline and self-respect that comes from gainful employment.

SCORE, working with Prisons, either manages or facilitates the operation of industrial workshops within our prisons. In Singaporean prisons, we operate both traditional industries — like our industrial-sized bakery and laundry (the largest in Southeast Asia) — and new economy ones, like the Call Centre and SCORE's Digital Media Design business.

In 2007, more than 4,000 inmates worked in SCORE's industrial workshops inside our prisons. SCORE also trained 5,500 inmates for post-release employment, and placed 2,500 of them into jobs even before release.

SCORE adopts a two-pronged approach in relation to maximizing the employability of prisoners. Through vocational training and work-skill upgrading, offenders are made "ready for work" while still in custody. At the same time, actively signing up potential employers, maintaining a job bank and on-going job placements ensure that "work is ready" for offenders at the time of release.

2. <u>The Prison School</u>

In addition to work, The Singapore Prison Service has found education to be a good transformational tool, particularly for younger offenders, and is especially proud of our *Prison School*. Run like a regular school, the Prison School offers over 500 young inmates another chance at formal education every year. There, they study and sit for both junior and senior high-school diplomas.

Year after year, student inmates attending the Prison School continue to surprise us by achieving results that are comparable with, and sometimes often better than, those turned in by mainstream schools. Many of the inmate graduates from the Prison School have been successfully admitted into Singaporean polytechnics and universities after release.

3. <u>Fostering Family Relationships</u>

We know that positive relations and family support are critical to the successful reintegration of offenders. To keep family ties intact, and also ensure that relationships are not irrevocably strained by a

member's imprisonment, the Singapore Prison Service actively engages families of the incarcerated in a variety of ways. Our aim is to help families cope better with a member's incarceration and, ultimately, to build supportive family networks for offenders to return to upon release. Many families have benefited from our family programmes.

4. Visitations

We encourage letter writing and regular prison visits. The inconvenience of travel to prisons for face-to-face visits is a commonly-cited deterrent to regular family visitations in many countries. Although distances are short in Singapore, the Singapore Prison Service still makes wide use of video-conferencing to make prison visitation a near painless process. We have established, at considerable cost, satellite visit centres, typically located close to major underground stations, which open early and also on weekends, where friends and relatives can go to for remote teleconferencing visits with their loved ones in prison.

5. Helping Families of the Incarcerated

When someone breaks the law, commits a crime, does a harm, he or she would usually be caught by the Police, prosecuted, tried and, if found guilty, convicted and sent to prison. Most people would think that this is the end of the story.

The truth is that almost every prisoner has family — parents, siblings, spouse or children — who are, of course, innocent, but would nonetheless still suffer the impact of the prisoner's incarceration. Incarceration of a family member not just creates emotion strain, but often also financial difficulties for the families of prisoners. Many need help and will require our assistance.

In this connection, the Singapore Prison Service has, in 2006, set up *Family Resource Centres* in several of our prisons to provide assistance and support specifically to the families of offenders. These Centres, outsourced to community welfare organizations, are able to offer information and referral services, short-term financial assistance, and even case management services for families with more complex needs. Our community partners who operate the Family Service Centres also conduct family-focussed programmes on various topics ranging from communications to reconciliation issues, to parenting and marital issues, and serve as points of contacts for the families to turn to in times of need and crisis.

6. Halfway Care Phase – Staged Release Back to Communities

(i) Community-Based Rehabilitation

No matter how comprehensive rehabilitation programming efforts are within prison, the prison environment remains removed and remote from regular life. Successful reintegration can be aided by having offender rehabilitation continue into the community. Community-based rehabilitation is used by the Singapore Prison Service to ease the transition of offenders from an institutional setting back into a communal one. Our programmes are designed to place the responsibility for reintegration squarely on the offender, while leveraging on community resources to achieve the best rehabilitation situation for the reforming prisoner.

Rather than directly releasing an offender who, due to years of incarceration, often has little or no ready support system in the community, the Singapore Prison Service uses several *Halfway Care* schemes to effect a more graduated re-entry. This allows an offender the opportunity to apply the skills and knowledge learnt in prison in a normalized environment.

During the *Halfway Care* phase, suitable offenders are allowed to serve the tail-end of their sentences in the community. Our various Community-based Programmes cater specifically to the needs of different categories of offenders. Those with family support can return to their homes, with electronic monitoring, under the *Home Detention Scheme*. Longer-term offenders and those who do not qualify for home detention can be emplaced on the *Work Release Scheme*. Privately-run *Halfway Houses* provide a caring and conducive environment for gradual reintegration.

(ii) Community-Based Programmes

(a) Home Detention Scheme

The Home Detention Scheme provides an avenue for the early release of offenders who are typically of low risk and most amenable to successful re-integration. Offenders selected for Home Detention have to wear electronic tags while they are on the Scheme, and are allowed to serve out the last months or year of

their sentence living with their families or in their private residences under a temporary release license with set conditions. These may include keeping curfew hours and periodic mandatory appearance at designated reporting centres. Involvement in full time employment or education is compulsory for prisoners undergoing home detention.

(b) Halfway House Scheme

The Halfway House Scheme offers offenders who have little or no family support, who may have no homes to return to, or whose family environments are judged to be detrimental to sustained desistence, but who are nevertheless desirous of staying crime-free, an alternative way of serving their sentences in the community.

Halfway Houses, typically operated by social service or religious organizations, provide hostel-like lodging for offenders. Contracted by the Singapore Prison Service, these Halfway Houses take in offenders placed on the Scheme for up to a year, and are selected because they are able to avail their residents with a safe and nurturing environment. Offenders on the Halfway House Scheme are required to work during the day and return to their assigned hostels for evening curfew.

(c) Work Release Scheme

As its name suggests, the Work Release Scheme allows suitable offenders to leave prison premises for employment during the day, while requiring them to go back to a low-security prison in the evenings. Contingent on their progress, offenders placed on the Scheme may graduate to the Home Detention or Halfway House Schemes.

We have found that such a scheme enhances self-esteem, gives the offender a chance to contribute to society by being productive, inculcates good work habits, and develops a sense of responsibility as the offender supports his family with the wages he earned.

7. The Singapore Experience So Far

To date, The Singapore Prison Service has emplaced some 26,000 offenders on our various Community-Based Programmes. Our experience so far has been encouraging. Completion rates have been consistently high, at about 96%. Offenders serving community-based rehabilitation are invariably lesser recidivists compared to those who do not participate. Also, survivability (that is, the period of desistence to future re-offending) is also longer.

In Singapore, community-based rehabilitation not only frees up prison capacity, but also encourages lower recidivism.

III. PREPARING THE COMMUNITY

The best rehabilitation regime during incarceration is of no use if ex-offenders find themselves rejected at every turn when they are released into the larger community. It is a sad fact that many ex-offenders have to live with the stigma of having served time behind bars. Almost invariably, they are discriminated against, ostracized, and generally looked down upon. Some will, for one reason or another, return to crime, cause another harm, get arrested again, and repeat the cycle.

Like it or not, prisoners eventually get released and return to free society. Accordingly then, conditions in the community must be conducive for re-integration if the aim is for re-offending to be reduced. Rehabilitation and preparing the inmate when still in prison is only one part of the equation. The other must be the preparedness of wider community to accept and accommodate released prisoners willing to live law-abiding lives. Doing one while neglecting the other will, certainly, be counter-productive.

Alas, preparing the community and creating conditions that encourage sustained desistence from criminal behaviour by ex-offenders is a difficult, complex and, often, seemingly insurmountable task. A task which involves political support, multi-agency collaboration, grassroots activism and the active engagement of civil society. That as it may, any correctional service hoping to reduce re-offending must make a concerted effort at preparing the community to receive the prisoners that it is about to release. For some years now, the Singapore Prison Service has invested considerable resources and energy into this area.

A. The CARE Network

The Singapore Prison Service, for reasons of jurisdictional and resource constraints, must necessarily concentrate its efforts at offender reform within the prisons. However, the task of reducing re-offending, clearly, cannot be confined within prisons, or be left solely to prison administration. Inevitably, successful rehabilitation and reintegration requires multi-agency, government-community and public-private co-operation.

Indeed, this has been our approach in Singapore, and the motivation for the creation of the CARE (Community Action for the Rehabilitation of Ex-Offenders) Network. Formed in May 2000, CARE brings together the main players, both in government and in the community, who are responsible for offender reintegration in Singapore. The Singapore Prison Service provides leadership for the CARE Network, whose other members are the Ministry of Home Affairs; SCORE, the Ministry of Community, Youth and Sports; the Singapore Aftercare Association; the Singapore Anti-Narcotics Association, The National Council for Social Services, the Industrial and Services Co-operative Society (ISCOS, which is a co-operative for ex-offenders).

The C.A.R.E. Network is an alliance which pools resources and coordinates activities, in the belief that we are far more effective acting together, rather than going it alone. C.A.R.E.'s vision of "Hope, Confidence and Opportunities for Ex-offenders" cannot be any clearer and is in need of fulfilling now, more than ever.

The CARE Network is perhaps best known for the *Yellow Ribbon Project*. Less well known, but no less successful, is the *Case Management Framework* that was conceived and implemented by the Network. The Case Management Framework has provided, and continues to give, aftercare support to more than 5,000 ex-offenders.

B. The Yellow Ribbon Project

Regrettably, the suspicion and prejudice that ex-offenders face after release can often be more punishing than the prison sentence itself. Many ex-offenders find themselves literally stepping into a second prison. This time it would be a prison with invisible bars, of mistrust, discrimination and even contempt.

Led by the Singapore Prison Service, the Yellow Ribbon Project is now in its sixth year. Through the Yellow Ribbon Project we hope to promote a more accepting society, one that is willing to give ex-offenders a second chance at making good. In order to reduce re-offending, it is important that we help unlock the second prison for our inmates, even as we let them out of the physical one.

The Yellow Ribbon Project, the only national second chance campaign of its kind anywhere in the world, exists to bring hope, confidence and opportunity to ex-offenders determined to lead crime-free lives. Its purpose is to generate *awareness* of the difficulties ex-offenders face after release, encourage *acceptance* of their return to society, and inspire public *action* to support their reintegration.

In 2008, the Yellow Ribbon Project distributed more than 340,000 yellow ribbon packs islandwide, signed up 133 new employers willing to hire ex-offenders, and collaborated with 45 community partners in organizing various Yellow Ribbon activities.

It was thus most encouraging when Lee Hsien Loong, the Prime Minister of Singapore, agreed to front our main Yellow Ribbon event in September 2007: a mass walk followed with a carnival at the Changi Prison Complex. In a wonderful show of community support for the Yellow Ribbon Project, more than 10,000 people turned up on a beautiful Sunday morning in their walking shoes and had a terrific time. That day, we all took double encouragement from the Prime Minister's words to ex-offenders: *"If you have made a mistake, if you have offended, then there has to be punishment. But if you have taken the punishment and you are prepared to correct yourself and make good and come back onto the right path — if you make the effort, we should give you the second chance."*

In Singapore, September is "Yellow Ribbon Month". Every September, we organise numerous community activities, including concerts, walks and runs, art exhibitions, and other public outreach events to spread the Yellow Ribbon message. Together with a carefully orchestrated media campaign, the Yellow Ribbon Project has become a national movement in Singapore and a runaway success.

The Singaporean public has responded with uncommon enthusiasm to the Yellow Ribbon cause, turning up at Yellow Ribbon events in large numbers, and donating generously to the *Yellow Ribbon Fund*.

The Fund, set up to support community-initiated programmes which help ex-offenders and their families, has raised more than $5million. The Fund does commendable work supporting and sustaining the Yellow Ribbon effort, and also helps deserving ex-offenders and their families directly, to the tune well in excess of $1.5m in 2008.

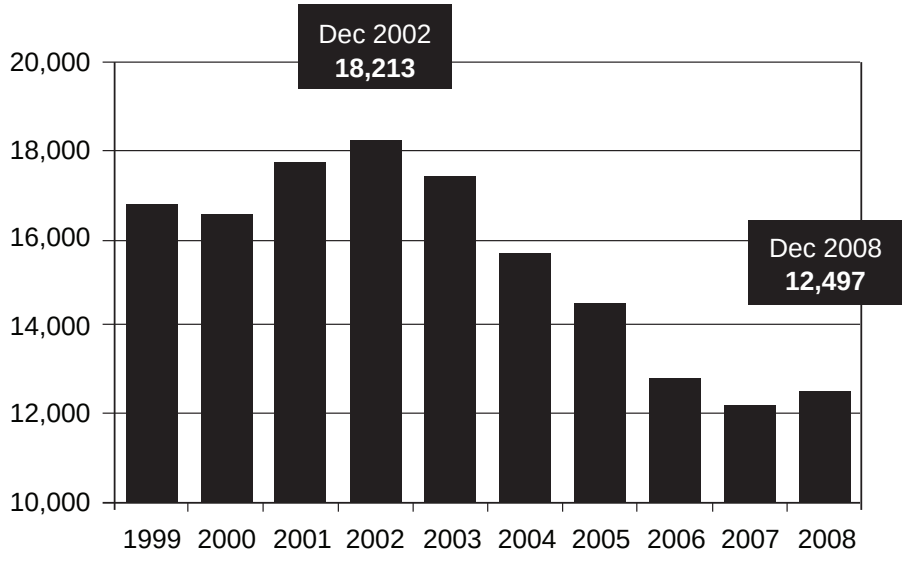
The response from volunteers and employers in Singapore to the Yellow Ribbon Campaign has been no less heartening. At end 2008, some 1,700 volunteers, almost as many as regular prison staff, come into our prisons and detention centres on their own volition to providing training and counselling for prison inmates. Almost 2,000 Singaporean employers are registered in our job bank, ready to offer employment to inmates and ex-offenders.

A wide-ranging survey conducted by the Singapore Prison Service in 2006 to gauge public perception of our community engagement initiatives found that more than 80% of the Singaporean public indicated awareness of the Yellow Ribbon objectives and, more encouragingly, about 70% expressed willingness to accept ex-offenders either as friends or colleagues. These findings were replicated in later surveys ran in 2007 and 2008, offering broad indications that the Yellow Ribbon Project has been consistently successfully at engendering awareness, acceptance and public action in support of offender reformation.

IV. CONCLUSION

A. The Smart Thing to Do

Today, about 12,000 men and women are incarcerated in Singaporean prisons. At about 250 per 100,000 population, it is a high imprisonment rate, generally indicative of Singapore's tough stance on crime. However, the inmate population has been on a steady decline after peaking at more than 18,000 in 2002. More encouragingly, we are witnessing a sustained improvement in the recidivism rate, which has fallen to record low levels.



Total Prison Population, Singapore, 1999-2009
(source: Singapore Prison Service)

Serving time should never be a waste of time. The period of incarceration allows us in the Singapore Prison Service an opportunity to work at reforming lives, at knocking some sense into the inmates, at showing them that crime does not pay, at teaching them a marketable skill, at giving them an education, at helping them to have another shot at life. The Singapore Prison Service does all this with one end in mind – to reduce the chance of a prisoner re-offending after release.

Why? Because one less recidivist means one less crime, means one less victim of crime, means less harm caused, means a safer Singapore for all. Offender reform is really the smart and practical thing to do.

B. It Takes A Village

Rehabilitation and reintegration are the two key ingredients for successful offender reform. Both cannot be confined to within prison walls. Rehabilitation involves not just programming for the individual criminogenic risks and needs of the offender, but must extend to enhancing his familial ties and future employability. Reintegration, by definition, must involve whole communities, starting with awareness, then acceptance and then practical action to make the inevitable re-entry of the ex-offender a positive one.

The Singapore experience, in recent times, at reducing reoffending has been an encouraging one. Crucially, the Singapore Prison Service chose, early on, to assume leadership for this enterprise, and has continued to plot, strategize, innovate and invest our energies and resources in finding new and more effective ways of dissuading re-offending, collaborating with all who share the desire for a crime-free society.

C. The Captains of Lives

Prisons are often described as places where bad people go to get worse. The Singapore Prison Service takes a radically different view. Singaporean prisons must not be mere jailhouses, but transformational places, where crime is deterred even as strayed lives are steered back on course.

The officers and staff of the Singapore Prison Service style ourselves as the *Captains in the lives* of offenders placed in our custody. We are a key partner in criminal justice. We protect society through the safe custody and rehabilitation of offenders, co-operating in prevention and aftercare.

In this way, we seek to build a secure and exemplary prison system.

SANCTION POLICIES AND ALTERNATIVE MEASURES TO INCARCERATION: EUROPEAN EXPERIENCES WITH INTERMEDIATE AND ALTERNATIVE CRIMINAL PENALTIES

*Hans-Jörg Albrecht**

I. INTRODUCTION

It was in particular in view of the abundant use of imprisonment that in Western Europe the question was put forward as early as the 1960s whether the range of criminal penalties should be widened to what today is commonly called intermediate, community or alternative criminal penalties and what conditions must be established to make these types of criminal penalties work. In the face of rising crime rates [1] and – as a consequence - increasing numbers of offenders adjudicated and sentenced, virtually all criminal justice systems since the 1970s have been preoccupied with the search for cost-benefit efficient, non-custodial responses to crime other than the summary fine and non-prosecution policies based on conditional or unconditional discharges. Prison sentences and imprisonment place a heavy financial burden on the state and do not seem to meet promises such as being an effective deterrent to crime or reducing recidivism. Crime and punishment policies relying on imprisonment come with enormous costs for state budgets and for civil society, which has to deal with problems resulting from the impact of imprisonment on families and those communities and neighbourhoods which have to reintegrate large numbers of (young and male) ex-convicts. Imprisonment is of course the least elastic penal sanction because - in particular European - human rights instruments have placed prisons under strict rules which prevent its easy adjustment to changes in the number of offenders convicted and sentenced.

The search for intermediate penalties back in the Europe of the 1960s was also fueled by arguments stressing counterproductive effects of imprisonment in the form of stigmatization, labelling and proliferation of crime through prisons considered to be "schools of crime". The search for alternatives was then still motivated in part by a strong interest in developing rehabilitative measures more effective in reducing recidivism. A two-track penal policy emerged which aimed at concentrating "rehabilitative" prison sentences on heavy recidivists (in particular career or chronic offenders or high-risk offenders) while low-risk offenders should be eligible for non-custodial criminal sanctions and diverted from the prison system. Furthermore, sentencing theory as elaborated in the 1960s and 1970s strongly advocated the need for a wide range of penalty options thought to facilitate matching particular sentences to particular offenders. Putting the focus on individualization in sentencing partially reflected rehabilitation theory but was in particular called for by the pursuit of justice and the assumption that personal and individual guilt as expressed in criminal offending could be best accounted for by various sentencing options tailored to the individual case.

The 1970s and 1980s also saw new concern for the role of the community in the system of criminal sanctions and their implementation. Community participation has been welcomed not only for its potential in contributing to cost-effective reintegration and rehabilitation of offenders, but also because it expresses recognition of the community's responsibility for effective (informal) crime control

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[1] See Haen Marshall, I.: Trends in Crime Rates, Certainty of Punishment and Severity of Punishment in the Netherlands. Criminal Justice Policy Review 2(1987), pp. 21-52.

II. PENAL POLICIES AND ALTERNATIVES TO IMPRISONMENT IN EUROPE

A. The Proliferation of Alternative Penal Sanctions

From the 1970s on, a wide range of intermediate penalties have been introduced and put into practice in Europe. This policy of proliferating alternatives to incarceration has been endorsed and backed up, particularly by the Council of Europe[2] Several recommendations and resolutions issued by the Council of Europe over the last 50 years encourage the use of alternatives to imprisonment and provide for a supra-national normative framework. As early as 1965 the Council of Europe published a resolution on suspended sentences, probation and other alternatives to imprisonment (65, 1), followed by a resolution in 1976 on certain alternative penal measures to imprisonment (76, 10). In 1992, the Council issued recommendations (Rec. R (92) 16) on the European rules on community sanctions and measures, which for the first time provided for a complete set of rules on the application and implementation of community sanctions. Special recommendations deal then with conditional release (Rec. R (2003) 22 concerning conditional release). In 2000 a follow-up to the 1992 community sanctions recommendations focused on improving the implementation of the European rules on community sanctions and measures (Rec. R (2000) 22). In 1999 the Council of Europe in a Recommendation concerning prison overcrowding and prison population inflation (Rec. R (99) 22) reiterates its view that prison sentences should be a last resort and that community sanctions should be the punishment of choice, except in the case that the seriousness of the crime prohibits any penalty other than a prison sentence.

The position of the Council of Europe as regards alternatives to imprisonment can be summarized in the following points:

- Imprisonment should be the last resort in penal policies;
- Community sanctions must comply with human rights (and not infringe on human dignity);
- Community sanctions should aim at rehabilitation and integration of the offender and cater also to the needs of the victim of a crime;
- A well-functioning infrastructure is needed for proper implementation of alternatives to imprisonment.

Concern for alternatives to imprisonment and intermediate penalties back in the 1960s and 1970s in Europe was fuelled by an unprecedented rise in crime which certainly was a consequence of a process of modernization affecting social structure, mechanisms of social integration and social control. In particular, the rise in property crimes placed a heavy burden on criminal justice systems. New forms of crime emerging with technological, economic and social advances, for example motor vehicle traffic offences, added to the sharp increase in cases which had to be processed through the criminal justice system. The rise in bulk property crime and motor vehicle offences brought also a sharp increase in the share of the population which came to the attention of the criminal justice systems and ultimately was convicted and sentenced. A debate on over-criminalization and over-penalization ensued which pointed especially at the risk to the basic (preventive) function of criminal law resulting from imposing too much punishment.[3] The observation that most offenders will not relapse into crime and that in fact most first-time offenders remained one-time offenders encouraged the pursuit of a two-track penal policy, as did the knowledge on chronic offenders building up since the 1970s as a result of cohort and life course research.[4]

Data from the Freiburg Birth Cohort Study confirm that chronic offending and criminal careers are confined to a small group of offenders (see Table 1) and that most offenders coming to the attention of police are one-time or occasional offenders.

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[2] For a review see Dindo, S.: Les Alternatives à la Détention. Commission Nationale Consultative des Droits de l´homme, Paris 2006, pp. 7.

[3] Popitz, H.: Die Präventivwirkung des Nichtwissens. Tübingen 1968.

[4] Wolfgang, M., Figlio, R.M., Sellin, T.: Delinquency in a Birth Cohort. Chicago, London 1972.

Table 1: Criminal Suspects in the 1970 Birth Cohort of German males at the age of 30 (Baden-Wuerttemberg, N = 104.000)

N Arrests	All criminal offences (traffic offences excluded)	N Suspects
1	31	31.834
2	15	15.702
2	10	10.428
3	7	7.730
4	6	6.157
5	5	5.062
6	4	4.310
7	4	3.700
8	3	3.238
9	3	2.859
10-19	1	1.096
20-49	0,1	147
> 49	0,01	

Source: Freiburg Birth Cohort Study

Imprisonment was therefore considered an option for offenders at risk of relapse into serious crime and in need of (long-term) therapeutic intervention; for low-risk (first-time) offenders, community sanctions or non-prosecution policies should apply. In Austria and Germany the debate on alternatives to imprisonment was particularly focused on short-term imprisonment. This followed from a discourse on negative effects of short term prison sentences which commenced with Franz v. Liszt (representing the modern school of criminal law) at the end of 19th century. Franz v. Liszt voiced mistrust against prisons and short term imprisonment. At the occasion of short term prison sentences, he argued, treatment programmes cannot be implemented, so the negative impact of prisons would prevail. In 1969, when the "Comprehensive Criminal Law Reform" in Germany was implemented, the legislature introduced also a quasi-prohibition of short-term prison sentences (up to six months). Instead of short-term prison sentences, (day) fines have to be imposed.[5] While Germany and – to a certain extent also Austria – pursued a policy of "day fines instead of short prison sentences", other European countries, while implementing alternatives to imprisonment too, continued to use short-term imprisonment. The issue of short-term prison sentences demonstrates that a uniform penal policy did not develop in Europe nor developed a consent as to what type of alternatives should be favoured. Penal policies are characterized rather by national particulars as well as specific (historical) trends in systems of criminal sanctions and sentencing practices.

Alternatives to imprisonment in Europe can be roughly collapsed into the following groups:

- Alternatives to pre-trial detention:
  - Bail
  - Electronic tagging and tracking

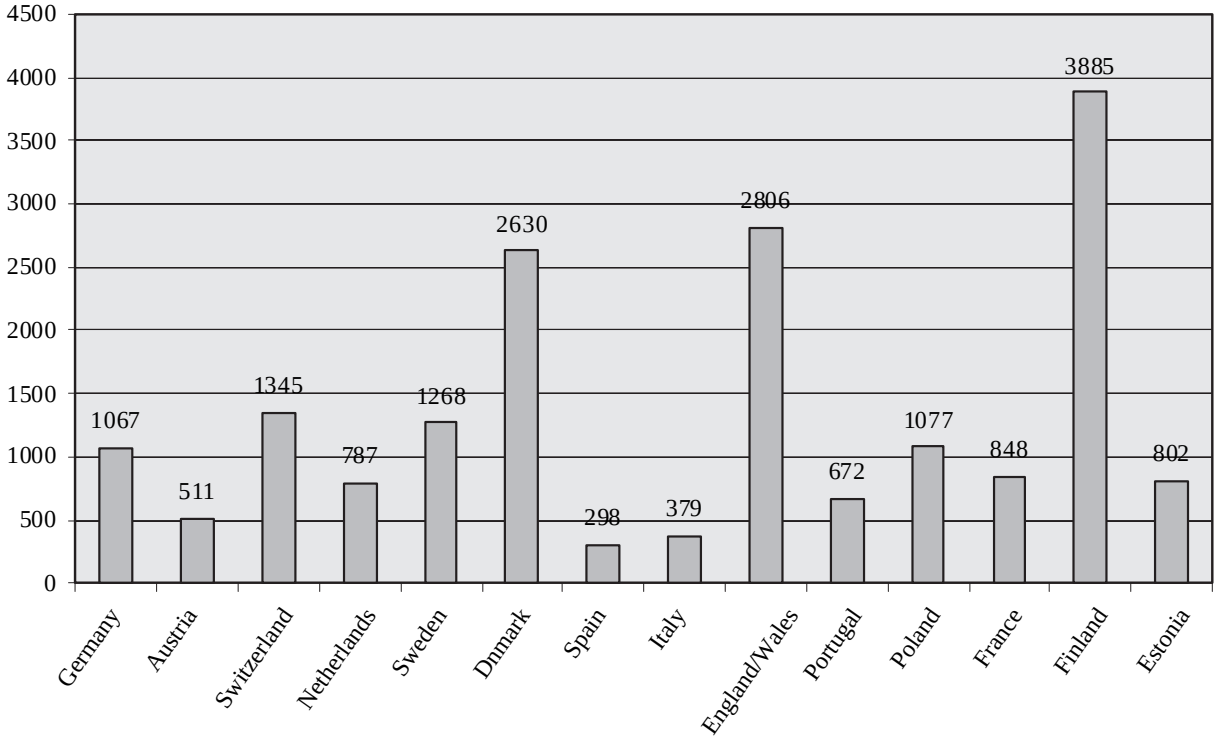
- Intermediate (or alternative) sanctions (in their own right) which are aimed at replacing prison sentences fully:
  - (Day) fines
  - Fully or partially suspended prison sentences (with conditions attached)
  - Community service
  - Compensation/restitution
  - House arrest and electronic monitoring
  - Treatment orders (drugs, alcohol)
  - Interdiction/exclusion orders (driving ban, exclusion zone)
  - Combinations of alternative sanctions

- Alternatives which aim at:
  - reducing the duration of a prison sentence (parole)
  - reducing the intensity of imprisonment (work furloughs, open prisons etc.).

[5] See Albrecht, H.-J.: Strafzumessung und Vollstreckung bei Geldstrafen. Berlin 1980.

A comparative approach to the analysis of criminal sanctions in Europe has to take into account that conviction rates differ significantly among European countries. This is due to differences in the definition of a criminal offence as well as differences in the scope of non-prosecution policies.

Graph 1: Rates of Convictions and Sentences Imposed (100.000) in Europe (2002/2003)



Source: Aebi, M.F.et al:European Sourcebook of Crime and Criminal Justice Statistics 2006. 3rd Ed., Strasbourg 2007, p. 99.

In some systems a qualitative distinction is made between a criminal offence and administrative wrongs (or misdemeanors) while others (for example Denmark or Finland) classify a wide range of non-serious offences as criminal (reducing, however, the penalties to be applied to low ranked criminal offences to fines).

B. Alternatives and Criminal Procedure

The concept of intermediate, community or alternative sanctions must be understood also from the perspective of changes in criminal procedure and a trend towards a simplified, summary and partially also consensual way of determining and imposing criminal penalties.

All systems obviously try to develop procedural mechanisms which enable criminal justice systems to cope with growing caseloads and more complex criminal cases (in particular economic crimes) and to improve performance of the system as regards goal attainments. However, while in the 1960s and 1970s goals pursued by way of settlement out-of-court procedures certainly were focused on reducing stigma and relapse in crime, the last decade has seen the dominance of cost arguments and the economic rationale. But, the last two decades have seen the victim of the crime become again a central figure in the criminal process. Mediation and compensation have attracted considerable attention also with a view to justifying conditional dismissals, making mediation and compensation an important argument in policy debates on settlements out-of-court. However, empirical evidence so far suggests that mediation and compensation in most systems do not play a major role compared to transaction fines which evidently are better suited for routine application and efficient administration.

- A common trend - although not affecting all systems - obviously concerns the leading role of public prosecution services in settlements out-of-court. It seems obvious that European legislators - France and Austria are the most recent examples to demonstrate this trend - are increasingly entrusting more powers to public prosecution services in dismissing cases conditionally. Public prosecution services have slipped into the role of decision-makers and of policy makers; they have become "judges before the courts". They decide on individual cases; however, by applying new powers, such as transaction fines, public prosecutors create and implement criminal policies as regards the general approaches adopted towards certain types of crimes. There is evidence also that this trend is continuing: on the one hand extending such powers on the side of prosecutors and on the other hand entrusting the power of case dismissal increasingly to police. At least in the Danish and Dutch criminal justice systems, such trends become visible while cautioning powers have always been part of police powers in England/Wales.

- A second common trend seems to be the emergence of sentence bargaining elements, be it on a statutory basis like in common law systems; in systems such as Spain, Italy or Poland; or as informal mechanisms, as for example developed by German courts. With that it becomes also evident that common law systems and continental systems, expediency based prosecution systems and legality driven systems converge substantially.

- A third common trend is visible with simplified procedures - penal orders - which consist of an administrative type of arrangement with a focus on petty crimes and mass crimes. Here, too, the public prosecutor in most systems has a significant position as it is the public prosecutors' office which initiates such proceedings, although, formally, it is the judge who is responsible for issuing the penal order. With simplified proceedings, the case in most instances is settled out-of-court as a trial is not requested and - according to empirical evidence - penal orders are rarely refused by defendants. As penal orders in most systems are restricted to non-custodial sanctions, simplified procedures may be considered to include some sort of implicit understanding that in exchange for accepting such economic processing a sentencing discount on a large scale is granted.

Out-of-court settlements, be it through unconditional and conditional dismissals by the public prosecutor, or through court-based bargaining and settlement procedures cutting off a full trial are first of all aimed at petty offences and moderately serious crime. However, it seems clear that there is a certain trend to move with conditional dismissals deeper into serious crime while court-based settlement arrangements from the very beginning have been developed and implemented to respond also to cases of serious crime, in particular complex cases of economic crimes.

Most important elements in out-of-court settlements certainly concern consent and/or confession. There are numerous variations as regards this element; however, there seems to be convergence towards consent as the major requirement for launching "out-of-court proceedings".

As regards evidence, available respective sufficient evidence or requirements in terms of factual circumstances making a case suitable and eligible for out-of-court procedures there exists a certain "double bind", as out-of-court settlements certainly have been introduced in various systems with a view to disposing complex cases of economic crimes. In general, if economic reasons in terms of saving resources and time are actually the most important push factors then it seems evident that certain groups of criminal cases eligible for transaction fines and the like should exhibit serious problems of evidence as only such cases may be considered to produce savings on the side of the criminal justice system (which then justifies sentencing discounts). However, it is evident that at least as regards mass and petty offences the bulk of cases will actually have properties such as clear and simple factual circumstances which do not call for a full trial.

Finally, there remain many open questions as regards a most important issue: the sentencing discount and the size of discounts that can be offered in exchange for consenting with out-of-court proceedings. There are certainly important links to sentencing theory in this field. Statutory guidelines most often either reduce possible penalties to non-custodial penalties (as is the case in penal order procedures as well as in conditional dismissals) or cut down the range of penalties by one third or two thirds (an option which quite often is used in statutory guidelines on mitigation in sentencing).

Summarizing concerns and conflicts around the emergence of out of court settlements, we may note the following:

Concerns for equal treatment have been raised with entrusting public prosecutors the power to create and to implement non-prosecution policies. In the Dutch system, general prosecution and sentencing guidelines for public prosecutors have recently come into force. These guidelines very precisely define those cases which must be prosecuted or dismissed and provide for a detailed tariff as regards the size of transaction fines. It seems plausible that such guidelines should be implemented wherever prosecution services adopt the functions of a sentencing judge.

The problem of division of powers has been addressed throughout Europe in the face of growing powers of public prosecutors in dismissing criminal cases conditionally and unconditionally. On the one hand, the trends towards non-prosecution policies certainly undermine the role of the parliament and the function of the rule of law; on the other hand, the judicial system is in danger of becoming marginalized. The proper response to these problems seems to be located in serious efforts to link the kind of crime policy problems addressed by way of non-prosecution policies with statutory decriminalization on the one hand as well as serious efforts to parcel out petty crimes by way of substantive criminal law. The latter would also re-instate the courts into a position of efficient control. The Austrian Criminal Code (§42) could serve as a promising model.

With extending police and prosecutors powers in settling cases a sort of executive law is spreading rapidly, characterized by informality and discretion. This is opposed to conventional principles of law as the legislator provides only a shell which is filled with substance by the executive branch.

Control of discretion and the risk of abuse of power have been prominent arguments on the agenda, too. Control of discretion and proper responses to the risk of abuse are linked to the victims' position in the procedure on the one hand, and to the question of transparency of out-of-court settlements on the other hand. In particular, the victims' position is of paramount importance, not only for the purpose of control, but also for pursuing victim policies independent of whether the case is settled out-of-court or within the framework of trial procedures. The French model in this respect offers a feasible solution as crime victims have to be informed on how the case is processed and may be heard by the public prosecutor or the court. As regards possibilities for appeal on the side of the crime victim, there are certainly arguments arising out of the goal of simplifying and cost-saving which speak against formal appeal powers for the victim.

Finally, the principle of presumption of innocence certainly suffers from out-of-court arrangements. The main argument which is used in favour of accepting out-of-court settlements and in view of presumption of innocence concerns "consent". However, out of court settlements then should be safeguarded by rules which can be delineated from the concept of "informed consent" and monitored either through a defence counsel or through the possibility of appeal mechanisms which allow for re-instating procedures in case "informed consent" principles have not been complied with.

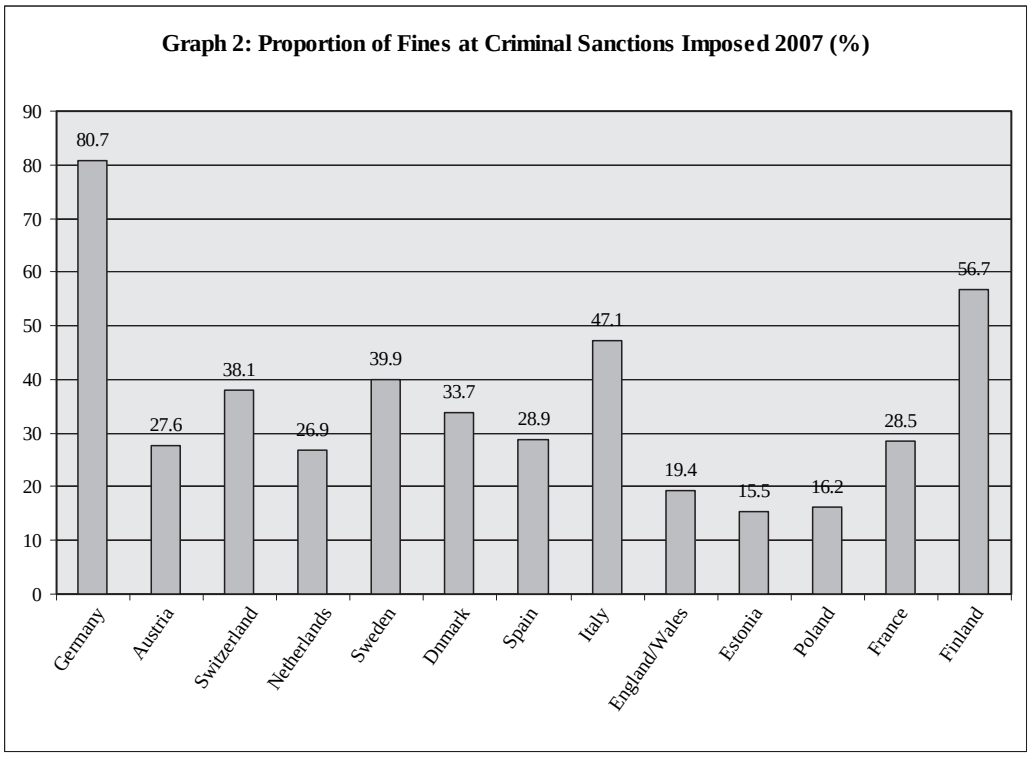
III. ALTERNATIVE AND INTERMEDIATE SANCTIONS: LOOKING BACK

A. Day Fines and Summary Fines

There is clear evidence that day fines succeeded in Austria, Germany and some Scandinavian countries as well as in Switzerland, and partially also in France and Spain, in particular in replacing to a quite considerable, though sharply differing, extent short-term imprisonment in the 1960s and 1970s (see graph 2).

As is the case with some other innovations in criminal law and criminal justice, the conceptualization and implementation of day fines initiated in Scandinavia. Finland is noted as the first country to introduce a day fine system, beginning in 1921.[6] Although there had been a long-standing scholarly debate prior to 1921 on the advantages of day fines and the potential in terms of proportional and equal punishment, the primary reason for the introduction in Finland early in the century lay in the rapidly declining value of money. Day fines, compared to summary fines, are easily adjusted to changes in the economy brought about by inflation

[6] See the comprehensive historical analysis in Jescheck, H.-H., Grebing, G. (Eds.): Die Geldstrafe im deutschen und ausländischen Recht. Nomos, Baden-Baden 1978.



or recession. Nevertheless, with the exception of some South American countries, Finland, Sweden and Denmark were the only countries to introduce a day fine system in the first half of this century. This was the case despite the fact that Italy, Germany, the Netherlands, Austria, and Switzerland made substantial revisions in their penal codes during the 1920s and 1930s. At the same time, it should be noted that the concept of the day fine generated substantial controversial discussion in all three Scandinavian countries and was far from unanimously accepted.[7] The Federal Republic of Germany and Austria introduced day fine systems in 1975,[8] followed by Hungary in 1978,[9] then by France and Portugal in 1983.[10] Some 20 years ago a system of unit fines was introduced after a series of experiments[11] in England/Wales through the Criminal Justice Act 1991 which went into force at the end of 1992.[12] But, introduction of day fines was ultimately not successful in England/Wales. Some six months after the new day fine provisions went into force the Home Office announced suspension of those provisions as the judiciary were obviously extremely opposed to the idea of fining offenders according to day fine standards. The French Criminal Code in force since 1 March 1994 has expanded the scope of day fines, which had been rather narrow since the criminal law amendment of 1983.[13] Poland and Spain have recently introduced systems of day fines, as did Switzerland. Belgium has retained the concept of summary fines. The trend toward an extended use of day fines is not unequivocal. Other European countries, including the Netherlands, Norway, Italy, and Iceland have not incorporated day

[7] For a review of the use of fines in Europe see also Casale, S.S.C.: Fines in Europe: A Study of the Use of Fines in Selected European Countries with Empirical Research on the Problems of Fine Enforcement. Vera Institute of Justice, London 1981; a general overview of sanction-systems is provided by van Kalmthout, A., Tak, P.: Sanctions-Systems in the Member-States of the Council of Europe. Kluwer, Deventer/Boston, Part I 1988; Part II 1992.

[8] See Grebing, G.: The Fine in Comparative Law: A Survey of 21 countries. Institute of Criminology Occasional Papers No. 9, Cambridge 1982.

[9] Nagy, F.: Arten und Reform punitiver und nicht-punitiver Sanktionen in Ungarn. In: Eser, A., Kaiser, G., Weigend, E.(Eds.): Von totalitärem zu rechtsstaatlichem Strafrecht. Max-Planck-Institut, Freiburg 1993, pp.313-339, p.324 (with a number of day fine units ranging from 10 and 180; the new criminal code has increased the maximum number of day fines to 360.

[10] Spaniol, M.: Landesbericht Frankreich. In: Eser, A., Huber, B. (Eds.): Strafrechtsentwicklung in Europa. Landesberichte 1982/1984 über Gesetzgebung, Rechtsprechung und Literatur. Max-Planck-Institut, Freiburg 1985, pp. 251-318, p.262; Hünerfeld, P.: Neues Strafrecht in Portugal. Juristenzeitung 1983, pp. 673-675.

[11] See Gibson, B.: Unit Fines. Waterside Press, Winchester 1990.

[12] Wasik, M., Taylor, R.D.: Criminal Justice Act 1991. Cambridge 1991.

[13] Ministere de la Justice: Circulaire Generale Presentant les Dispositions du Nouveau Code Penal. Journal Officiel de la Republique Francaise, Paris 1993, p.44.

fines into the criminal justice system and do not consider abolishing the system of summary fines. But at the same time, fines *per se* continue to play a major role in the sentencing practices of these countries.

However, an explicit penal policy aiming at the replacement of short-term prison sentences through day fines has only been implemented in Germany and Austria. In other European countries, short-term prison sentences continue to play a salient role in penal practice. But, fine default imprisonment results in Germany in a significant number of prisoners serving short-term prison sentences (see table 2).

Table 2: Prisoners broken down by sentence length 2006

Country	< 6 months	6-12 months	1 – 3 years	3 – 5 years	> 5 years	Life
Denmark	25	16	17	21	20	1
Sweden	11	12	34	17	24	3
France	17	16	21	11	34	1
England/Wales	8	6	22	22	31	11
Germany	22 *	20	19	26	10	3
Italy	1	2	8	14	66	8
Poland	6	17	44	14	15	1

* Includes fine default imprisonment

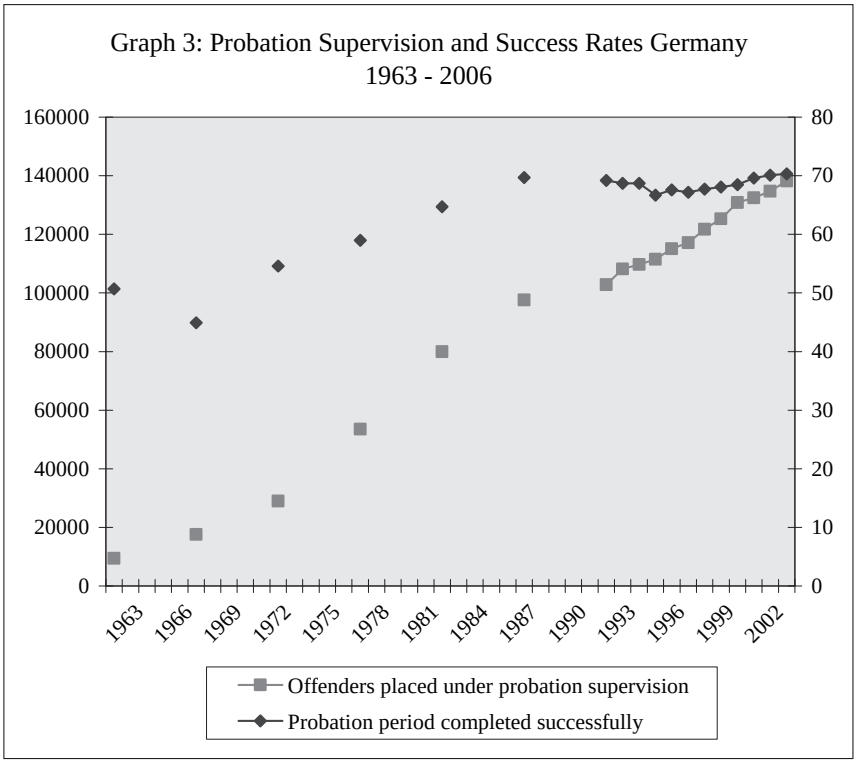
Source: Aebi, M.F., Delgrande, N.: Council of Europe Annual Penal Statistics. SPACE I, Survey 2006. Strasbourg, 12 November 2007, p. 50.

B. Suspended Prison Sentences, Probation and Community Service

A second pillar in the system of intermediate sanctions developed and implemented in the 1970s, besides day fines and financial penalties, concerns suspended prison sentences and probation. Suspended prison sentences and probation turned out to be quite successful as alternatives to immediate imprisonment. As the concept of day fines is strongly dependent on settled offenders' probation, suspension of prison sentences has had an important share at replacing imprisonment for offenders not eligible for day fines on economic grounds. Probation and suspended prison sentences are rooted in the rehabilitative idea and emphasize placement of offenders under the supervision of probation workers. Both probation and suspended prison sentences come with conditions and orders attached which seek to tailor the sentence to the specific needs and risks displayed by the offender. Such conditions and orders, which may include a fine, community service, electronic tagging, exclusion orders, compensation, treatment orders or victim-offender-mediation, make probation and suspended sentences a flexible tool which may be used to implement various criminal policies. In fact, while during the 1970s suspended prison sentences had been primarily considered to further rehabilitation, the 1980s and 1990s then saw a certain emphasis on punitive and risk controlling conditions attached to probation orders and suspended prison sentences.

In Germany, in particular during the 1970s and 1980s, suspension of prison sentences and placement of offenders under probation supervision were expanded significantly (see graph 3: from some 20,000 cases end of the 1960s to ca. 140,000 cases in 2006). Despite the considerable increase in prison sentences suspended (due also to an increasing willingness of the courts to grant suspension in face of medium and high-risk offenders) the success rates (in terms of completion without revocation of probation) increased, too.

Furthermore, community service received considerable attention in the 1980s in most European countries. Some countries report a strong increase in the use of community service orders. What makes community service so attractive to be incorporated into systems of criminal sanctions is (comparable to day fines) the easy transformation into time spent in serving punishment, and with that, the easy comparability with imprisonment. Insofar, community service is built easily into sentencing schemes which take as a point of departure time which has to be served. Community service has been introduced in various European countries, among them the Netherlands, England and Wales, Norway and France. In others, like for example Germany, community service may not be imposed as a sole criminal penalty in adult criminal law but is available as a condition for a suspended prison sentence or as a substitute for fine default imprisonment.



The limits to community service are found in international conventions and national constitutions on forced labour outside the prison context (see for example the International Covenant on Civil and Political Rights 1966, Art. 8). Here the consent of the offender is seen as a way of avoiding the infringement of prohibition of forced labour. Whether this is an adequate solution to the problem has been doubted, but in principle community service is accepted virtually everywhere when consented to by the offender. Currently, the sanction systems in European countries providing for community service as sole sanction set minimum and maximum numbers of hours to be imposed by the court, with a maximum number of between 240 and 360 hours evidently the standard in European legislation.

C. Compensation, Restitution, Mediation, and Restorative Justice

Throughout the 1980s the topics of reparation, restitution, compensation, victim-offender-mediation or reconciliation have received considerable attention in most Western European countries and to a considerable extent also in countries of central and Eastern Europe. International standards have emerged with respect to the role and position of the crime victim in the criminal justice system.

The United Nations started to address the needs of crime victims in the first half of the 1980s. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power was adopted by General Assembly resolution 40/34 of 29 November 1985. Here, for the first time, the particular relevance of crime victims and the need to create legislation that facilitates access to justice not only for crime victims but also for those who have been victimized by the abuse of power were recognized on the international level. In 1999 a "Guide for Policy Makers and the Handbook on Justice for Victims" was approved. The Statute of Rome in 1999, establishing the International Criminal Court (and the Rules of Procedure and Evidence), deals with victims of crime, as does the Palermo Convention on Transnational Organized Crime in 2000 and its optional protocol in 2002 on trafficking, which includes specific sections for victims. ECOSOC adopted in 2002 Guidelines on Restorative Justice, in 2002 crime prevention guidelines and in 2005 the Guidelines for Child Victims and Witnesses. The General Assembly issued in 2005 the Basic Principles and Guidelines on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. The United Nations Draft Convention on Justice and Support for Victims of Crime and Abuse of Power (14 November 2006) summarizes victim-related criminal justice standards with demands for:

(i) Procedural safeguards as regards confidentiality of proceedings and respect for the privacy of the victim;
(ii) The right to information on the course of criminal or administrative proceedings as well as the rights of victims;
(iii) Comprehensive rights to compensation;
(iv) (Short, medium and long term) assistance in coping with the adverse effects of victimization; and
(v) Effective protection of victims from the risk of retaliation.

The Council of Europe's recommendations on the position of the victim within the framework of criminal law and criminal procedure and on the assistance to victims and the prevention of victimization refer also to the new concern for the crime victim and frame victim policies designed also to recognize the crime victim in the system of criminal sanctions. Among the policies derived from the victim's perspective it is restitution (or compensation) and victim-offender-conciliation which in one way or another have been incorporated into penalty systems. However, restitution or compensation orders are mostly attached to probation or suspended prison sentences or serve as conditions to be fulfilled in exchange for non-prosecution.

It is interesting to see why restitution suddenly received so much attention in the 1980s and how these grounds may fit into penal policies developed since then. Different answers can be found here. It's first of all the perspective of the victim which has to be taken into consideration. It has been claimed that victims of crime are marginalized in the criminal process, which emphasizes solely the offender. Indeed, concentrating the criminal procedure and criminal penalties on the offender matched with legal theory as prevention, either pursued through individual or general deterrence or through rehabilitation or incapacitation represented the main goal of criminal law and its implementation. When rehabilitative efforts as well as deterrence failed to demonstrate at least significant effects, the vacuum left behind could be easily filled with a new rationale for responding to the offender: restitution and compensation for the victim. An answer is provided also by cost-benefit-considerations arguing that the burden for the criminal justice system, especially for the correctional system, can be reduced by introducing pre-trial restitution as an alternative to regular criminal proceedings and criminal penalties. In particular, from the victims' policy perspective, compensation and restitution are open to various crime policies. These devices can be used to make the system more punitive and to demonstrate the offenders' accountability. It seems that recently the punitive aspects of compensation and restitution are receiving more recognition. From a practical point of view however, it must be noted that compensation and restitution as a main response or a sole penalty range far behind imprisonment, probation and day-fines.

D. Electronic Tagging and Tracking

The developments so far visible in Europe point to acceptance and integration of electronic monitoring (and house arrest) into the systems of criminal sanctions.[14] When at the beginning of the 1990s electronic monitoring entered the European crime policy arena, England/Wales,[15] Sweden[16] and the Netherlands[17] were the first countries to introduce electronic monitoring as a main penalty, as a post-sentencing and early release from prison device and/or as an alternative to pretrial detention. Portugal, Italy, France, Belgium, and Scotland introduced electronic monitoring around 2000.[18] Austria, Denmark and some of the Eastern European countries recently passed legislation on electronic monitoring.[19] Switzerland is still operating

[14] Bishop, N.: Le controle intensif par surveillance electronique: un substitut suedois a l´ emprisonnement. Bulletin d´ information penologique19/20(1995), pp. 8-9 1996, arguing that eg. the Swedish system of electronic tagging complies fully with rules 31 and 55 of the European Rules on Community Sanctions and Measures; see also Bishop, N., Schneider, U.: Improving the Implementation of the European Rules on Community Sanctions and Mesures: Introduction to a New Council of Europe Recommendation. European Journal of Crime, Criminal Law and Criminal Justice 9(2001), pp. 180-192, p. 184.
[15] Mortimer, E., May, Ch.: Electronic monitoring in practice: the second year of the trials of curfew orders. London: Home Office 1997.
[16] Bishop, N.: Le controle intensif par surveillance electronique: un substitut suedois a l´ emprisonnement. Bulletin d´ information penologique19/20(1995), pp. 8-9.
[17] Ministry of Justice: Electronic Monitoring. The Hague 1996.
[18] For a summary see Haferkamp, R.: Elektronisch überwachter Hausarrest - Europa und die Schweiz. Neue Kriminalpolitik 1999, pp. 4-6; Mayer, M., Haverkamp, R., Levy, R. (eds.): Will Electronic Monitoring Have a Future in Europe? Freiburg 2003.
[19] Mayer, M., Haferkamp, R., Levy, R. (Eds.): Will Electronic Monitoring Have a Future in Europe? Freiburg 2003.

local experiments with electronic tagging, as is Spain.[20] In Germany the state of Hesse introduced electronic monitoring in 2000 on an experimental basis[21] and has expanded its outreach to the whole state.[22] Other German states currently draft laws on electronic monitoring. The German Federal Government had established a Reform Commission on Criminal Sanctions whose proposals for reforming the system of sanctions did not include electronic monitoring but were restricted to modest developments within the current system, based on the day fine, as well as immediate and suspended prison sentences.[23] In the Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union of April 2004,[24] electronic tagging was covered and evidently has been understood as a criminal sanction that is part of European standards. Also, in a Report submitted to the Committee on Legal Affairs and Human Rights of the Council of Europe on the Situation of European Prisons and Pre-Trial Detention Centres published in 2004,[25] electronic monitoring is presented together with community service, suspended sentences and the like, as a promising alternative to imprisonment and as a strategy to reduce costs linked to deteriorating prison conditions and the heavy burden of overcrowded prisons in Europe.

Electronic monitoring can be found in Europe in pretrial criminal proceedings,[26] either as an alternative to regular bail or as an instrument which is launched with the aim of reducing the risk of absconding and thus allowing for suspending an arrest warrant that would have placed a suspect in pretrial detention.[27]

Then, electronic monitoring was introduced as a main or sole sanction in some systems, normally labelled "front door electronic monitoring". This has been the case for example in England and Wales and in the Netherlands.

Some systems add electronically monitored house arrest to conditions attached to suspended prison sentences or as an element in the imposition of community sanctions tailored to the needs of an offender.

Post-sentencing replacement of prison sentences by electronic monitoring has been chosen by Sweden, while in other systems, electronic monitoring has found its place as a modification of imprisonment (and thus has contributed to further diversifying prison regimes).

Finally, electronic monitoring may be inserted into correctional programmes by adding it as a condition of earlier than regular release, in terms of a condition attached to parole. In this perspective, electronic monitoring is introduced also to ease the transition from prison to liberty.

Therefore, electronic monitoring may be used as a sole sanction which is then related to house arrest and the concept of confinement and/or supervision and monitoring of physical freedom within a concept of restrictions put on liberty.

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[20] Ceron I Riera, M.: The Pilot Project on Electronic Monitoring in Catalonia, Spain. In: Mayer, M., Haverkamp, R., Levy, R. (eds.): Will Electronic Monitoring Have a Future in Europe? Freiburg 2003, pp. 149-154.

[21] Albrecht, H.-J., Arnold, H., Schädler, W.: Der hessische Modellversuch zur Anwendung der „elektronischen Fussfessel". Zeitschrift für Rechtspolitik 33(2000), pp. 466-469.

[22] Schädler, W.: The Pilot Project on Electronic Monitoring in Frankfurt, Germany. In: Mayer, M., Haverkamp, R., Levy, R. (eds.): Will Electronic Monitoring Have a Future in Europe? Freiburg 2003, pp. 163-168; Mayer, M.: Modellprojekt Elektronische Fußfessel. Wissenschaftliche Befunde zur Modellphase des hessischen Projekts. Freiburg 2004, p. 17.

[23] See Abschlußbericht der Kommission zur Reform des strafrechtlichen Sanktionensystems. Bonn 2000, pp. 165-181 displaying a rather poor assessment of electronic monitoring and evidently completely misleaded view on electronic monitoring in Europe and elsewhere; Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur Reform des Sanktionenrechts. Deutscher Bundestag Drucksache 15/2725, 17. 03. 2004.

[24] Commission of the European Communities: Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union. Brussels, 30.04.2004, COM(2004)334 final, p. 74.

[25] Report, Committee on Legal Affairs and Human Rights of the Council of Europe on the Situation of European prisons and pre-trial detention centres. Doc. 10097, 19 February 2004.

[26] In Portugal electronic monitoring is restricted to the function to serve as an alternative to pretrial detention, see Nunes, J.R.: The Portuguese Pilot Project on Electronic Monitoring. In: Mayer, M., Haferkamp, R., Levy, R. (Eds.): Will Electronic Monitoring Have a Future in Europe? Freiburg 2003, pp. 155-158.

[27] See Albrecht, H.-J.: The Place of Electronic Monitoring in the Development of Criminal Punishment and Systems of sanction. In: Mayer, M., Haferkamp, R., Levy, R. (Eds.): Will Electronic Monitoring Have a Future in Europe? Freiburg 2003, pp. 249-264.

Electronic monitoring may be used as an element of community sanctions in terms of an add-on, if community sanctions are constructed along the goal of individualization of punishment. In England and Wales, for example, various community sanctions are put at the disposition of criminal courts and can be combined and adjusted to the needs of the offender, the victim and society. Electronic monitoring then is part of a programme of sentencing which enhances the capacity of community sanctions to deliver credible and efficient punishment.

Some countries, for example the Netherlands, have opted for introducing both "front and back door" models of electronic monitoring.[28] Electronically monitored house arrest in the Netherlands may be imposed as a sole sanction instead of a prison sentence of not more than six months. Electronic monitoring may be combined also with a suspended prison sentence as well as with community service.[29] Then, a modification of serving a prison sentence was introduced, entitling a prisoner, after having served half of the prison sentence (but at least a minimum of one year), to apply to serve the remainder in the form of electronically monitored house arrest. Here, electronic monitoring is part of a correctional programme which lies at the discretion of prison administration and can range between six weeks and one year. Electronic monitoring thus adopts the function of low security detention facilities and of a precursor to full parole. The programme provides for participation of the prisoner in measures of rehabilitation for a minimum of 26 hours a week.[30] Voluntary participation is required, as is consent of adult members of the household where house arrest is to be served. Sweden has opted for a back-end model of electronic monitoring, which covers prison sentences of up to three months.[31] Here too, consent of the convicted person as well as of the adult members of the household is a condition for electronically monitored house arrest. The experiment currently implemented in parts of Switzerland is based on the Swedish model.[32] The prison administration is the competent body to decide on whether and how electronically monitored house arrest is to be served instead of a prison sentence. However, different models have been implemented during the experiments in the participating Cantons. While in some Cantons electronic monitoring can be combined with community service, in others community service is strictly separated from electronic monitoring.[33] The French model is also focused on replacing sentences of immediate imprisonment; however, it is extended to serve as an alternative to remand prison.[34] It is aimed at convicted persons whose sentence does not exceed one year of imprisonment as well as at prisoners who have to serve not more than one year of their original prison sentence. As in the Dutch and Swedish models, consent is required, which furthermore in France has to be declared in the presence of a defence counsel. Either the convicted person or the public prosecutor can apply for substituting imprisonment through electronic monitoring while the correctional judge (*juge d'application des peines*) makes the final decision. Electronic monitoring should not exceed four months and should be embedded in a programme of rehabilitative measures. In England and Wales electronic monitoring was introduced through the Criminal Justice Act 1991 after a series of experiments.[35] The courts may impose electronically monitored house arrest in all cases where the law does not prescribe the penalty as imprisonment. However, a back-end model of electronic monitoring has been added which allows for prison sentences of not more than four years to be reduced by two months.[36] Scotland has introduced "Restriction of Liberty Orders" by Section 5 of the Crime and Punishment (Scotland) Act 1997. This legislation also provides for the use of electronic tagging to monitor offenders' compliance with conditions of the order. A Restriction of Liberty Order requires an offender to be restricted to a specific place for a maximum period of 12 hours per day up to a maximum of 12 months, and/or from a specified place or places for up to 12

[28] Boelens, R.: Electronic Monitoring in The Netherlands. In: Mayer, M., Haverkamp, R., Levy, R.: (eds): Will Electronic Monitoring Have a Future in Europe? Freiburg 2002, pp. 81-88.

[29] See Spaans, E.: Electronic Monitoring: The Dutch Experiment. CEP-Bulletin June 1998, pp. 6-8.

[30] Van Kalmthout, A., Tak, P.: New Sanctions Proliferating in the Netherlands. Overcrowded Times 11(1999), pp. 1, 20-23.

[31] Haferkamp, R.: Intensivüberwachung mit elektronischer Kontrolle - das schwedische Modell, seine Bedingungen und Ergebnisse. Bewährungshilfe 1999, pp. 51-67.

[32] Haferkamp, R.: opus cited, 1999, pp. 4-6.

[33] Entwicklung & evaluation: interkantonaler Modellversuch Elektronisch überwachter Strafvollzug (Electronic Monitoring / EM) für Kurz- und Langstrafen 1. September 1999 - 31. August 2002. Evaluations-Schlussbericht e&e, Zürich, 30. Juni 2003, p. 8.

[34] See www.justice.gouv.fr/chancell/cc49inia.htm for an overview on aims and the scope of application; for a full description of the French scheme of electronic monitoring see Kensey, A., Pitoun, A., Lévy, R., Tournier, P.V.: Sous surveillance électronique. La mise en place du "bracelet électronique" en France. Paris 2003.

[35] Whitfield, R.G.: Electronic Monitoring - Erfahrungen aus den USA und Europa. Bewährungshilfe 1999, pp. 44-50.

[36] See for a summary Whitfield, D.: Tackling the Tag. The Electronic Monitoring of Offenders. Winchester 1997.

months. Offenders will be aged 16 or over. The offender must consent to the Order. Electronic tagging is imposed concurrently with a probation order. Therefore, a breach of the probation order is not a breach of the restriction of liberty order and vice versa.

The technology implemented is restricted in most European systems to tagging that allows the authorities to ascertain whether the convicted offender complies with the conditions as regards house arrest and the daily schedule that has been made part of the sanction. The radio frequency technology that is used in electronic monitoring is, however, unable to determine an offender's whereabouts during their absence from their residence. In contrast, Global Positioning Satellite system electronic monitoring continuously tracks movements at home and in the community on the basis of uniquely defined inclusion and exclusion zones. Violations of this (active) monitoring system are immediately sent to an on-call officer in the circuit for resolution. Another GPS technology used with less frequency is "passive" GPS. Here, the offender is tracked 24 hours a day, but this information is reported only once a day instead of being continuously transferred to an officer. This tool for offender supervision is of course less expensive than the active GPS system, but is unable to immediately notify authorities of non-compliance.

GPS tracking has become in England and Wales part of an exclusion order that prevents an offender from accessing an area as specified in a judicial order. The Criminal Justice and Court Services Act 2000 allows the tracking of offenders released on license to monitor their whereabouts, or their compliance with other license conditions. This act introduces the community sentence of an exclusion order. After a trial period (that started on 2 September 2004 and was completed in the second half of 2005) the government has decided to postpone the introduction of tracking devices.[37] Electronic tracking is already used in Florida (as well as other parts of the United States). In Florida, electronic tracking will in the near future in particular be used for monitoring sex offenders. The Florida Senate in April 2005 passed a bill that requires sex offenders who have been sentenced for sexual abuse of children under the age of 12 after expiration of a mandatory prison term of at least 25 years to wear GPS tracking devices for life.

IV. EVALUATING ALTERNATIVES TO CUSTODY

A. Introduction: The Need for Evaluation Research

Although, the European Rules on Community Sanctions and Measures demand proper research on and evaluation of community sanctions,[38] and community sanctions are justified with avoiding negative impacts of imprisonment, reducing overcrowding in prisons, saving resources and improving prevention of recidivism, such research has rarely been carried out in Europe. Those criminal sanctions which are the pillars of alternatives to custody, fines and probation/suspended sentences, are completely under-researched.

When looking at empirical research on alternatives to custody, it can be noted that the most powerful method of identifying effects of criminal sanctions and sentencing options, the controlled experiment, until now has not been used,[39] with the exception of a Swiss evaluation study that adopted randomized assignment to electronic monitoring and to community service (as alternatives to imprisonment).[40] Indeed, in an attempt to identify cost-benefit research on various sentencing options for a meta-analysis, McDougall et al were able to find nine studies satisfying (methodological) criteria for inclusion.[41] Out of these, only two dealt with a comparison between secure institutions and community sanctions.[42] More interest in empirical evaluation research can recently be noted for electronic monitoring where at least some basic research is now available

[37] Shute, S.: Satellite Tracking of Offenders: A Study of the Pilots in England and Wales. Ministry of Justice, London 2007.

[38] Bishop, N., Schneider, U.: Improving the Implementation of the European Rules on Community Sanctions and Measures: Introduction to a New Council of Europe Recommendation. European Journal of Crime, Criminal Law and Criminal Justice 9(2001), pp. 180-192, pp. 190.

[39] Bremer Institut für Kriminalpolitik (Hrsg.): Experimente im Strafrecht – Wie genau können Erfolgskontrollen von kriminalpräventiven Maßnahmen sein? Bremen 2000.

[40] Villettaz, P., Killias, M.: Les arrêts domiciliaires sous surveillance électronique dans les cantons de Genève, du Tessin et de Vaud. Rapport final à L'Office fédéral de la justice. Lausanne 2003, pp. 16-18.

[41] McDougall, C., Cohen, M.A., Swaray, R., Perry, A.: The Costs and Benefits of Sentencing: A Systematic Review. The Annals of the American Academy of Political and Social Sciences 587(2003), pp. 160-177.

[42] McDougall, C. et al: opus cited 2003, p. 167.

from all systems that have introduced electronic monitoring.[43] Evaluation research addressing electronic monitoring, however, is not different from evaluation research carried out in the field of community sanctions in general. Some studies make use of control groups that have been either matched with experimental cases subject to electronic monitoring or have been taken from cases where imprisonment had been imposed prior to introducing electronic monitoring but which would have been eligible for electronic monitoring.[44] The limitations of evaluation research in Europe reflect legal restrictions as regards implementation of controlled experiments and random assignment of cases.

The goals of evaluation studies concern first of all:

1. Identification of problems in implementing alternatives.

2. Possible net-widening effects:
   (i) This goal can be subdivided into the goal of finding out whether alternative sanctions in fact reduce the burden of the prison system and how on the micro-level cases of alternative sanctions compare with imprisonment as regards costs and benefits.
   (ii) Net-widening related research then deals with questions of whether punishment is intensified[45] and whether the net of criminal justice is expanded through creating new enforcement organizations.[46]

3. Success (and failure) of alternatives to custody is measured through completion or revocation of community sanctions as well as recidivism.

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[43] Brottsförebyggande radet: Intensivövervakning med elektronisk kontroll. Et utvärdering av 1997 och 1998 ars riksomfattande försöksverksamhet. Stockholm 1999; Swedish National Council on Crime Prevention: Electronic Tagging in Sweden. Report 2005: 8; Spaans, E.: Electronic Monitoring: The Dutch Experiment. CEP-Bulletin June 1998, pp. 6-8; Mortimer, E., May, Ch.: Electronic Monitoring in Practice: The Second Year of the Trials of Curfew Orders. London 1998; Villettaz, P., Killias, M.: Les arrêts domiciliaires sous surveillance électronique dans les cantons de Genève, du Tessin et de Vaud. Rapport final à L'Office fédéral de la justice. Lausanne 2003; entwicklung & evaluation: interkantonaler Modellversuch Elektronisch überwachter Strafvollzug (Electronic Monitoring / EM) für Kurz- und Langstrafen 1. September 1999 - 31 August 2002. Evaluations-Schlussbericht e&e, Zürich, 30. June 2003; National Council for Crime Prevention (BRÅ): Intensive supervision with electronic monitoring. BRÅ-report: Stockholm 1999; Lobley, D., Smith, D.: An Evaluation of Electronically Monitored Restriction of Liberty Orders. Crime and Criminal Justice Research Findings No. 47 Lancaster University; Home Office Research Study 222, London 2000; Dodgson, K., Goodwin, P., Howard, P., Llewellyn-Thomas, S., Mortimer, E., Russell, N., Weiner, M.: Electronic monitoring of released prisoners: an evaluation of the Home Detention Curfew scheme Home Office Research, Development and Statistics Directorate, London March 2001; Schaap, R.A.: Results of the Evaluation of the Netherland Project on Electronic Monitoring. In: Mayer, M., Haverkamp, R., Levy, R. (eds.): Will Electronic Monitoring Have a Future in Europe. Freiburg 2003, pp. 89-92; Elliott, R., Airs, J., Easton, C., Lewis, R.: Electronically monitored curfew for 10- to 15-year-olds – report of the pilot. Research, Development and Statistics Directorate Home Office London 2000; Kensey, A., Pitoun, A., Lévy, R., Tournier, P.V.: Sous surveillance électronique. La mise en place du "bracelet électronique" en France. Paris 2003; Penedo, C.: Evaluation of the Portuguese Electronic Monitoring Programme. In: Mayer, M., Haverkamp, R., Levy, R. (eds.): Will Electronic Monitoring Have a Future in Europe. Freiburg 2003, pp. 159-161; Mayer, M.: Modellprojekt elektronische Fussfessel. Studien zur Erprobung einer umstrittenen Maßnahme. Freiburg 2004; Mayer, M.: Modellprojekt Elektronische Fußfessel. Wissenschaftliche Befunde zur Modellphase des hessischen Projekts. Freiburg 2004.

[44] Dodgson, K., Goodwin, P., Howard, P., Llewellyn-Thomas, S., Mortimer, E., Russell, N., Weiner, M.: Electronic monitoring of released prisoners: an evaluation of the Home Detention Curfew scheme. Home Office Research Study 222, Home Office Research, Development and Statistics Directorate, March 2001, p. 51.

[45] March, B. L. Prison crowding and alternatives to incarceration: A diffusion study of acceptance in the state of Missouri. Columbia 1993.

[46] Mainprize, St.: Electronic monitoring in corrections: Assessing cost effectiveness and the potential for widening the net of social control. Canadian Journal of Criminology 34(1992), pp. 161-180; Schumann, K.F.: Widening the Net of Formal Control by Inventing Electronic Monitored Home Confinement as an Additional Punishment: Some Issues of Conceptualization and Measurement. In: Mayer, M., Haverkamp, R., Levy, R. (eds.): Will Electronic Monitoring Have a Future in Europe. Freiburg 2003, pp. 187-198.

B. Implementing Alternatives

1. Resources

Research on the process of implementation of alternative sanctions first of all points to the need to have in place a solid infrastructure in terms of staff, organizations, technology and resources.[47] Research and practical experiences show that sufficient financial and human resources are to be placed at the disposal of those organizations responsible for the implementation of community sanctions, in order that they can fulfill their tasks and duties, as can prison authorities when executing prison sentences. Implementation of community service for example is dependent on access to work places and proper supervision of offenders serving community work hours. In Europe, probation services and social work units in the criminal justice system have been extended considerably since the 1960s. However, this trend came to an end in the 1990s when welfare related budgets started to shrink significantly.

2. Implementing the "*ultima ratio*" Standard

While the *ultima ratio* idea was not new as criminal law at large should be the *ultima ratio* in systems of social control, it is nevertheless difficult to present viable methods to implement this principle in everyday decision-making in the criminal justice system. So far, Germany has put into effect firm statutory guidelines as regards the choice between day fines and short-term imprisonment (laying a rather heavy burden of justification on trial judges resorting to imprisonment) which proved to be efficient in cutting down short term prison sentences. Sentencing guidelines now provide in some systems (the Netherlands, England and Wales) for clear rules on the choice between prison and non-custodial sanctions while others (for example France) leave the decision to the discretion of the courts.

3. Alternatives and Pretrial Detention

An obvious problem for implementing intermediate penalties is then the use of pretrial detention. In fact, the use of pretrial detention makes intermediate penalties or community sanctions illusionary. The use of pretrial detention partially reflects "short sharp shock" and security policies. Insofar, the concept of intermediate penalties points also to the need to develop strict criteria which help avoid the abuse of pre-trial detention as a form of pre-trial custodial penalty.

4. Alternatives and Compliance

Intermediate penalties then need compliance. So, for example, community service certainly is dependent fully on voluntary co-operation of the offender. However, compensation, probation, and other non-custodial penalties, rely also on a certain measure of compliance. A core problem in implementing intermediate penalties therefore concerns the question of what to do with non-compliance or violations of conditions, etc. attached to intermediate penalties. With respect to intensive supervision of probation clients, research could demonstrate that the rate of technical violations increases sharply compared to ordinary probation programmes. Therefore, reactions towards non-compliance with community sanctions should be re-considered. At least technical violations should not automatically lead to the imposition of a prison sentence and should not constitute a criminal offence.

5. Alternatives, Conversion Rates and Credibility

What seems of paramount importance (in particular as regards acceptance of intermediate penalties by the judiciary and the public) is the requirement of clear and rational conversion rates between the various penalties incorporated into the system of criminal sanctions. Intermediate penalties as well as community-based sanctions on the one hand and financial and custodial sanctions on the other hand must be related to each other and made comparable on one or several dimensions. This is one of the weakest points in much legislation. So, for example, it does not seem to be very convincing that a prison sentence of, say, one year can be substituted by a community sanction of 240 hours, while at the same time when the community sanction is a failure, each two hours not worked off can be substituted by a subsidiary imprisonment of not more than one day. This means in fact that one year, originally substituted by 240 hours community service, because of the refusal to comply, will be again substituted in a prison sentence which can be no more than 120 days. A legal provision which opens a way for calculating offenders to gamble is certainly doomed to be a failure. There are two dimensions on which various penalties can be compared. The first dimension refers to the time an offender is subject to a criminal penalty, the second dimension concerns the intensity

[47] Report of an Independent Inquiry into Alternatives to Prison: Crime, Courts & Confidence. London 2004.

of restrictions which are placed upon the offender. These should be elaborated in a set of sentencing guidelines.

6. Combining Alternative Sanctions

Research on the implementation of intermediate penalties suggests that the judiciary and prosecution make heavy use of intermediate penalties. However, it is obvious that there are still very clear priorities in the use of intermediate penalties. Day fines and summary fines are those sanctions used most widely. Then, probation and suspended sentences follow. Compensation/restitution as well as community service rank rather low on the list, although we may observe some community service and compensation "bubbles" on the European landscape drawn by official accounts of main penalties meted out. These "bubbles" are explained by the fact that most systems use compensation and community service either as attachments to suspended sentences or at the back end of the enforcement process. In particular, alternative "combination" penalties mixing various alternatives in an attempt to adjust alternative sentences to the seriousness of the offence as well as to the specific needs of the individual offender seem to be on the rise.

7. Implementation of Technology

Technology plays a crucial role in the implementation of electronic monitoring. Here, it is evident from evaluation reports that no major problems are encountered.[48] Violations of obligations accompanying electronic monitoring are rare.[49] This reflects the selection of good risks. An exception so far is the Scottish experiment where case recruitment led to more young offenders and offenders with a prior record being placed under electronic monitoring and completion rates of electronic monitoring amounted to 72% (while completion rates in other jurisdictions range well above 90%).[50] Completion rates are correlated with age, prior record and length of electronic monitoring.[51] Research on the English home curfew programme shows that the most common reason for not completing the curfew period successfully is breach of curfew conditions.[52]

[48] Lobley, D., Smith, D.: opus cited, 2000, pp. 42.

[49] Dodgson, K., Goodwin, P., Howard, P., Llewellyn-Thomas, S., Mortimer, E., Russell, N., Weiner, M.: Electronic monitoring of released prisoners: an evaluation of the Home Detention Curfew scheme. Home Office Research Study 222, Home Office Research, Development and Statistics Directorate, March 2001, p. 13; Mayer, M.: Modellprojekt Elektronische Fußfessel. Wissenschaftliche Befunde zur Modellphase. des hessischen Projekts. Freiburg 2004, p. 15; Haverkamp, R., Mayer, M.: Die Zukunft der elektronischen Überwachung in Europa. In: Monatsschrift für Kriminologie und Strafrechtsreform 86 (2003), pp. 217; Villettaz, P., Killias, M.: Les arrêts domiciliaires sous surveillance électronique dans les cantons de Genève, du Tessin et de Vaud. Rapport final à L'Office fédéral de la justice. Lausanne 2003, p. 3.

[50] Lobley, D., Smith, D.: Evaluation of Electronically Monitored Restriction of Liberty Orders. The Scottish Executive Central Research Unit 2000

[51] Dodgson, K., Goodwin, P., Howard, P., Llewellyn-Thomas, S., Mortimer, E., Russell, N., Weiner, M.: opus cited, 2001, p. 20.

[52] *Ibid*. p. 14.

Table 3: Implementation of electronic monitoring in Europe [53]

	Sweden	England/Wales	The Netherlands	Hesse/Germany	France
Average period (months)	1,3	3,1	3,5	4,6	85% less than 4 months
Recidivism	11%	18%			
% successfully completed	95	82	90	90	95
Age (medium)	37	27	34		Most < 35 years old
Violations %	5	11	16		
Drugs %	5	3	20	40	16
Burglary %	2	17	19		
DUI %	51	3	-	10	18
Property crime %	3	30	-	20	35
Violence %	21	12	22	15	15
% male offenders	93	92	90	89	Almost exclusively male
Min-Max months	0,5-2	- 6	1-6	- 6	- 3

Sources: CEP: Electronic Monitoring in Europe.www.cepprobation.org/reports/electronic_monitoring_in_europe.shtml; Brottsförebyggande radet: Intensivövervakning med elektronisk kontroll. Et utvärdering av 1997 och 1998 ars riksomfattande försöksverksamhet. Stockholm 1999; Spaans, E.: Electronic Monitoring: The Dutch Experiment. CEP-Bulletin June 1998, pp. 6-8; Mortimer, E., May, Ch.: Electronic Monitoring in Practice: The Second Year of the Trials of Curfew Orders. London 1998; Max-Planck-Institut für Ausländisches und Internationales Strafrecht: Laboratoire Europeen Associee. Bilanz (1998-2001) und Perspektiven (2002-2006). Freiburg 2002, pp. 28-29; Swedish National Council on Crime Prevention: Electronic Tagging in Sweden. Report 2005: 8, p. 19.

C. Net-widening, Replacement of Imprisonment and Alternatives

The assessment of the extent of replacement of prison sentences through non-custodial penalties and net-widening effects is difficult. From the perspective of longitudinal aggregate data on sentencing and imprisonment, it can be concluded that suspended sentences, probation, parole and the fine play a significant role. However, the question remains whether the role of alternatives includes replacement of imprisonment or whether alternatives serve as a penalty for new offender groups (or offenders who would have been discharged without or with conditions).

The problems can be demonstrated in particular in the case of electronic monitoring. As none of the evaluation studies conducted so far in Europe have been based on randomized assignment of cases, hard data on replacement of prison sentences by electronic monitoring are not available. Conclusions therefore are made on the basis of qualitative data and perceptions of decision makers as well as perceptions of offenders on how their cases would have been decided without the option of electronic monitoring. In most studies it is cautiously concluded that electronic monitoring replaces prison sentences to a certain extent.[54] In Switzerland, it was concluded that the replacement effect is close to zero and that competition between electronic monitoring on the one hand, and community service (which serves also as an alternative to detention in a prison facility) on the other hand, results in one alternative replacing the other.[55] But anyway, the number of electronic monitoring cases is rather small in all European countries, except for England and Wales. This prevents of course electronic monitoring from having impacts similar to penalties like e.g. day fines, suspended sentences, etc. Graph 4 shows the absolute numbers of electronic monitoring cases in

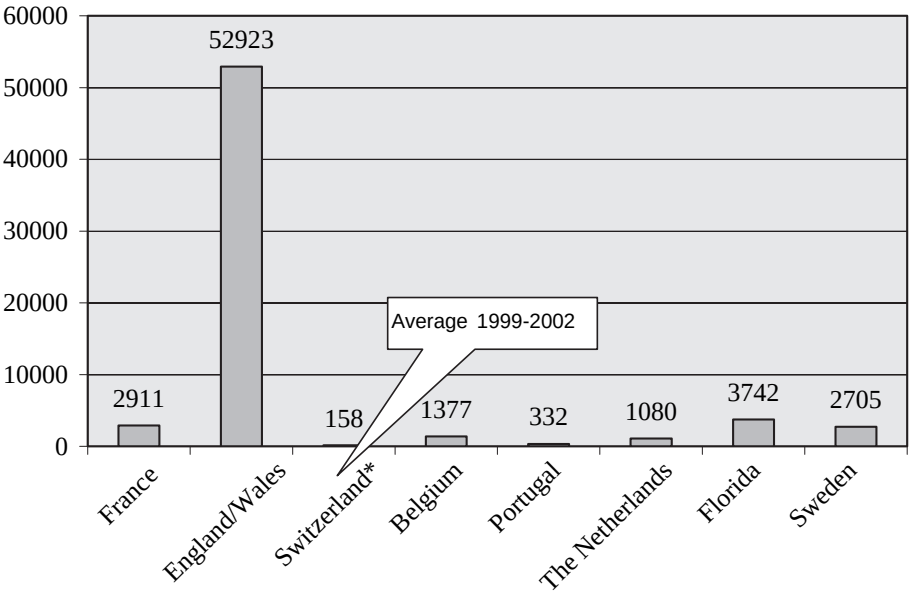
[53] CEP: Electronic Monitoring in Europe.www.cepprobation.org/

[54] Dodgson, K., Goodwin, P., Howard, P., Llewellyn-Thomas, S., Mortimer, E., Russell, N., Weiner, M.: Electronic monitoring of released prisoners: an evaluation of the Home Detention Curfew scheme. Home Office Research Study 222, Home Office Research, Development and Statistics Directorate, March 2001, p. 42; Mayer, M.: Modellprojekt Elektronische Fußfessel. Wissenschaftliche Befunde zur Modellphase des hessischen Projekts. Freiburg 2004, p. 23.

[55] entwicklung & evaluation: interkantonaler Modellversuch Elektronisch überwachter Strafvollzug (Electronic Monitoring / EM) für Kurz- und Langstrafen 1. September 1999 - 31. August 2002. Evaluations-Schlussbericht e&e, Zürich, 30. Juni 2003, p. 30.

various jurisdictions for 2004 and reveals that this disposition has become a major instrument in supervising parolees in England and Wales.

Graph 4: Electronic Monitoring Cases 2004



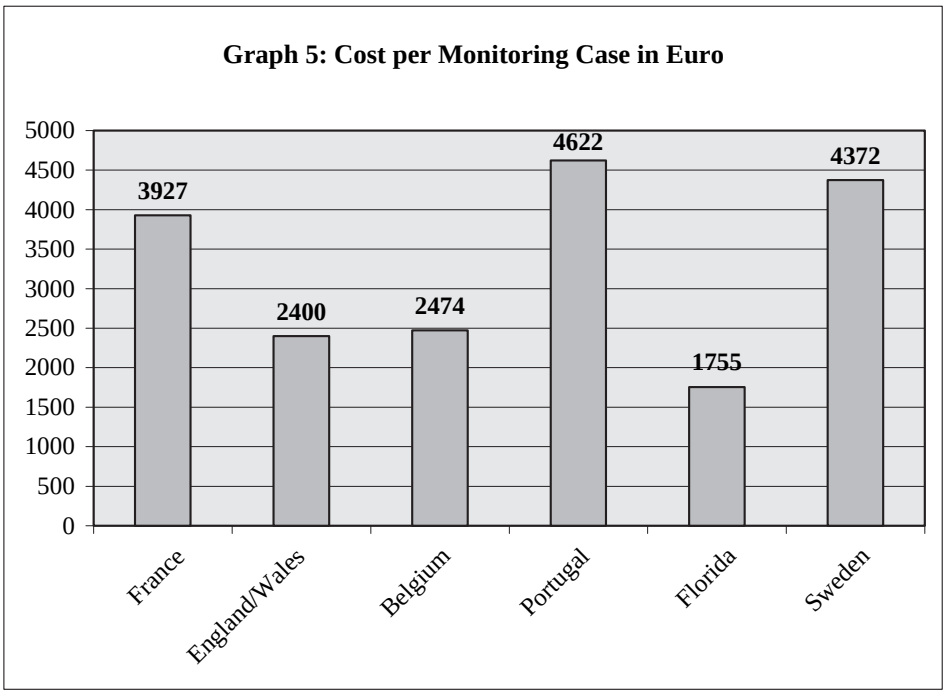
D. Cost-Effectiveness

The cost-effectiveness of penal sanctions is rarely made an issue of in-depth research. Cost-effectiveness, however, has been debated in the new millennium, particularly with respect to electronic monitoring. Differences in per case costs (graph 5) certainly reflect the type of programme which is implemented through electronic monitoring as well as the average length of electronic monitoring.

When looking at costs per day, the average seems to oscillate around some €50,[56] well below the average costs of imprisonment (approximately €100 per day) and above the costs of regular probation supervision. Another perspective can be adopted with trying to estimate the share of funds that go to electronic monitoring. Based on estimates on the budgets for criminal justice at large (including criminal corrections),[57] the proportion of such budgets vested in electronic monitoring can be calculated for England and Wales, and France and Sweden. According to that, out of each €100 spent in England and Wales on criminal justice, some 80 cents go to electronic monitoring. In Sweden it is approximately 50 cents and in France 10 cents. The small share of funds invested in electronic monitoring may be also interpreted as indicating that net-widening effects are limited also as regards creation of new and powerful enforcement agencies.

The costs of electronic monitoring are certainly lower than those occurring when implementing prison sentences.[58] However, the costs of regular probation may be below the costs resulting from electronic monitoring, due to more investments in supervision and programmes including electronic monitoring.[59]

[56] See Mayer, M.: opus cited 2004, p. 211.
[57] van Dijk, F., de Waard, J.: Legal infrastructure of the Netherlands in international perspective. Crime control. The Hague, June 2000.
[58] Lobley, D., Smith, D.: opus cited, 2000, pp. 39.
[59] *Ibid.*



E. Effectiveness of Alternative Penalties

The effectiveness of alternative penalties is regularly measured by rates of recidivism. However, as was mentioned earlier, controlled experiments which could provide for a conclusive answer have – with one exception – not been carried out in Europe. Accounts of recidivism rates after various sentences have been imposed demonstrate that the highest recidivism rates come with imprisonment. Fines, suspended sentences, and community service are followed by significantly lesser rates of re-offending. This of course is due to selection: low-risk offenders are more likely to receive non-custodial penalties than are high-risk offenders.

So, for example, rates of recidivism are rather low after electronic monitoring. Low rates of recidivism reflect here – as do high completion rates – selection of good risk cases. However, Swedish evaluation research concludes that recidivism rates after electronic monitoring are not different from those of a group of offenders matched to the electronic monitoring group.[60] This confirms research on recidivism which says that any criminal penalty has only a very small potential to change those conditions which nurture crime. However, high-risk cases seem to do better than predicted when subject to electronic monitoring.[61] This is true also for drug offenders.[62]

V. A NEW CONCERN FOR IMPRISONMENT, PRISON OVERCROWDING AND ALTERNATIVE SANCTIONS IN THE NEW MILLENNIUM

A. A New Generation of Alternatives to Custody

While intermediate sanctions in the 1970s developed within the framework of rehabilitation or diversion (trying to avoid the negative side-effects of imprisonment and other criminal sanctions), security and risk management have become leading motives in penal policies implemented since the 1990s.

The focus of penal policies has switched to organized crime, transnational and cross-border crimes as well as sensitive and highly polarizing crimes such as hate and sexual violence, terrorism and drug crimes.

[60] Swedish National Council on Crime Prevention: Electronic Tagging in Sweden. Report 2005: 8, p. 19; similar results are reported in Dodgson, K., Goodwin, P., Howard, P., Llewellyn-Thomas, S., Mortimer, E., Russell, N., Weiner, M.: Electronic monitoring of released prisoners: an evaluation of the Home Detention Curfew scheme. Home Office Research Study 222, Home Office Research, Development and Statistics Directorate, March 2001, p. 55.

[61] Dodgson, K., Goodwin, P., Howard, P., Llewellyn-Thomas, S., Mortimer, E., Russell, N., Weiner, M.: opus cited, 2001, p. 56.

[62] *Ibid.* p. 21.

New types of offenders have entered the arena of policy-making which are partially linked to new crime phenomena like, for example, the rational offender, the immigrant offender and criminal organizations or corporate criminals and criminal corporations. With these types of offenders, the basic approach adopted in criminal justice systems during the 1960s, rehabilitation and re-integration focused on the individual sentenced offenders, has come under considerable pressure.

Penal policies in Europe then have become more expressive and turn away from knowledge-based, rational approaches to crime control. This can be seen in the greater involvement of the public (and/or the community), in particular with arrangements that provide for confrontation between the offender and the victim and the community, or exposure of certain categories of (sex) offenders to the public. The latter approaches have led to a rediscovery of public shaming and stigmatization. Besides demands for safety, this expresses also a move towards more emotionality and moralizing in punishment. In fact, criminal policy and crime politicians during the last decades relied more and more on expressive and mobilizing functions of criminal law when confirming that criminal justice must pursue the goal of improving safety and increasing the probability of punishment. "Closing the gap" between the number of offences known to police and the number of offenders convicted and sentenced has become a rallying point for such sentiments, which upgrade criminal law and criminal sanctions again to instruments which serve as censure on the one hand and reassurance of the public on the other hand (and express also low (or zero) tolerance towards criminals).[63]

Punishment underwent a process of economization; it has become a high quality product whereby quality is evidently linked to cost-efficiency, in particular as regards implementation and enforcement. The punishment, rehabilitation and control language indeed has changed into a language that is attentive to costs and customers. Most remarkable, however, is the momentum victim policies have gained during the last decades. With placing more emphasis on victims and the community, on compensation and restorative justice, a process of re-privatization of punishment is initiated which fits well into the general trend of the declining importance of the monopoly of power.

With criminal policies turning away from the offender and towards the victim and the public another change becomes visible. Sentencing theory, once strongly expressing the goal of fitting punishment to the individual offender, moves towards fitting punishment to the crime and the impact the crime had (on victims and society).[64] For selected groups of offenders, security and incapacitation become focal concerns. In particular for sex offenders, a punishment regime is established which is based on risk assessment, indeterminate detention and incapacitation.[65] In general, these changes are consistent with a move in criminology away from empirical theories and towards normative theories of crime and criminal justice. It is evidently punishment theories and practices emerging during the last decades which emphasize exclusion and security rather than fundamental individual rights, inclusion and re-integration.

These changes have resulted in switching the goals of community sanctions to tight supervision, credibility and cost-effectiveness. In fact, this concerns a departure from the concept of community bound sanctions of the 1960's and the 1970's headed towards rehabilitation and reintegration of criminal offenders.

B. A New Concern for Imprisonment

Despite the general recognition of the last resort standard and the implementation of alternatives to imprisonment, the 1990s saw in some European countries a massive surge of imprisonment rates and in virtually all European countries imprisonment rates well above those reported in the 1970s and 1980s.

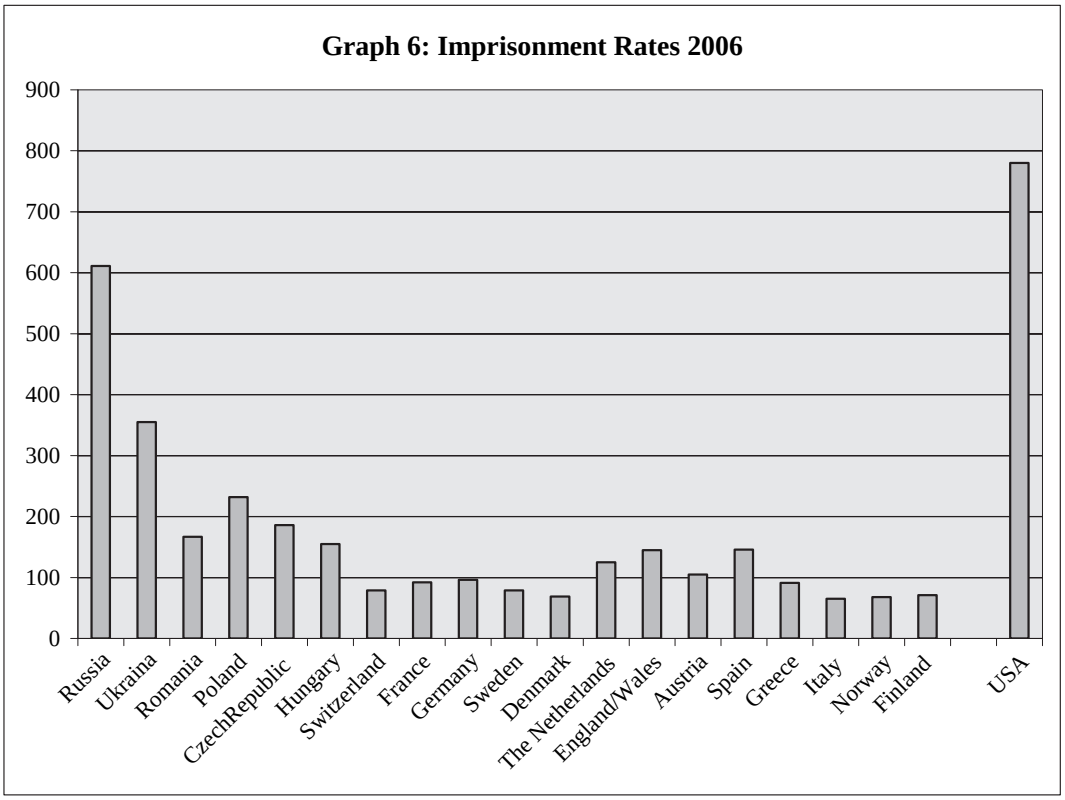
Based on the latest prison figures in Europe (Graph 6) four groups of countries can be differentiated:

- the new democracies in the east of Europe which display the highest rates of imprisonment (around 200/100,000), still in line with the heavy use of prison sentences in the past;

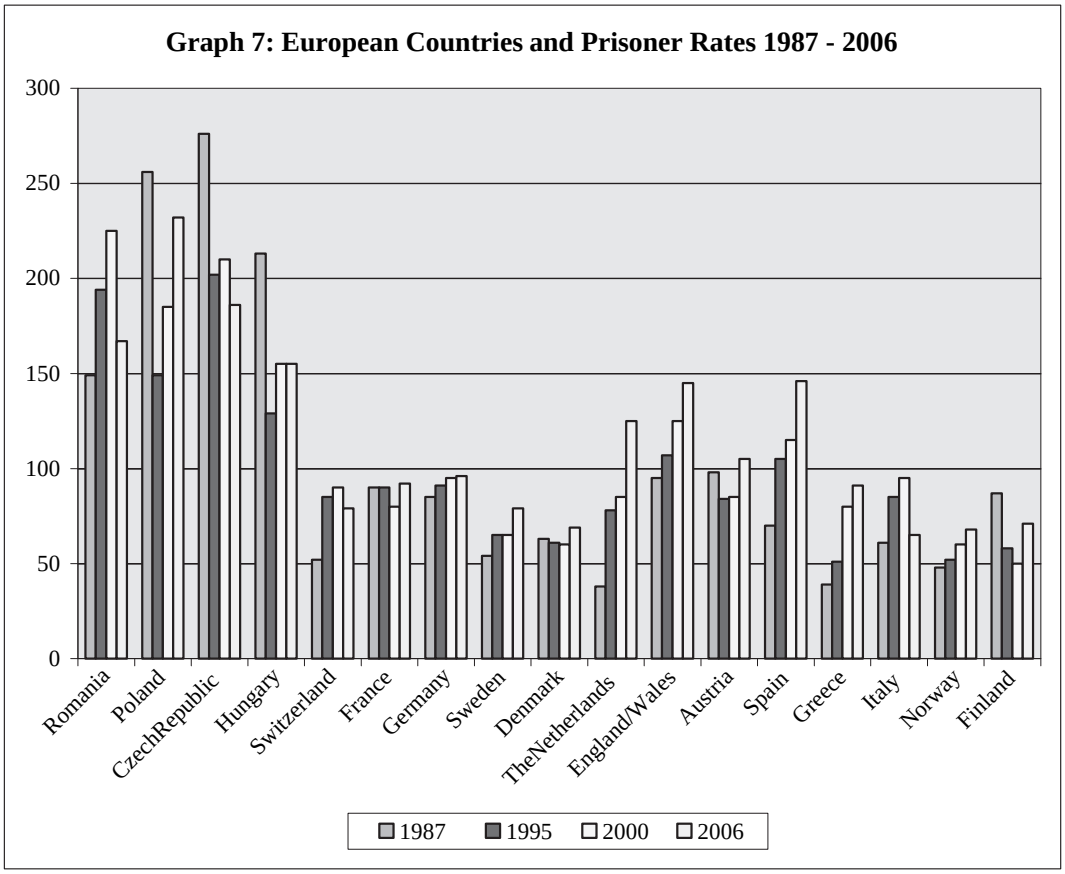
[63] Home Office Communication Directorate: Criminal Justice: The Way Ahead. Home Office, London 2002, p. 3; White Paper on Criminal Justice: Justice for All. Home Office, London 2002.

[64] See eg. Home Office: Making Punishment Work. Report of a Review of the Sentencing Framework for England and Wales. London, July 2001; White Paper on Criminal Justice: Justice for All. Home Office, London 2002, pp. 86.

[65] Walther, S.: Umgang mit Sexualstraftätern: Amerika, Quo Vadis? Vergewisserungen über aktuelle Grundfragen an das (deutsche) Strafrecht. MschrKrim 80(1997), S. 199-221.



Source: Walmsley, R.: Prison Systems in Central and Eastern European Countries. Progress, Problems and the International Standards. Helsinki 1996; Walmsley, R.: World Prison Population List (third edition). Home Office: London 2002, 2009.



- countries which experienced a steep increase in the number of prisoners in the last decade and display a prison rate of well above 100/100,000 (the Netherlands, England and Wales, Spain);
- countries which display prisoner rates that fall short of 100/100,000 (France, Germany, Greece);
- countries with prisoner rates still well below 100/100,000 (Scandinavian countries, Switzerland, Italy).

A closer look at the period 1987–2006 and the course imprisonment rates take in various European countries leads to a different grouping.

In some countries, between 1987 and 2006, prisoner rates have increased at a rapid and significant pace (England and Wales, the Netherlands, Greece, Spain).

Another group of countries is characterized by small increases (France, Germany, Denmark, Austria, Switzerland).

In most of the new democracies in the east of Europe imprisonment is on the rise again[66] after a rather short but nonetheless drastic decline in the use of imprisonment shortly after the political changes at the end of the 1980s - which was also driven by the use of amnesties.[67] Virtually all criminal justice systems in the east of Europe experienced major drops in prison rates at the end of 1980s or at the beginning of the 1990s. But, obviously sentencing patterns either did not change, or, despite changing sentencing patterns and changing crime patterns, contributed to fast-rising prison populations in the 1990s. The period of a policy of decarceration which followed immediately the process of entering economic and political transition certainly was part of a general policy to reduce the level of repression maintained by the former authoritarian regimes, but seemingly has been of a short transitional character only.[68] For Eastern Europe, we may hypothesize that a lack of alternatives to prison sentences,[69] strong public support for imprisonment, as well as fear of crime and demands for tough responses to messages of ever increasing crime rates, has contributed to the growth in imprisonment rates.[70]

Most countries of the "Old Europe" have experienced significant increases in the number of prisoners over the last decades. Germany, for example, reports in 2006 an imprisonment rate which comes close to rates observed some forty years ago (before a massive decline in prison figures set off). England and Wales are leading imprisonment rates in Western Europe. Prison projections for England and Wales at the beginning of the new millennium had suggested for 2009 a prison population of between 90,000 and 110,000.[71] The head count in March 2009 in English prisons comes close to that estimate with some 83,000 sentenced and remand prisoners.[72] The Netherlands, once proud of its mild penal climate, has experienced a remarkable growth in prisoner rates[73] (which was accommodated by enlarging drastically the prison capacity) as did some of the Southern European countries like Greece and Spain. There is but one exception from this rule: Finland. Finland was, back in the 1960s, top ranked in Europe in the list of imprisonment rates. Finland today falls in the category of countries with the lowest rates of imprisonment in Europe and displays, when contrasted with prison figures of 1987 and 2006, a decline. This due to a political decision to reduce the difference in the use of prison sentences between Finland and the other Scandinavian countries.

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[66] Walmsley, R.: World Prison Population List (third edition). Home Office: London 2002.

[67] Lammich, S.: Politische Demokratisierung und strafrechtliche Entwicklung in den Ländern des ehemaligen Ostblocks. Kriminalpädagogische Praxis 19(1991), pp.6-14, p. 11; see also for a description Walmsley, R.: Prison Systems in Central and Eastern Europe. Progress, Problems and the International Standards. Helsinki 1996, pp. 6-8.

[68] Walmsley, R.: Prison Systems in Central and Eastern Europe. Helsinki 1996, p. 9.

[69] Stern, V.: Alternatives to Imprisonment in Developing Countries. London 1999.

[70] Lammich, S.: Politische Demokratisierung und strafrechtliche Entwicklung in den Ländern des ehemaligen Ostblocks. Kriminalpädagogische Praxis 19(1991), pp.6-14, p. 11.

[71] Morgan, R.: English Penal Policies and Prisons: Going for Broke. Overcrowded Times 7(1996), p. 1, 20-21; Councell, R., Simes, J.: Projections of Long Term Trends in the Prison Population to 2009. Home Office, London 2002.

[72] Ministry of Justice: Population in custody, monthly tables, March 2009. England and Wales Statistics Bulletin. London 2009.

[73] Mooelnaar, D.E.G. et al: Prognose van de sanctiecapaciteit tot en met 2006. Onderzoek en beleid, The Hague 2002, pp. 120; however, projections demonstrate that the pace of increase, although an increase of 13% between 200 and 2006 is predicted, will slow down.

The increase in the use of imprisonment has been also interpreted as a "punitive turn" in European penal policies.[74] In fact, there are plausible explanations for the increase in the size of European prison populations which seem to support a punitive turn. Prison sentences have become longer, in particular for drug trafficking and violent offences. Concern for violent offences (including domestic violence) as well as sexual offences, from the viewpoint of both retribution and incapacitation of the dangerous offender, contributed also to the increase in the prison populations in Europe. Then, increases in the size of precarious populations, populations most likely to be eligible for prison sentences, provide a fertile ground for the use of prison sentences.[75] Precarious groups are those which are unsettled and not integrated into the labour market and therefore do not lend themselves easily to the application of alternatives to pretrial detention and custodial sentences. The immigrant and migrant populations especially are among the fastest growing prisoner groups in Europe.[76]

The new interest in prison sentences is then carried by a process of globalization and harmonization of criminal justice reform.[77] In the last decades, international crime control conventions more and more demand uniform legislation in basic criminal law and procedural law in order to assure swift and uncomplicated co-operation between different criminal justice systems. The international instruments (and their European counterparts stemming from the Council of Europe and the European Union) demand punishment that fits the seriousness of the criminal offences dealt with and the need to discourage individuals or groups effectively from committing such crime. Here, for example, conventions like the 1988 Vienna U.N. Convention on Measures against Drug Trafficking and the 2000 Transnational Organized Crime Convention have to be mentioned.

The international and national penal policies evidently come today with contradicting and sometimes confusing messages;[78] while the last resort standard shall still apply to imprisonment, a demand for credible penalties and discouraging punishment is voiced at the same time.

VI. SUMMARY

1. Imprisonment has again gained considerable ground in Europe.

2. Intermediate penalties which originally have been developed as alternatives to imprisonment do not seem to counteract this trend in an effective way.

3. However, intermediate penalties have been successful in replacing imprisonment and still are successful in doing so. This success certainly can be attributed to theoretical and practical efforts vested in the implementation stage of intermediate penalties.

4. The success of intermediate and alternative sanctions in Europe certainly can be explained also by combining various alternative sanctions, in particular the fine, with simplified and summary procedures that allow for both a swift response to crime as well as a cost-effective way to process a wide range of petty and moderately serious criminal offences.

5. Despite this success, certain problem areas of intermediate penalties become apparent, most importantly, the lack of clear conversion philosophies which make various penalties comparable, and, as an overlay to such conversion rates, the lack of clear policy decisions and sentencing statutes which define priority areas for specific penalties.

6. The concepts and philosophies of intermediate penalties then have been subject to important changes which, roughly, can be summarized in a move towards cost-effectiveness, risk control and punishment and away from rehabilitation.

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[74] Garland, D.: The culture of control. Oxford 2003.

[75] Kuhn, A.: Comment Réduire le Nombre de Personnes Privées de Liberté? Rapport de Recherche FNRS, Lausanne 1997.

[76] Palidda, S., Frangouli, M., Papantoniou, A.: Les Conduites Déviantes et La Criminalisation des Immigrés. Mailand 1998.

[77] Weigend, Th.: Strafrecht durch internationale Vereinbarungen – Verlust an nationaler Strafrechtskultur? ZStW 105 (1993), pp. 774-802.

[78] Dindo, S.: Les Alternatives à la Détention. Commission Nationale Consultative des Droits de l´ homme, Paris 2006.

7. The 1990s then saw the emergence of new offender groups and new criminal offences which attracted policy concern, groups which obviously are outside the reach of intermediate penalties. The organized and rational offender, as well as transnational and migrant offenders, point towards social and legal responses which aim at physical control and exclusion.

8. The changing composition of prison populations in Europe underline the need to adjust the concepts of intermediate penalties to immigrant offenders, drug offenders and other offenders active in the informal economies, if intermediate penalties shall serve a role they played successfully for the group of settled offenders.

OVERCROWDING: CAUSES, CONSEQUENCES AND REDUCTION STRATEGIES

*Neil Morgan**

I. INTRODUCTION: 'DOING MORE WITH LESS'

All correctional services face the challenge of 'doing more with less'. *Doing more* means that they are expected not only to 'house' prisoners in a safe and secure environment but also to deliver rehabilitative programmes and to prepare prisoners for release. Importantly, they must also meet the growing expectations of external accountability agencies including human rights organizations. Doing more *with less* reflects the fact that that the number of prisoners is generally increasing at a faster pace than the resources that are allocated to corrections. The current global financial crisis is likely to exacerbate the problem. There may well be an increase in some types of crime and a consequential increase in the number of prisoners but it is unlikely that there will be a commensurate increase in available resources.

It is therefore especially timely for UNAFEI to be examining the topic "Effective countermeasures against overcrowding of correctional facilities". This paper analyses the causes of overcrowding (including the question of what statistical data is required to obtain an accurate picture). It then itemizes and discusses the negative consequences of overcrowding, which extend far beyond questions of 'bed numbers' before concluding with some suggestions about possible legal options to reduce overcrowding.

My second paper will examine some ways in which to ameliorate the negative effects of overcrowding. First, it notes some of the measures that can be used to manage overcrowded facilities and discusses the importance of developing and monitoring standards for service delivery. Building out of this, it then outlines the role that independent accountability agencies, such as human rights agencies, may be able to play. In this part of the paper I will be discussing, amongst other things, the role of the Office of the Inspector of Custodial Services in Western Australia and the implications of countries ratifying the Optional Protocol to the Convention against Torture (OPCAT).

II. OVERCROWDING: UNDERSTANDING THE CAUSES

If we are to have any chance of developing effective countermeasures to overcrowding, we must first understand the precise causes of overcrowding in the particular jurisdiction. Most people assume that prison populations rise in response to two factors, namely, rising crime rates and/or longer sentences imposed by the courts. Although these factors are obviously important, the causes of overcrowding are multi-factored and multi-layered. Good quality statistics are essential if we are to understand the effect of these different factors.

A. Crime Rates and Imprisonment Rates

One of the most interesting points to emerge during the annual conferences of the Asian and Pacific Conference of Correctional Administrators (APCCA) is that *there is no simple link between crime rates and imprisonment rates*. For example, both Singapore and Japan are 'low crime' countries according to official crime statistics. However, on international scales, Singapore has a high imprisonment rate whereas Japan has a low imprisonment rate. Some parts of the USA appear to have both a high crime rate and a high imprisonment rate. And some European countries, such as the Netherlands, which have a low imprisonment rate, are reporting problems with some types of crime. Thus, international comparisons show that all four permutations are possible: high imprisonment rate/low crime rate; high imprisonment rate/high crime rate; low imprisonment rate/high crime rate; and low imprisonment rate/low crime rate.

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Presentations to APCCA reveal *very variable patterns in terms of the extent to which changes in imprisonment rates reflect changes in crime rates*. For example, Japan and Malaysia have attributed their increasing rates of imprisonment to increased crime rates (and, in the case of Japan, to more foreign prisoners). However, in other countries there is no clear link between crime rates and imprisonment rates. In Australia and New Zealand, recorded crime rates have been relatively constant in recent years but imprisonment rates have gone up dramatically. This appears to be partly due to an increase in the seriousness of some offences (see below) but is also due to a general 'tightening up' on law and order issues.

In Canada, crime rates have been declining but the imprisonment rate has remained constant rather than declining. In some countries, including Cambodia and Indonesia, the increasing rate of imprisonment appears to be due to more efficient policing and prosecution practices as well as to a probable increase in some crimes.

Korea, Singapore and Thailand have seen a significant decline in the rate of imprisonment. In Korea, this seems to reflect changes to prosecution and parole practices not just changes in crime rates. Singapore's recent sharp decline does not seem to reflect an equivalent drop in the crime rate; rather, it seems to be attributable to the development of a number of alternative sentences, a system of home detention, and reduced recidivism rates (see below). Thailand's reduced rate of imprisonment is due to a large extent to the increasing use of drug rehabilitation centres rather than prisons; in other words, some of the decline in imprisonment really involves a displacement to other facilities.

B. Unsentenced Prisoners

Prisoners may be either sentenced or unsentenced. The term 'unsentenced' is used here to refer to people who have been remanded in custody awaiting trial or who are currently on trial. The proportion of sentenced to unsentenced prisoners varies dramatically between countries. Most countries are between 10% and 30%. However, the figure is less than 10% in some places (including Brunei and Singapore) and more than 50% in others (65% in India and 75% in Sri Lanka).

Thus, in some places, there is very limited potential to reduce overcrowding through measures targeted at unsentenced prisoners. In others, however, there is considerable potential for appropriate countermeasures. However, statistics tend only to refer to the number of unsentenced prisoners. To develop effective countermeasures, we need more detailed data to work out whether the problem is:

(i) Inflow: in other word, the number of people being remanded in custody and the reasons for this. For example, were they refused bail or were they granted bail but unable to meet the conditions set by the court?
(ii) Duration: in other words, the length of time for which people are held in custody as unsentenced prisoners; or
(iii) Both inflow and duration.

Across Australia, bail laws have been tightened up, leading to problems of both flow and duration but there also appear to be some differences between different States and Territories. In India, it would appear that the most pressing problem is duration not flow. India's annual presentations to APCCA indicate that the proportion of suspects remanded in custody is relatively low, but that there can be a very long wait for trials to be finalized.

It is only by undertaking research that identifies the exact nature and extent of the problem that we can develop appropriate jurisdiction-specific solutions (see below).

C. Pressure Points (Including Female Prisoners)

Overcrowding and pressures on prisoner numbers are not spread neatly and evenly across prison systems and there tend to be particular pressure points. For example, in many Australian prisons, the least overcrowded parts are the highest security sections of maximum security prisons and punishment areas. This is because prisoners are managed, in part, through reduced association with others. In many countries, the demand for beds for unsentenced prisoners outstrips supply more than with sentenced prisoners.

Another very significant global trend has been the increase in the number of women committing serious

crimes (often drug-related) and therefore in the number female prisoners and their proportion relative to the number of male prisoners. Most jurisdictions now have between 3% and 7% female inmates (including Japan, Korea, Australia, Canada, India, Indonesia and New Zealand). However, the figure is higher in a number of other jurisdictions, including Malaysia, Singapore, Brunei, Hong Kong and Thailand. Importantly, *in most places, the rate of female imprisonment has risen faster than the male population over the past decade*. This is the case in Canada, China, Japan, Indonesia and Singapore and a number of other countries. Australia's figures are particularly dramatic; the number of female prisoners has doubled in the last ten years and the number of male prisoners has increased by around 50% over the same period. Unfortunately, women therefore quite often face more significant overcrowding problems than men.

D. Police and Prosecution Practices

The criminal justice process is best seen as a 'funnel' or 'pyramid' because the courts only deal with a small proportion of the total number of crimes. In other words, there is an 'attrition rate' between the number of crimes committed and the number sentenced.

This situation comes about in a number of ways. Some crimes are never reported to the police (the so-called 'dark figure' of crime). Some crimes are reported to the police but are not 'cleared up'. And some crimes are cleared up in that the police find the person they believe to be responsible but, as a result of the exercise of police or prosecutorial discretion, the case is never taken through the courts. This may, for example, happen in countries with practices of 'diversion' through cautioning, prosecutor's fines, referrals to 'restorative justice' processes.

The 'attrition rate' varies between crimes and between countries but it is often estimated that the courts deal, at most, with 10% of some crimes. For example, in countries where such research has been done, it is generally found that sexual offences are under-reported (often because the parties are known to each other or for other reasons). Some estimates put the figure of reported sexual assaults at around 25%. Of these 25 cases, some will not be solved by the police and others will not proceed to trial because the prosecuting authorities believe the evidence is weak and that there is 'no reasonable prospect of conviction.' It is easy to see how the number of offences that result in conviction may be less than 10%.

The same is true of burglaries. In Australia, the majority of burglaries (probably 90%) are reported to the police because victims tend to be insured and a police report is a precondition of making an insurance claim. Historically, however, only around 15% of burglaries were cleared up by the police. Again, some did not result in a conviction so that, like sexual offences, the end result was probably that no more than 10% were convicted and sentenced.

However, changes in police and prosecution practices and advances in policing techniques can lead to an increase in the number of offences that result in a conviction, even when even the actual number of offences has not changed. The best recent example is probably the use of DNA as a means of identification. This has led in many parts of Australia to a significant 'DNA catch-up' involving previously unsolved burglaries and other crimes. This occurs when a person is arrested and charged for an offence and his or her DNA is then checked against DNA samples obtained from earlier crime scenes. If they get a match, the suspect is likely to be charged with the earlier offences as well as the more recent ones. Given the DNA evidence, he or she is also more likely to plead guilty or be found guilty. Similarly, in cases of rape, DNA evidence makes it easier to prove that the suspect had sexual contact with the victim (though it does not address other critical issues such as whether she consented to sexual contact).

E. Sentencing Practices

International experience suggests that there are at least five factors at the sentencing stage that may contribute to increasing numbers of prisoners. The relevance of these factors in each jurisdiction will vary.

1. More Crime

The number of people being sentenced to imprisonment by the courts will sometimes reflect the simple fact that there is more crime being committed, cleared up by the police and prosecuted.

2. Seriousness of Offences

We have already noted that in some countries, the imprisonment rate is going up even though the

overall crime rate is not. However, one of the problems with recorded crime statistics is that they generally refer to broad offence categories and do not give a clear indication of the seriousness of the offences in that category. For example, in the Penal Codes of India, Sri Lanka, Malaysia and Singapore, the word 'hurt' means any 'bodily pain, disease or infirmity.'[1] The more serious offence of 'voluntarily causing grievous hurt' is rather narrowly defined. This means that the offence of 'voluntarily causing hurt' will therefore include some relatively trivial matters and some very serious ones. General statistics on the number of offences of causing hurt will not reveal the actual amount of injury that was caused. There is certainly a perception in several countries (including Australia, New Zealand and Canada) that although the statistics do not show any more crimes of violence in numerical terms but that the levels of violence are increasing. Inevitably, this will lead to longer sentences.

3. Offender Attributes

There is a good deal of evidence that criminal justice systems are now dealing with more complex offenders who have more complex problems and needs. Substance abuse, mental illness and other forms of mental impairment are on the rise and are often associated with higher levels of violence and more difficult management problems in prisons. Some countries also face a growing problem with gangs.

4. Alternatives to Imprisonment

There are many possible alternatives to imprisonment based on ideas such as supervision, community work and undertaking rehabilitative programmes in the community. The extent to which judges will use such alternatives will depend on whether they are seen to be realistic options (see below).

5. Law and Order Politics

In many countries, the media tend to focus on crime and usually focus on dramatic examples of violence. Public concern is heightened, even if the 'real' crime rate is not escalating, and this can lead to political responses such as mandatory minimum sentences, higher maximum penalties and reduced access to early release schemes such as parole. At times, this can also lead to conflicting and confused messages to sentencing judges. For example, in Western Australia, some innovative new alternatives to custody were introduced in the 1996 and judges were encouraged to use them. But at almost the same time, they were being criticized for leniency and mandatory minimum sentences were introduced for 'third strike' home burglars.

F. Releasing Practices

Another critical part of the 'jigsaw' concerns releasing practices. There is a wide variety of potential early release options.

1. Pardons or Amnesties

These are used *inter alia* in Thailand, the Maldives, Mongolia, Vietnam and Indonesia and are ad hoc, not governed by legislation and unconditional (the person is free and is not subject to compulsory supervision or monitoring on release).

2. Remission Systems

These are statute-based but are again unconditional (for example, Malaysia and Singapore have statutory schemes allowing remissions of up to one third of the sentence imposed by the court). However, in the interests of 'truth in sentencing', some countries (including Australia) have abolished remission on the basis that it distorts the real meaning of the sentence imposed by the court.

3. Parole Systems

These are statute-based and are very different from remissions in that (a) release on parole tends to be discretionary; and (b) the offender is subject to supervision and monitoring on release, with the ultimate sanction being a return to prison. The conditions that are placed in parole orders typically include conditions not to re-offend, to report regularly to a community corrections/parole officer; to undertake certain programmes in the community; and (if the person is a drug user) to submit to drug testing. Parole involves both a 'carrot' (an incentive) and a 'stick' (a threat). It can be of either short or long duration.

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[1] Generally see Stanley Yeo, Neil Morgan and Chan Wing Cheong, *Criminal Law in Malaysia and Singapor*e, LexisNexis, Singapore, 2007 chapter 11.

4. Home Detention

This generally involves the use of electronic monitoring. It can be either a 'front end' sentencing option or a form of early release. When used as an early release scheme it tends to be of relatively short duration (up to six months) because of its intensity.

G. Breaches of Parole and other Orders

The final element in understanding imprisonment rates (and, therefore, overcrowding) concerns the way in which the system responds to breaches of conditional orders such as parole, probation and other community based sentences. In the United Kingdom a very large number of people are returned to prison each year for breaching orders. Sometimes this is because of serious offending but it is often because the person has failed to comply with the conditions of the order itself. A number of senior judges and others have expressed their concern that many of the 'failure to comply' breaches, such as failing to report to a probation officer, are attributable to the person's 'disorganized circumstances' and not to real 'villainy'.

There is no doubt that the flow into prison for breaches of orders can be dramatic. The question of 'failure to comply' breaches raises some particularly interesting questions with respect to the aims of community-based orders, the conditions that should be placed in such orders and the consequences that should flow from a breach.

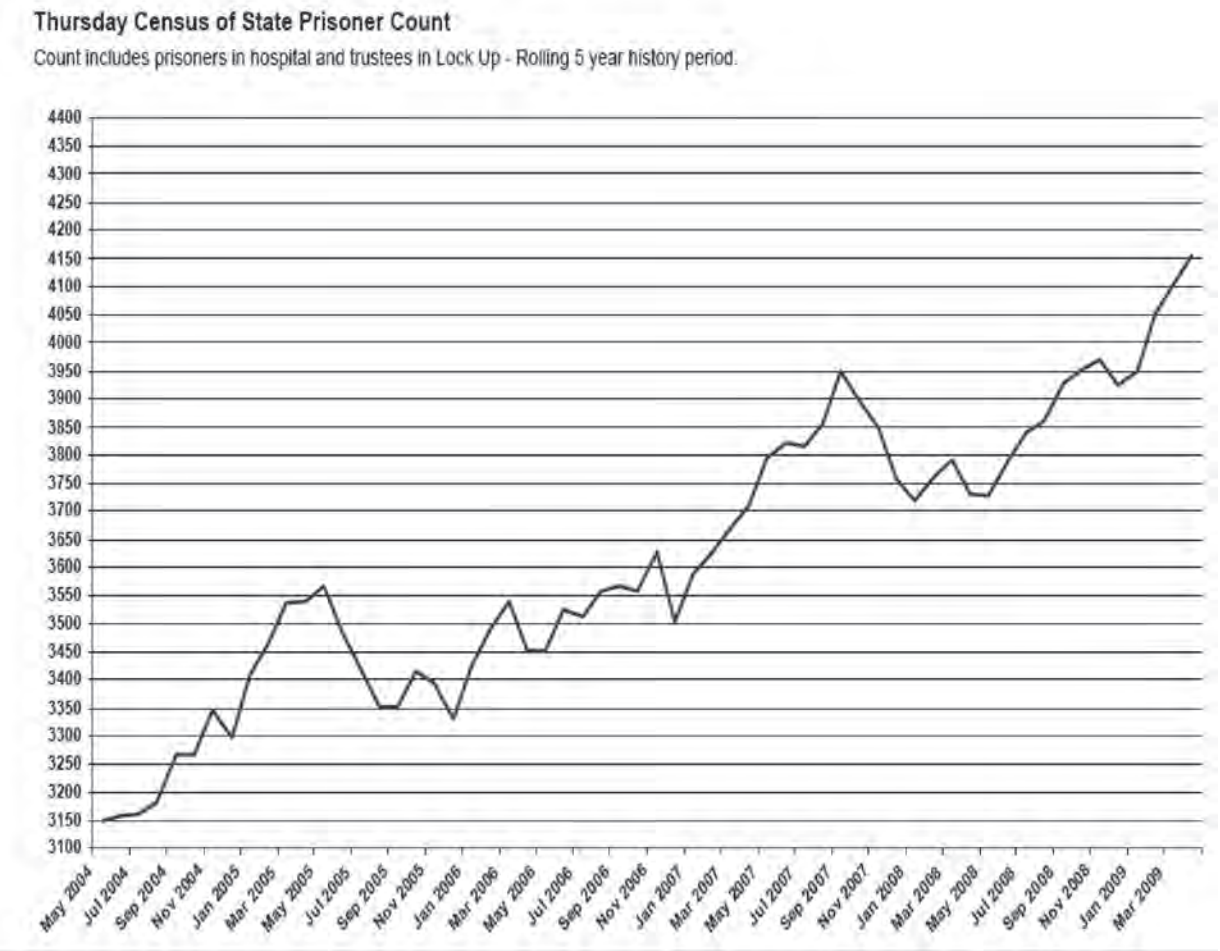
Take the example of urinalysis testing as a condition of parole. First, it should be noted that there are very different approaches to the use of such conditions across Australia. In Western Australia, a condition of 'regular and random urinalysis' is routinely imposed in parole orders if the offender has any history of drug use. In practice, this means urinalysis is a condition of the vast majority of parole orders. In Victoria, on the other hand, urinalysis is not routinely used but may be imposed if the person is undertaking a specific drug rehabilitation programme where monitoring is considered desirable. A second question concerns what should be done if the person returns a positive urinalysis result. At one time, the Western Australian Parole Board was hesitant to hold the person in breach and return them to prison simply for returning a positive result, unless there was also evidence of further offending, or of the drug use being very serious (eg Class A drugs) or escalating. In other words, the Board saw urinalysis as a *monitoring tool*. However, Board membership has changed and the Board now views urinalysis much more as a *breaching tool*, with a single positive test for any drug being very likely to lead to a return to prison.[2]

H. Summary and Case Study

Understanding imprisonment rates and overcrowding requires careful analysis. The factors will vary between different jurisdictions and there is no single-hit solution. The normal assumption is that higher imprisonment rates reflect higher crime rates or tougher sentencing practices by the courts. However, the preceding analysis has shown that the situation is much more complex.

Western Australia provides a particularly good example of the points that have already been made. The following table shows the rate of imprisonment over the past five years.

[2] Some interesting issues arise from such policies. Cannabis stays in the system far longer than some of the harder drugs such as heroin, amphetamines and 'ice'. Consequently, the person who takes cannabis will be at risk of returning a positive urinalysis result for longer that the person who uses 'worse' drugs such as heroin or 'ice'.



The table shows that the rate of imprisonment has increased dramatically, from 3,150 in May 2004 to 4,150 in April 2009, an increase of 30%. The increase from June 2008 to April 2009 is particularly dramatic (420 prisoners, or an 11% increase, in just 10 months).

These increases are of such a magnitude that they cannot be attributed simply to changes in the crime rate, in the number of people coming before the courts or in judges' discretionary sentencing practices. Instead, the increases reflect a number of factors. These include the DNA back-catch; an election in which 'law and order' was a big issue and there was pressure on the judiciary to 'get tougher'; the implementation of an election promise to reduce the 'discounts' that judges had previously given to offenders to compensate for the abolition of remission (see above); a very dramatic tightening up on the number of people released on parole; and an increase in the number of people returned to prison for breaching parole.

In other words, the neck of the criminal justice 'funnel' in Western Australia has become wider, the exit routes have been squeezed, and there is more chance of a person quickly re-entering the prison system for breaching orders.

III. CONSEQUENCES OF OVERCROWDING

A. Introduction

Overcrowding presents numerous challenges for prison management. Some of these are well-known but others are less commonly-understood. In my view, it is essential to clearly identify these consequences and to articulate them to government. The crucial point is that it is not just a question of finding places for people to sleep but a question of safety, security, human rights standards and meeting correctional goals such as rehabilitation. It is also essential to explain to governments that the matters discussed below have a cumulative and incremental effect.

The following list is not necessarily complete but covers some of the key ways in which overcrowding will impact on staff and prisoners in terms of day to day arrangements and on more systemic considerations.

B. Facets of Overcrowding

1. Capacity and Cell Space

The most immediate problem that people associate with overcrowding is that prison cells (or, when they are used, dormitories) need to house more and more people. The focus is usually on 'bed-space'. Sometimes it can be difficult to get a precise assessment of the extent of this problem because 'bed-space' and 'capacity' can be rather flexibly interpreted. For example, in Western Australia, most prison cells were originally designed with the intention that they would be single-occupancy (usually called the 'design capacity'). However, it is physically possible to put bunk beds in most cells and rather than being a necessary exception at certain times, it seems that 'double bunking' is becoming an acceptable norm. These double bunks are now counted in prison capacity charts to give a figure that is termed 'current actual beds'. Official 'head office' figures claim that one of the State's prisons currently sits at 95% capacity (based on comparing the number of prisoners with the 'current actual beds'). The prison superintendent regards it as being at over 160% capacity (based on comparing the design capacity with the number of prisoners).

2. Development of Unit Infrastructure for Increased Numbers

It is rare for additional facilities such as showers, toilets and better eating/recreation areas to be put into housing units when numbers are increased. Indeed, it is impossible to undertake renovation work when the place is full!

3. Staff Resources

Staff resources may not keep pace with rises in prisoner numbers. There are two potential aspects to this problem. First, the *number* of staff per head of the prisoner population may decline. Secondly, the *quality and experience* of staff may well drop off.

4. Safety and Security

Overcrowding is likely to increase the risks of assaults and bullying between prisoners (for example, undetected in-cell behaviour). Unless the necessary additional staff resources are injected (both number and quality), staff are also likely to feel less safe.

5. Dynamic Security

The combined effect of the previous points is likely to be that staff will lapse into a less positive role: they will become gaolers rather than correctional officers and will retreat into their secure areas rather than interacting more positively with prisoners. This means that many of the benefits of 'dynamic security' (such as reducing pressure and gathering useful intelligence through positive interactions) may well fall away.

6. Education, Programmes and Work

Each of the above play a crucial role in modern correctional systems. First, they aim to assist prisoners' rehabilitation and reduce the chances of a return to prison (thereby repaying the investment in such activities). Secondly, they keep prisoners busy and thereby improve security in the institution. Busy prisoners who have access to positive activities are less likely to cause trouble than idle and frustrated prisoners. Computer access for study and recreation purposes is also increasingly valued. However, experience suggests that it is unlikely that the necessary resources will be allocated to developing the physical infrastructure and staff resources to meet a full level of service delivery. This will mean reduced rehabilitative effects and enhanced tension in the institution.

7. Recreation

Recreation helps keep prisoners fit and is a valuable safety valve for reducing tension. Opportunities for recreation frequently drop back at times of overcrowding.

8. Contact with the Outside World

Contact with the outside world is recognized as being integral to improving the chances of prisoners successfully 're-entering' society at the end of their sentences. Again, the infrastructure (such as more telephones, more facilities for video-links and internet visits and additional visiting times) must be provided if prisons are to meet such goals. But at times of financial constraint and staff pressures, this is unlikely to be the case.

9. Hierarchical Regimes

Hierarchical regimes are a core feature of good modern correctional systems. The idea is that prisoners should be able to work their way up through the system, from a basic regime to a more enhanced regime. For example, in Australia, the aim is for prisoners to earn the right to move to higher levels of privileges and more enhanced regimes, ideally culminating in 'self care' (sometimes, but not exclusively, in minimum security). Hierarchical regimes that reward good behaviour have a good effect on discipline and security but they simply cannot be achieved if the prison is full. For example, if all the 'self-care' units are occupied, prisoners will have to remain at lower levels even when they have earned the right to advance. For this reason, it is often said in Australia that prisons should ideally be at 90% of their design capacity.

10. Food and Health Services

These inevitably come under great stress at times of overcrowding because, again, experience suggests that the full complement of additional resources (both physical and human) is rarely provided.

11. Sewerage and Other Issues

If a prison was designed with a population of 500 in mind, there is an obvious risk that sewerage systems and other resources such as water recycling will come under stress as a result of increased numbers.

C. Summary

The individual, cumulative and systemic effects of overcrowding are dramatic. Even if places are found for prisoners to sleep, staff resources and the resources required for food, health, education, programmes, work, recreation are likely to drop back relative to the number of prisoners. It will no longer be possible to offer a proper hierarchical regime, the benefits of dynamic security are likely to be lost, and the human rights of prisoners (which attract increasing national and international scrutiny) will be adversely affected. Tension is likely to increase and the prison regime may become more assertive and more confrontational as the system tightens up and drifts into 'survival' mode. It is not melodramatic to conclude that the risks of a loss of control or riot are thereby magnified.

IV. MEASURES TO REDUCE OVERCROWDING: A BLUEPRINT

A. Introduction

It follows from what has already been said that the measures that are pursued to reduce the extent of overcrowding should reflect a careful statistical analysis with respect to the precise reasons behind overcrowding in the particular jurisdiction. The following section sketches some of the possible options, most of which will require legislative attention and not just the setting of policy directions.

B. Unsentenced Prisoners

1. Inflow

Measures to tackle the problem of inflow include greater use of bail (though in many places, the political reality is that the focus on 'law and order' is seeing more restrictive bail laws and less weight given to the presumption of innocence); the development of options such as electronic monitoring or bail hostels; and employing 'bail co-ordinators' in prisons to assist people to meet their bail conditions.

2. Duration

Measures to tackle the problem of the duration of stay before sentence include more prosecutors, more courts, more judges and more efficient court processes. Ideally, perhaps, there should be a limit on the time that a person can be held pending the outcome of a trial. The Indian Supreme Court has ruled that people should not be held for longer than the maximum sentence for the offence with which they have been charged. In Scotland a stricter limit applies: there is a general limit of 140 days (increased from 110 days in 2003)[3] on the time a person can be held before a trial commences.

C. 'Community Based Sentences' and Prison as the Last Resort

1. Realistic Modern Sentencing Options

Realistic modern sentencing options should be given to the courts if prison is to become, as it should

[3] http://www.scottish.parliament.uk/business/committees/justice1/reports-04/j1r04-02-vol01-02.htm#11

be, the option of last resort. Across much of the Asian and Pacific region, this does not seem to be the case. Courts still seem often to operate with a limited number of alternatives such as fines and probation. Fines may be unrealistic and probation is often conceptualized as an order that is imposed *'instead of sentencing'* the person. There is a good deal to be said for developing community-based *sentences* where there is a focus on punishment and reparation (for example through community work) as well as rehabilitation.

2. The Right Administrative Infrastructure

Correct administrative structures must be put in place to support community-based sentences. There is room for debate as to whether such services should be located (a) in welfare departments, separate from prisons (as has historically been the case with many probation services) or (b) in an integrated department of correctional services that covers both prisons and community corrections. In my view, the latter option is generally preferable as it better recognizes that community based-sentences are 'real sentences' not just 'welfare' measures. It should also help to ensure a continuum of services (and in some systems, there may be an opportunity for correctional staff to work for periods of time in both the custodial and non-custodial sections).

3. A Statutory Hierarchy of Sentencing Options

Such a system has been adopted in most Australian jurisdictions. This means, in essence, that the judge must not impose a sentence of imprisonment unless all other options (which are 'ranked') have been ruled out as inappropriate.

4. Limitations on Short Sentences

Some jurisdictions have abolished short term sentences. The theory behind this was sound: it was to make imprisonment truly the last resort by encouraging judges to use the alternatives. However, it has proved problematic. Western Australia has abolished sentences of six months or less. But this means that when judges do reach the conclusion that there is no alternative to imprisonment, their starting point is now seven months (or, legalistically, six months and one day) – sometimes rather longer than they consider necessary.

D. Police and Prosecutorial Discretion

Where possible, efforts should be made to divert appropriately selected minor offenders out of the mainstream criminal justice system to reduce (a) the risks of 'contamination'; (b) the problems that can result from a formal criminal record and (c) the costs of and pressures on the traditional criminal justice system. Typical options here include formal cautioning, referrals to 'restorative justice' programmes and financial penalties. To date, in many countries, formal cautioning and referrals to 'restorative justice' programmes have tended to focus on juveniles. In my view there is scope for such options to be more fully developed for both juveniles and adults.

E. Parole and other Forms of Early Release

Parole systems have come in for some criticism in a number of countries on two main grounds. The first is a general complaint that parole weakens the sentence and makes the system too 'soft.' The second is that on the occasions when people on parole commit serious crimes of violence, there is criticism of the decision to grant parole to that person.

However, there is a good deal to be said in principle in favour of a system where the person spends part of the sentence in custody and is then released back into the community under supervision and with the threat of being recalled to prison rather than releasing the person without such constraints at the end of their sentence. It is impossible to totally eliminate the risk that the person will offend again because parolees are generally serious offenders who lead high risk lifestyles (that is why they are in prison!). However, careful risk assessments by a Parole Board will help to reduce community risk. Ideally, legislation should set out the parameters of parole decision-making.

I noted earlier the question of people coming back into prison – potentially for the whole balance of the sentence – because of 'failure to comply' breaches (for example, failing to report as required) rather than further offending. If this is the case, it is worth considering an approach that caps the period for which a person can be returned to prison for such breaches – perhaps at a maximum of 28 days. This provides the person with a real incentive to comply but reduces the problem of long-term returns.

F. Prison-Based Rehabilitation Programmes

For most of the past 40 years, there has been a focus on delivering rehabilitation programmes in prisons. The main focus these days is on courses that are built out of a behavioural psychology/cognitive skills framework. This is not the place to debate the success or otherwise of such programmes but two points must be made in the context of the topic 'reducing overcrowding'. The first is that Parole Boards are likely to place significant weight on 'programme completion' as this is seen as a way to reduce the risk of re-offending. *It is therefore essential that programmes are delivered in a timely manner and are completed by the time the person is eligible for parole.* Secondly, even if a programme has been assessed as successful in other jurisdictions, *it is essential to ensure that the assumptions on which it is built are relevant locally, that the process of delivery is appropriate to the particular offender group, and that evaluations of programmes are carried out.*

G. Re-Entry Initiatives

Over recent years, there has also been growing interest in the development of initiatives that ease a person's 're-entry' back into society. This approach is not based on any complex theory but is essentially a matter of common sense. As such, it should be something to which every system can aspire and work. *The three main areas of concern to prisoners on release are generally accommodation, family and employment.* Many prisoners have struggled with one or all of these issues in the past and correctional services should therefore try to address them as best they can (a) before the person is released and (b) after release (perhaps using the opportunities presented by a supervised parole system).

There are a number of possible models but in the Asia Pacific region, Singapore probably provides the most interesting case study. As noted earlier, Singapore has a high imprisonment rate and the country is renowned for being very tough on crime. However, it was recognized that this was having the effect that criminals were 'demonized' and not accepted back into society. The Yellow Ribbon Campaign, combined with more prison-based rehabilitative programmes and a concerted effort to link offenders into work on release have made major inroads. Recidivism rates have dropped and the rate of imprisonment has declined substantially. So much so, that Singapore will not need all of its projected new prison capacity – an enviable position indeed!

MAINTAINING STANDARDS, DECENCY AND HUMAN RIGHTS IN OVERCROWDED TIMES

*Neil Morgan**

I. INTRODUCTION

My first paper identified the general theme of 'doing more with less'. In other words, the demands that are placed on criminal justice agencies rise faster than the allocated resources. Increasing demands come from many quarters including politicians, the media, victims' groups and human rights agencies. The paper then discussed the causes and effects of overcrowding before providing a checklist of legal options to try to reduce the extent of overcrowding. However, overcrowding will undoubtedly remain a problem for many – perhaps most – countries.

The first paper argued that overcrowding creates pressures at three levels. First, it creates *individual* pressures (it impacts on individual prisoners and individual staff). Second, it creates *systemic* pressures (it impacts on the system's capacity to operate and deliver full services). Third, these pressures are *cumulative* (a number of pressures – some relatively small in themselves - will coalesce and build together). The purpose of this second paper is therefore to ask whether and how it is possible, at times of overcrowding, to maintain standards, decency and human rights.

This paper first examines 'internal' management options within correctional departments. It then moves on to discuss the setting of standards for correctional services; the options for service delivery at times of financial constraint (including a brief discussion of privatization); how standards can be monitored (including a case study of the Western Australian Office of the Inspector of Custodial Services); and, finally, the implications of countries ratifying the Optional Protocol to the United Nations Convention against Torture (OPCAT). Although the main focus is on corrections, the points under discussion have relevance across the whole criminal justice system.

II. INTERNAL MANAGEMENT

Internal management strategies within correctional departments should have two components. The first is *good corporate planning by 'head office'*. Key aspects of this include monitoring trends and pressures, strategic planning and direction setting. The second component is clear, firm and fair local (ie prison-based) management strategies to deal with 'on site' issues.

A. Corporate Planning

("If you don't know where you are going, you will never get there")

Corporate planning faces some significant hurdles in the field of corrections because, as we have seen, trends can be both swift and dramatic. For example, in 2002, Singapore was planning to expand the capacity of its new Changi Prison complex from one 'cluster' (for 5,000 prisoners) to four such clusters. On the other side of the coin, countries such as Australia and New Zealand have seen a very rapid increase in prisoner numbers over the past decade, sometimes with 'spikes' appearing very suddenly.

Predicting prisoner numbers is very difficult as the factors are diverse and sometimes unpredictable. It is unlikely than anyone would have predicted the extent of the decline in prisoner numbers in Singapore, and the changes in Australia and New Zealand bear no clear relationship to changes in official crime rates. In part, this is because *many parts of the criminal justice system are subject to changes of government and*

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to quite abrupt changes of policy settings. It is also because *many parts of the system involve discretionary decision making*. For example, prosecutorial discretion and discretionary practices with respect to the enforcement of parole and community-based sentences can have a major impact. Importantly, decisions made in these parts of the system also tend to be less transparent and less open to public scrutiny than decisions made by courts.

Good corporate planning is also hampered by inbuilt time lags. For example, it is not uncommon for new prisons to take at least three years from planning to commissioning. Good modern correctional practice is also that new prisons should be filled gradually to avoid too many teething problems. Thus, a new prison may not be filled for 6-12 months after opening. Thus, the system is usually playing 'catch up' in trying to meet demand.

However, whilst there are some hurdles to effective forward planning, some things rarely change and most systems face systemic ongoing issues. Despite other distractions, good corporate-level planning should therefore include at least the following elements:

- A clear sense of direction, embodied in a simple and effective mission statement;
- Policies and practical measures to tackle known and predictable pressure points (for example, in many countries, unsentenced prisoners, women and over-represented groups);
- Development of contingency plans in the event of a sharp rise in prisoner numbers;
- Examination of service delivery options;
- Positive engagement with NGOs;
- Ensuring that the whole organization is consulted; informed; in line; and feels supported;
- Putting the case about the risks of overcrowding forcefully to government Ministers even if they are reluctant to listen.

B. Local Management

At the local management level, security and safety are critical. However, there are risks if the system slips into a negative, oppressive survival mode. The key elements to sustaining good practice even in overcrowded times are probably as follows:

- Maintain clear lines of management;
- Maintain a focus on positive staff/prisoner relationships;
- Maintain firm and transparent discipline and grievance procedures for prisoners;
- Maintain the delivery of education, programmes, recreation, visits etc.;
- Develop and maintain staff support processes and mechanisms.

III. SETTING STANDARDS

Three questions arise with respect to the idea of setting standards for correctional services. First, *why* set standards? Second, *what level of detail* should be set? Third, and tied to the last question, *how* can appropriate national or local standards be developed?

A. Why Set Standards?

I have already identified a number of ways in which internal management mechanisms (both corporate-level and local-level) can help redress some of the problems caused by overcrowding. However, there are limits to this. Ultimately, a prison will generally have to accept those prisoners who are sent there, even if the prison is already 'full'. And it can be very difficult to put the case to government for more resources simply by using 'internal' management arguments: prisons are expensive, the media and the public have little sympathy for the position of prisoners, and more expenditure on prisons means less expenditure on other public services such as schools and hospitals.

Externally-validated standards, which reflect and build upon international human rights obligations, can therefore provide a useful tool for correctional administrators in (i) setting benchmarks and targets; (ii) assessing performance; and (iii) putting a stronger case for funding to ministers and to treasury/finance departments.

B. Levels of Standards

There is a bewildering array of international documents and standards. They can appear intimidating and off-putting in terms of the number, scope and amount of repetition. The basic framework is as follows:

1. General United Nations Conventions

Several United Nations conventions contain broad statements to the effect that no-one should be subject to 'torture or to cruel, inhuman or degrading treatment or punishment'. The main examples are Article 5 of the UN Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights (ICCPR).

2. Specific United Nations Conventions

Some conventions provide more detail and more specific principles governing the position of people who are deprived of their liberty. These include the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (usually known simply as the 'Convention against Torture' or UNCAT) and the Convention on the Rights of the Child (CROC).

3. UN Standard Minimum Rules

The United Nations has adopted 'Standard Minimum Rules' in a number of areas. They include the Standard Minimum Rules for the Treatment of Prisoners (the first such rules and commonly known just as the UNSMR's) – adopted 30 August 1955; the Standard Minimum Rules for Administration of Juvenile Justice (The Beijing Rules) – adopted 29 November 1985; and the Standard Minimum Rules for Non-Custodial Measures (The 'Tokyo Rules') – adopted 14 December 2000. The various Standard Minimum Rules documents provide a very useful starting point. They are non-binding and may require some local modification, but they create a set of expectations that are largely universal and are very commonly used.

4. Other UN Principles and Rules

Some later UN documents bolster the Minimum Rules. These include the Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment (1988); Basic Principles for the Treatment of Prisoners (1990); and Rules for the Protection of Juveniles Deprived of their Liberty (1990). For most purposes, however, the Standard Minimum Rules will be the most useful starting point.

5. Regional and National Standards

Some parts of the world have adapted and built on the various UNSMR's to develop regional standards (for example, the European Prison Rules) or national standards (for example, the American Correctional Association Standards; the Standard Guidelines for Corrections in Australia (revised in 2004); and, in the United Kingdom, Her Majesty's Prison Inspectorate's lengthy document entitled 'Expectations' (August 2008).

6. Local Standards

In Western Australia, the Office of the Inspector of Custodial Services (OICS) has added further layers in its Code of Inspection Standards for Adult Prisoners and its Standards for Aboriginal Prisoners. There are many reasons for this. The standards have more direct operational relevance and more local flavour. They also ensure that the State's Department of Corrective Services and individual prison superintendents have a focus on external expectations without having to examine what they might see as vague and 'remote' principles scattered across various United Nations documents. The standards are also used in assessing performance through independent inspections. Work is in progress on developing OICS Standards for Juvenile Detainees and then Standards for Women Prisoners.

C. Developing Relevant Standards

1. Key Principles

I suggest that four main principles should underpin the setting of national standards:

- They should *reflect accepted international standards*.
- They should be *locally relevant*.
- They should be *sufficiently detailed*.
- They should *set best practice targets (these will not just reflect current practices or easily achievable goals)*.

2. An Example: Food

One of the most common complaints of prisoners in many countries relates to food. Issues of food provision are complex because some prisoners have dietary *requirements* based on health or religious grounds and others may have dietary *preferences*. In Australia, we also find that most prisoners tend to eat rather unhealthily when they live in the community, and often have a preference for sweet foods such as cakes and soft drinks and for fatty foods such as fried food and fast food. And traditionally, much prison food was itself fatty, sweet, unhealthy and not very palatable.

The question of food for prisoners is far too specific to be part of international human rights covenants or for general domestic human rights legislation. However, it is covered by the Standard Minimum Rules for the Treatment of Prisoners. Rule 20 reads as follows:

"(1) Every prisoner shall be provided by the administration at the usual hours with food of nutritional value adequate for health and strength, of wholesome quality and well-prepared and served.
(2) Drinking water shall be available to every prisoner whenever he needs it."

The Standard Guidelines for Corrections in Australia go further (especially in Guideline 2.13 which refers to special dietary needs). They read as follows:

"Food and Water
2.12 Every prisoner should be provided with continuous access to clean drinking water and with nutritional food adequate for health and well being, at the usual hours prepared in accordance with the relevant health standards.

2.13 Special dietary food should be provided where it is established such food is necessary for medical reasons, on account of a prisoner's religious beliefs, because the prisoner is a vegetarian, or where the prisoner has other reasonable, special needs."

In Western Australia, the OICS standards are considerably more detailed. First, standards 96 to 99 of the Code of Inspection Standards for Adult Prisoners state:

"96. Food should be hygienically prepared and of sufficient quality, quantity and variety to meet prisoners' nutritional needs.

96.1 Menus should be planned to ensure that high quality, nutritional and varied meals are provided. Prisoners should be consulted about food choices and kitchen staff should schedule regular sessions with different prisoner cohort groups to receive comments about prison food.

96.2 Prisoners should be able to choose between food options.

96.3 All prisoners should have continuous access to clean drinking water.

96.4 Particular care and consideration must be given to ensure that prisoners that are required work outside the prison or prisoners in transit have access to adequate supplies of drinking water, using the guideline quantities noted above.

96.5 Menus should consider the availability of fresh produce, climate, prisoner work requirements, and the need for special meals.

96.6 Menus should be developed in consultation with a qualified dietician.

96.7 Food should be procured, stored, prepared, produced and served in accordance with generally accepted professional health and safety standards and in compliance with legislation.

96.8 All persons engaged in food preparation and or handling should be trained in food hygiene matters commensurate with their work activities.

96.9 All persons involved in preparing and serving food wear appropriate protective clothing.

96.10 Custodial staff must supervise the serving of food to prevent tampering with food and other forms of bullying. Particular care must be taken to ensure that food for protection prisoners is not subject to tampering.

96.11 There should be regular formal and informal kitchen inspections.

97. Special dietary food should be provided where it is established such food is necessary for medical reasons, on account of a prisoner's religious beliefs, because the prisoner is a vegetarian, or where the prisoner has other reasonable, special needs.

97.1 Halal and other religious requirements for food procurement, storage, preparation, distribution and serving should be fully observed. This may involve the separate preparation and cooking of certain foods.

97.2 Prisoners requiring special diets such as vegetarian, vegan, religious, cultural and medical diets, should be able to select from a menu which includes sufficient choice.

97.3 Prisoners should be educated about healthy eating and its benefits.

97.4 Prisoners are consulted and can make comment about the quality, quantity and variety of food and have their views taken into account.

97.5 There should be arrangements for food to be available at non-meal times for late arrivals, court returns etc.

98. Prisoner accommodation that involves self-catering must be monitored to ensure appropriate standards of hygiene and nutrition.

98.1 Prisoner self-catering arrangements require the prison to ensure that proper standards are observed for the storage of food, the hygiene of the kitchen, and that prisoners are receiving a balanced diet.

99. The provision of tea, coffee and snacks in any work, study, recreation or accommodation areas must be subject to regular inspection with regard to hygiene and safety.

99.1 Food that has been purchased from the canteen for later consumption must be stored safely and hygienically.

99.2 Healthy snacks should be available as an alternative to confectionery.

99.3 Nutritional information concerning healthy food and lifestyles should be made available to prisoners."

Standard 18 of the OICS Standards for Aboriginal Prisoners also makes reference to food:

"18. Food and dietary arrangements should take account of the particular health needs and preferences of the prisoner population and appropriate provision should be made for the availability of traditional food and bush tucker.

18.1 A range of menu options for traditional foods should be provided that recognises the diversity within the Aboriginal prisoner population and that meets the requisite health and dietary requirements.

18.2 Simply providing a traditional meat such as kangaroo once a week is not sufficient without considering traditional vegetables, nuts and fruits. It is acknowledged that these are not as readily available as European style foods but this should not prevent the identification of sources of supply. In this regard, community groups should be approached for assistance in securing regular supplies of traditional foods.

18.3 Traditional ways of preparing and cooking traditional foods may not meet strict institutional health regulations, and in prisons with a predominantly Aboriginal population it will be necessary to ensure that health standards are met while at the same time producing food that is acceptable and appetising to Aboriginal prisoners.

18.4 Healthy diet promotions need to be implemented on an ongoing basis for all prisoners. These should engage Aboriginal prisoners through tastings and cook-ins rather than relying upon standard classroom approaches to learning."

Some may feel that the OICS standards are too detailed. However, they do illustrate they way in which locally relevant issues (such as education on nutrition; support for prisons in providing healthy food even in the face of prisoner complaints; and the special needs of particular groups) can be enveloped in local or national standards and how specific examples can be given to support the general principle. The existence of these detailed standards also provides OICS with a checklist when we conduct our inspections and can provide the Department of Corrective Services with support in seeking appropriate funding to maintain or improve standards in overcrowded times.

IV. SERVICE DELIVERY OPTIONS

A. Privatization: Issues, Criticisms and Evidence

Discussion of standards and resource constraints leads inevitably to the vexed question of privatization. This is not the place for a detailed discussion of the various forms of privatization that can occur or for the intricacies of such processes. However, it is necessary to make some general observations.

First, let me state my personal position. Intuitively, the idea of 'privatizing' parts of the criminal justice system seems wrong because prisoners and suspects are detained by the state. On the other hand, I am above all an advocate for better standards (if possible at a reduced cost). Furthermore, it needs to be recognized that NGO's have always played a role in the justice system and there have often been elements of 'outsourcing' of services.

There are many critics of prison privatization. Their criticisms tend to involve two main types of argument. The first is that the criminal justice system is a state responsibility and that privatization involves an abdication of that responsibility. However, critics tend to over-state their case. The critical point is that the *state retains the ultimate duty of care*. In privatizing services, it is 'contracting *in*' a service; it is *not* contracting *out* of its ultimate responsibility. Bad privatization models have failed to recognize this properly. Good privatization models have clearly embedded the principle: for example, they ensure that the highest level security and control duties remain with the public sector and do not allow the private sector to decide whether a person is released or to extend a prisoner's stay for disciplinary reasons.

The second main criticism relates to service delivery: it is said to be wrong for the private sector to profit from punishment and that service delivery will suffer when profit is the motive. However, the worldwide evidence is that the private sector, like the government sector, is capable of running very good prisons, alarmingly bad prisons and everything in between. What seems to matter most is the way in which privatization is done, not the fact of privatization itself.

B. Keys to Success

In summary, the evidence is that privatization can work but can also fail. So what are the keys to success? Although there can be no guarantees, the four key factors are as follows:

- Manage the initial process properly (evaluate the bids carefully and decide on the basis of value for money and capacity to deliver the service, not the cheapest bid);
- Set clear contractual requirements for performance and include penalties for failures (such as outbreaks of disorder) or under-performance (such as failing to provide adequate access to education or treatment programmes);
- Monitor the contractor's performance and enforce the contract;
- Re-tender if not satisfied.

In terms of standards, it should also be noted that in most places, privatization has driven a sharper focus on standards because it has been necessary to include these as part of the contract for services. The system-wide side-effect is that the public sector should then be expected to meet the same standards as the private sector.

In terms of *costs*, care must be taken when comparing the public and private sectors. The full costs of the private sector include not only the fee that is paid under the contract but also the additional costs that are covered by the public sector (such as contract monitoring and high level security operations). However, in both Australia and the United Kingdom, there is evidence that (i) many privately operated prisons are performing better than public sector prisons; and (ii) the total costs of the private sector are lower.

C. Example

An example of good practice from Western Australia is Acacia Prison which was commissioned in 2001. Great care was taken in developing the specifications for the new prison and in the selection of the contractor, who was responsible for designing and constructing the prison and then had a contract for its management for five years up until 2006 (a DCM – design, construct and manage arrangement). The State always had the option to take the prison over if things went badly wrong (as was the case with one prison in Victoria).

In the period from 2001 to 2005 there were no serious incidents but in other ways (such as education, programme delivery and staffing issues), the prison was not meeting full expectations. In simple terms it was generally 'doing OK' but no more, and there were some points of weakness. It was comparable to many of the other prisons in the State.

In 2005, the contract for prison services was re-tendered. The original contractor put in a competitive bid but, in the end, a different contractor was selected, and took over in May 2006. Acacia is now the best-performing male prison in the state, based on a number of indices. In total its costs are around 60%-65% of the costs of public sector prisons. In making these comparisons, some allowance must be made for the fact that Acacia prison is the state's largest prison (so there are economies of scale) as well as its newest prison (so it has the advantage off modern buildings). Nevertheless, the savings are significant.

It is also worth noting that the contractors (Serco) have proved to be cautious in accepting more prisoners into Acacia. Even though more prisoners would mean a higher fee, Serco has requested more infrastructure funding from the government and does not want to jeopardize its commercial reputation.

The keys to success were those identified earlier – a rigorous process for selection of the contractor; a clear set of contractual obligations; a robust monitoring system; and exercising the option of re-tendering. The monitoring system has two components –'internal' monitoring by the Department of Corrective Services and independent, external monitoring by the Inspector of Custodial Services. Both play a critical role and there is no doubt that a robust external system helps to ensure standards, accountability and transparency.

V. MONITORING STANDARDS: WESTERN AUSTRALIA'S INSPECTOR OF CUSTODIAL SERVICES

A. Background

The Office of the Inspector of Custodial Services (OICS) was established in 2000 in light of decision to privatize a new prison (Acacia). The view was taken that if prison services were to be privatized, it was essential to ensure public accountability and transparency.[2] The governing legislation is now the Inspector of Custodial Services Act 2003 (WA).

The Inspector is an Officer of the State Parliament appointed by the Governor. This *functional independence* means that the Inspector is not located within the Department of Corrective Services (DCS) and does not work under the direction of a Minister. However, there are protocols to govern these relationships.

Since the Inspector is an officer of the Parliament, his reports are tabled in Parliament and published on his website (www.custodialinspector.wa.gov.au). There is not yet an equivalent office elsewhere in Australia; other jurisdictions have mechanisms that are internal to the Department or Ministry and little is ever made public by way of reports or criticisms.

B. Jurisdiction and Powers

Although the trigger for establishing OICS was the new privately operated prison, it has jurisdiction over all prisons and a range of other custodial services. In total, it covers prisons (13); work camps (7); juvenile detention centres (2); court custody centres (17); custodial transport (for example, prison to court and inter-prison transfers); and any cases involving suspected terrorist detainees (wherever they are held). Currently, OICS therefore has no jurisdiction with respect to psychiatric facilities, immigration detention centres, police detention facilities (except as an adjunct to transport) or community corrections.

In line with what has already been said, the OICS mission is to "provide an independent, expert and fair inspection service so as to give Parliament and the community up-to-date reports and advice about custodial facilities and services". The focus is on systemic issues, not individual complaints (which are for

[2] It should also be noted that, in the interests of transparency, the contract itself is publicly available (see http://www.correctiveservices.wa.gov.au/A/acacia_security_management_contract.aspx). In most places, this is not done for 'commercial confidence' reasons. However, it is, in my view, an important part of a good privatisation process.

the Department of Corrective Service and the Ombudsman to resolve). However, individual complaints may well point to systemic issues, so mechanisms are in place to track this.

The Inspector *must* inspect every prison, detention centre and court custody centre at least once every three years. He *may* inspect at any time a 'custodial service' and any 'administrative arrangements' in relation to such services (includes prisoner transport).

The statutory powers of the Inspector and his staff are very extensive. Importantly, they include:
(i) The power to conduct unannounced inspections (this power is not commonly used but is critical);
(ii) The right of unfettered access to all places at all times;
(iii) It is an offence to hinder the Inspector or staff in any way (e.g. by not providing information when requested);
(iv) Criminal penalties also apply to anyone who victimizes another engaging with OICS;
(v) The right to publish findings and recommendations.

C. Reports and Other Publications

OICS has now published 60 detailed Inspection Reports (for good examples of topics discussed in this paper, see Reports 19 and 53 on Acacia Prison at www.custodialinspector.wa.gov.au under "reports and reviews"). In addition, the Office has published 'thematic reviews' on a number of matters, including a series of suicides at one of the State's prisons (2004); a review of vulnerable and predatory prisoners (2003); a review of prisoner transport (2007) and a review of health services (2008). These reports all have potential value well beyond the borders of the State

D. Ongoing Monitoring

In addition to conducting its inspections, OICS keeps a close eye on places under its jurisdiction through:

- Tracking incident reports and other intelligence from prisons;
- Regular contact with prison superintendents and others;
- Regular liaison visits by allocated OICS liaison officers (usually at least four visits per annum to every prison and detention centre);
- Managing the Independent Visitors Scheme (IVS). Around 34 community volunteers are appointed to observe and report on the treatment and conditions of detainees and staff. More than 100 reports are received each year from this source;
- The OICS Community Reference Group, which includes all key NGOs.

E. Inspection Methodology

The methodology for announced inspections (the usual practice) aims to embrace a number of different sources of information so that our findings, criticisms and recommendations are validated and well-founded. The basic methodology is as follows:

- Surveys of staff and prisoners three months before the inspection period;
- Desk-top analysis of these results;
- Briefings from the Department on any matters we request;
- Discussions with service providers and others;
- Panel discussions;
- On-site inspections (including inspections of physical infrastructure, security and group discussions with staff and prisoners). Usually this takes one week with four to eight staff but, at times, we have taken two weeks;
- The Inspector provides an 'Exit Debrief' at the end of the inspection period in which the main issues and suggestions are provided;
- The report is then written and sent to the Department of Corrective Services for comment. The Department is asked specifically to respond to any recommendations in the Report, by stating whether it accepts those recommendations or not;
- After comments are received from the Department, the Report is then finalized. Due to the various procedural requirements, there is usually a period of 6 to 9 months from the time of the on-site inspection and the publication of the final report.

When *unannounced* inspections are conducted, the first few elements of this methodology are obviously not followed. Throughout its work, as noted earlier, OICS makes extensive use of its various Standards.

VI. IMPLICATIONS OF THE OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE (OPCAT)[2]

I have provided some detail about the operations of the Office of the Inspector of Custodial Services not only because it provides an interesting example of external scrutiny but also because its structure, powers and processes are a model for what should be developed in all those countries who decide to implement the Optional Protocol to the United Nations Convention against Torture (OPCAT).

A. Parties to OPCAT

As with all such instruments, the first stage is for a country that is already a signatory to the UN Convention against Torture to *sign* the Optional Protocol. However, signing OPCAT does not create binding obligations: it is, in essence, a statement of principle and a sign of good faith and an intention to ratify at a later date. *Ratification* imposes a number of obligations.

The number of countries signing and ratifying OPCAT is increasing significantly. The current situation is as follows:

1. Ratifications (47 'States Parties')

Albania, Argentina, Armenia, Azerbaijan, Benin, Bolivia, Bosnia and Herzegovina, Brazil, Cambodia, Chile, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Former Yugoslav Republic of Macedonia. France, Georgia, Germany, Guatemala, Honduras, Kazakhstan, Kyrgyzstan, Lebanon, Liberia, Liechtenstein, Maldives, Mali, Malta, Mauritania, Mauritius, Mexico, Moldova, Montenegro, New Zealand, Nicaragua, Paraguay, Peru, Poland, Senegal, Serbia, Slovenia, Spain, Sweden, Ukraine, United Kingdom, Uruguay.

2. Signatories (25)

Australia, Austria, Belgium, Burkina Faso, Republic of the Congo, Ecuador, Finland, Gabon, Ghana, Guinea, Iceland, Ireland, Italy, Luxembourg, Madagascar, Netherlands, Norway, Portugal, Romania, Sierra Leone, South Africa, Switzerland, Timor-Leste, Togo, Turkey.

B. Relevance of OPCAT

In essence, OPCAT gives 'teeth' to the United Nations Convention against Torture. The relevance of this may not be immediately obvious because many countries would say *"We don't torture people"*. However, the critical point is that OPCAT goes much further than 'torture' in the sense of doing unspeakable things to people to extract confessions or evidence. OPCAT outlaws *any form of cruel, inhuman or degrading treatment* and extends to *all places where people are deprived of their liberty*:

In most countries, the 'Big 5' places where people are deprived of their liberty are probably prisons, juvenile detention facilities, immigration detention centres, police detention facilities and locked psychiatric wards. Other places covered by OPCAT include court security, prisoner transport, locked aged care facilities, airport holding areas, places run by national security services and locked facilities for wards of the state.

C. Requirements of States Parties

OPCAT imposes two main requirements on parties who have ratified. First, there is an *international dimension*: with effect from the date of ratification, all States Parties must allow inspections of all places of detention by the United Nations Subcommittee on Prevention of Torture (the SPT) which has been established under OPCAT.

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[2] See website of the Association for the Prevention of Torture (APT) – www.apt.ch and R Harding and N Morgan, *Implementing the Optional Protocol to the Convention Against Torture: Options for Australia* (2008) –www.hreoc.gov.au/human_rights/publications

Secondly, there is a *national dimension*. Within 12 months of ratification (or later if the country makes a 'reservation' to that effect), States parties must develop 'national preventive mechanisms' (NPM's) to prevent torture and cruel, inhuman or degrading treatment.

It should be noted that for political and resourcing reasons, the direct involvement of the SPT in any given country is likely to be sporadic and ad hoc. In practical terms, therefore, it is the NPM's within the country that will have the greater importance.

The precise NPM structures that are adopted in each country will differ and the position in federal systems such as Australia is particularly complex.[2] However, it is important to emphasize that the NPMs must have functional independence and professional expertise (Article 18); broad powers of inspection including the rights to enter and inspect places of detention and the right to access information without hindrance (Article 20); and that people who communicate with the NPM must be protected (Art 21).

It can be seen that the Office of the Inspector of Custodial Services meets all of the requirements of NPMs under OPCAT. Indeed, it is one of very few (perhaps the only) fully OPCAT-compliant mechanisms currently operating in Australia. For this reason, the Inspector of Custodial Services Act (WA) and OICS practices should, in my view, provide a national template for the development of legislation to establish Australia's NPMs. OICS legislation, practice and experience may be useful to other countries too, as they move towards full OPCAT implementation.

VII. CONCLUSION

Unfortunately, abuses can, and do, occur in some places of detention. Recent history has revealed that some appalling examples of abuse and lower level abuse will also occur. Sometimes the abuse is deliberate (and may satisfy traditional definitions of 'torture'). But more often, it is the result of neglect, indifference or a lack of focus on proper standards. At times of overcrowding and limited resources, it can be especially difficult to meet existing standards, and even more difficult to move towards higher standards. 'Internal' mechanisms to address such issues may have limited impact unless bolstered by external expectations.

For these reasons, I believe that there are many benefits in using existing United Nations standards as a starting point in the development of more detailed national standards. It is also a good idea to keep an open mind about service delivery options. Although privatization must be approached cautiously, and will certainly not work for everyone, there is evidence that in some places, it has offered real benefits in terms of costs, standards of service and 'competition' for the public sector.

Whatever processes are adopted, it is absolutely critical to ensure that there are effective monitoring mechanisms. Some of these will be internal, but external processes are also fundamentally important. The benefits of external scrutiny, as recognized by delegates to the 2008 Asia and Pacific Conference of Correctional Administrators in Malaysia, include improved standards; greater accountability and transparency (and therefore greater public confidence); improved processes; and better capacity to put the case for funding to governments.[3]

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[2] See R Harding and N Morgan, *Implementing the Optional Protocol to the Convention Against Torture: Options for Australia* (2008) – www.hreoc.gov.au/human_rights/publications

[3] N. Morgan and I. Morgan, *Report of the 28th Asian and Pacific Conference of Correctional Administrators*, available soon at www.apcca.org. See the reports on Agenda Item Two and Specialist Workshop 1.

PARTICIPANTS' PAPERS

CURRENT LEGAL REGIME OF IMPRISONMENT IN BRAZIL AND EFFECTIVE COUNTERMEASURES AGAINST OVERCROWDING OF CORRECTIONAL FACILITIES

*Marialda Lima Justino da Cruz**

I. INTRODUCTION

There are many instruments of human rights which establish standards of treatment for those deprived of their liberty, such as the Universal Declaration of the Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.

Brazil is a signatory to further international agreements that refer specifically to prisoners and their imprisonment conditions.

In 1955, the First United Nations Congress on the Prevention of Crime and Treatment of Offenders was held in Geneva and it adopted the Minimum Rules for the Treatment of Prisoners, which influenced penal treatment in many United Nations member states.

In 1995, in Brazil, the Minimum Rules for the Treatment of Prisoners were elaborated, which have the purpose of fulfilling the Resolutions of the General Assembly of the United Nations in 1971 and 1974 and the other orientations that followed. It is good to emphasize that it was during the Fourth United Nations Congress on the Prevention of Crime and Treatment of Offenders, in the Japanese city of Kyoto, in 1970, that the world woke up to the importance of practicing many principles that would limit State actions in punishing the offender, as well as the relationship of the inmate toward the public prosecutor, in consonance with what is provided in the Constitution and laws of each country.

The set of principles and rules established in the documents mentioned above is not an outline of a standard correctional facility, but, having in mind the objective of reintegrating the inmate, it establishes the minimum necessary procedures for good penitentiary administration, based on the Universal Declaration of Human Rights.

Thus, the present work intends to show how the practices have been implemented in Brazil, with the intention of giving the inmate decent and humanitarian treatment, in order to avoid recidivism and reduce overcrowding of correctional facilities.

Moreover, some juridical institutes provided for in Brazilian legislation will be outlined in this paper, either constitutional or infra-constitutional, which affect how many offenders receive and can complete alternative penalties.

It is right that the construction and improvement of practices that seek the successful re-socialization of the Brazilian penitentiary system are based on official documents, and that obviously, success depends only on their good application.

II. CURRENT LEGAL REGIME OF IMPRISONMENT IN BRAZIL

A. Aspects

When the penitentiary system is mentioned, the image of a precarious and appalling structure of overloaded cells, imprisoned inmates without even minimum sanitary conditions, bad food and exposure to all kinds of disease comes to mind.

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Despite this not being the rule, there is no doubt that the Brazilian penitentiary system requires dramatic improvement, bearing in mind that the overcrowding of correctional facilities is a serious problem to address, so as not just to create conditions for the inmate to be effectively recovered, but to fulfill the law which assures humanitarian treatment, the right to health, the right to learn a profession, legal aid and much more.

Unfortunately, in some situations, correctional facilities, due to overloading and lack of programmes effective for the rehabilitation of the convict, become "schools of crime" in which an inmate can "improve" and develop a personality, that was, in a certain way, already turned to crime, so that he or she commits more serious and violent crimes upon release.

Thus, in the actual system, if drastic measures are not taken, the State will combat the problem of rehabilitating prisoners only in a deceitful way, because it will give society a false impression: that the problem was eliminated, that the offender who violated the law has been punished, imprisoned and that "justice was done".

However, the same criminal, in the case where there is no State effort to promote his or her recovery and rehabilitation, some time afterwards, will be released and will return to the society even more violent and without moral and social values.

The question of the problems concerning the penitentiary system deserves being combated by the means of public politics and strict application of the Law Nº 7,210/84, which is known as the National Prison Law, or the Law of Penalty Execution, which concerns disposition of the sentence or judicial decision and establishes the conditions for the social integration of the convict.

Despite being old, the National Penal Law (Law of Penalty Execution) is a modern law because it gives guarantees to the inmate, like worthy treatment, the right to health, minimum sanitary conditions, to learn a job, all things to assure his or her social reinsertion. Making the law effective is difficult, because often overcrowding prevents the implementation of the measures assured to prisoners.

In 2006, The National Penitentiary Department – DEPEN,[1] linked to the Ministry of Justice, was reformed, and on that occasion the Federal Correctional Facility System was created: its exclusive function is to manage and control the Federal Correctional Facilities, according to the determination of the Law of Penalty Execution.

The staff of correctional facilities are public servants who were admitted to the public service by a public examination and who are trained specifically to deal directly with inmates.

All correctional facilities in Brazil are public; however, discussion of private ownership of correctional facilities is common. Would it be the solution to all problems?

Some people are in favour. They believe that those who are imprisoned should compensate society for their crimes, but, in the end, if is the society itself that bears all the expenses. In Brazil, there is not work for all the inmates in the penitentiary system, so, if the administration of the correctional facilities could become private, and was taken out of the obligation of the State, inmates would form "potential workers", because all the inmates could work and all would leave the prison ready to be reintegrated into society.

On the other hand, some people are against this proposal. The Brazilian Constitution provides that correctional facilities must be administrated by the State, so some people think that making the administration private would be an unconstitutional measure, that something pertinent to the State itself cannot be delegated to the private sector.

Other options are that the State administrates the correctional facilities but it can give other attributions, such as the supplying of food, clothes, legal aid, medical care, etc. to third parties. The delegation of some

[1] National Penitentiary Department – DEPEN, an organ linked to the Ministry of Justice, whose competence is, among other attributions, to plan and co-ordinate the national politic penitentiary.

activities could be implemented without violating the Federal Constitution, and one of the main forms to make this happen is Public Private Partnership.

B. Statistics: the Number of Imprisoned Inmates in Brazil

Brazil has 183,987,291[2] inhabitants and, according to official data in the statistical report produced by the National Penitentiary Department, the jail population in Brazil in July 2008 was 439,737[3] inmates, and about 7% of this total was female.

There are 1,716 correctional facilities in Brazil, with a total capacity of 277,847. In other words, there are 161,890 more prisoners than spaces, according to the National Penitentiary Department.

It is important to emphasize that the situation here mentioned would be worse if one considers the quantity of warrants of arrest that are waiting to be fulfilled all over the country, as will be demonstrated below.

It is possible to make an outline of the offenders in correctional facilities nowadays in Brazil, considering socio-economic aspects like level of education, race, colour, age and income. Most of them are young men, mulatto or black, with a low level of education, coming from the lower socio-economic class, who work in industries or job that do not demand a qualification and which are low-paid.

This outline changes again considering the offenders who fulfill alternatives measures that originate from proceedings in the Special Criminal Court, where there is the possibility of receiving a Conditional Suspension of the Process.

III. MEASURES APPLIED BEFORE CONVICTION THAT AFFECT THE IMPRISONMENT SYSTEM

A. Caution Arrest

In Brazil, it is a rule that the suspect is free during the accusatory procedure. But this does not prevent a suspect's freedom from being taken away before a criminal conviction is rendered.

The Brazilian Federal Constitution foresees three kinds of caution arrests.

- Redhanded Arrest (*Flagrante Delicto*) – it occurs when the author was arrested committing or immediately after committing the crime;
- Temporary Arrest – ordered by a judge to ensure the investigations by the judicial police. There is a period of five to thirty days depending on how serious the offence;
- Preventive Arrest – ordered by a judge to ensure the criminal prosecution, public order and the fulfillment of the punishment.

All the decisions taken to proclaim caution arrest (or temporary arrest) must be based on minimum evidence of authorship and materiality.

There can be no arrest without a warrant or unless the offender is caught red-handed. Arrests without one of those two bases were abolished by the Federal Constitution of 1988.[4]

The number of temporary arrests in Brazil is very high and after many studies of this topic, there is a conclusion that in Brazil, a fact that contributes to the excessive quantity of confined prisoners is the caution arrest, in other words, imprisonment even before the perpetrator of the crime has been convicted and sentenced, but which is implemented to guarantee the continuity of the investigations and/or to make sure that

[2] Source: Counting the Population 2007 (Census), published by the Brazilian Institute of Geography and Statistic IBGE (public foundation linked to the Ministry of Planning, Budget and Management, which is the country's main provider of data and information).

[3] Source: http://www.mj.gov.br/data/Pages/MJ8F939E3DITEMID1252A3A4A59E44448925C8872CF1946BPTBRIE.htm

[4] Art. 5º, LXI, of the Federal Constitution: "No one shall be arrested unless in flagrante delicto or by a written and justified order of a competent judicial authority, save in the cases of military transgression or specific military crime, as defined in law".

punishment is effected.

According to the Ministry of Justice, there are about 130,000 temporary prisoners, who have not been definitively condemned. This number caused concern to the National Justice Council (CNJ,[5]) which determined in the first half of 2008 the achievement of a judicial community effort all over Brazil, which resulted in the release of 1,000 inmates who were confined beyond the allowed period of time following a caution arrest.

The CNJ estimates that this number could be even bigger as the community effort work mentioned above was carried out only in some States of Brazil and according to information spread by the National Penitentiary Department, about 96% of prisoners in Brazil are extremely poor and, due to their poverty, do not have good quality legal aid.

Aiming to reduce such problems, The National Justice Council approved a Government Edict that has the objective a preventing undue detention and imposes an obligation for judges to give information to their respective offices of the Department of Internal Affairs of the situation of temporary imprisonment.

In this way, due to the Edict here referred, judges will have control of cases which have been delayed for more than three months whose offenders are under caution arrest and judicial action will certainly be more effective.

According to the National Justice Council, in some Brazilian States more than 70% of the jail population is composed of temporary prisoners, in other words, prisoners who are being charged by the State and are awaiting trial; however, a significant number of those would be reduced with the measures adopted by the Council.

B. Bail

As mentioned earlier, the freedom of a suspect is a rule and, for that, the Law guarantees freedom during the police inquest or the trial until the rendition of the criminal judgment. The authorities in charge of giving the concession of this benefit are the judge and the police chief.

The decision to apply bail is more common in the civil police sphere, because judges grant bail without payment when the suspect meets the requirements for "Provisional Freedom".

The Brazilian Federal Constitution provides some crimes that are non-bailable, such as the practice of torture, traffic of drugs, terrorism and crimes defined as heinous crimes. So, excepting these crimes, the judge can grant bail to an offender.

Bail is not frequently used in Brazil because we have another measure called Provisional Release which is more often applied by judges, because it is a constitutional guarantee. Besides, people who commit crimes in Brazil are mostly very poor, and, for this reason, judges prefer to grant them Provisional Release instead of fixing bail.

C. Provisional Release

The Brazilian Constitution disposes that the provisional release from imprisonment, when possible, will be given by the judge.[6]

The expression "provisional" rests on the fact that with or without bail (which is a guarantee), some conditions are imposed on the offender, such as he or she must be present in all hearings; in case those conditions are not observed, the provisional release will be revoked. This kind of freedom is called "provisional" because it is pending the result of the criminal trial.

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[5] National Justice Council – CNJ, installed 14 June 2005, organ of the Judiciary Power with action in all the National Territory, whose competence, among others, is the control of the administrative and financial actions of the Judiciary Power, the fulfilling of the functional obligation of the Judges, and, to propose projects of management of many branches of the Judiciary Power. Source: http://www.cnj.jus.br/

[6] Art 5º, LXVI, of the Federal Constitution: "No one shall be taken to prison or held therein, when the Law admits release on own recognizance, subject or not to bail".

The offender who deserves the benefit of Provisional Release is one who does not represent a danger to society, did not commit serious crimes and is not a recidivist.

The institution of Provisional Release is frequently used in Brazil, and many inmates receive this benefit daily all over the country. It contributes to diminishing overcrowding in the correctional facilities. Bail became unusual after the passing of this law.

This is a fundamental right and not something that the judge can give randomly.

D. Conditional Suspension of the Process (Law Nº 9,099/95 - Art 89)

Law Nº 9,099/95, known as the Law of Special Civil and Criminal Court, in its Article Nº 89, provides for the Conditional Suspension of the Process; this was a turning point in the history of Brazilian criminal proceedings.

Some amendments have been made to this Law, but according to it, the perpetrator of an offence for which punishment does not exceed two years can accept that the process can be suspended for a period of between two and four years, if during this period, he or she will obey some conditions imposed by the judge.

There is neither interrogation nor collecting of proof. At the end of the established period, in case none of the conditions were broken, the punishment could be finished and the latest conviction will not be recorded.

With this measure the number of procedures diminish because justice personnel dedicate more time to serious crimes and petty offenders do not come into the penitentiary system.

Conditional Suspension of the Process is frequently used in Brazil because our legislation enumerates many petty offences with punishment of less than two years.

During this period, no one monitors the perpetrator, because of lack of staff. So the offenders must live a straight life and avoid trouble.

IV. PENALTIES AND ALTERNATIVE MEASURES TO IMPRISONMENT AFTER CONVICTION

Considering the increasing mobilization and worries of society about violence and criminality, the Brazilian Government is forced to present structured and effective solutions to prevent crime.

There is no doubt about the importance of the correctional facility system in this regard, since violent actions result in punishment that must be fulfilled and, at the moment of the application of the law, the State has the opportunity to interrupt this cycle of violence, avoiding heaping convicts inside correctional facilities, and instead investing in alternatives to fight crime and do something that can stop recidivism and minimize the overcrowding problem in prisons.

Penalties and alternative measures are an option of reprimand to criminals, without putting them in prison. According to specialists, the implementation of alternative penalties can reduce overcrowing of correctional facilities, besides encouraging the rehabilitation of the inmate.

On 13 February 2009, the National Penitentiary Department published[7] data showing that in July 2008 there were 13.415% (498,729) more offenders fulfilling punishment and alternative measures than were imprisoned (439,737). It means that alternative punishments nowadays represent another penitentiary system, directed to a specific group of people different from those that need to be kept confined.

Moreover, it is necessary that the administration of the correctional system recognizes the importance of alternative measures and gives attention to the penal control of its fulfillment, because they are short term measures that could bring great stability to the correctional facility system, reducing the prison population and stoping the cycle of violence, preventing petty offenders from mixing with more dangerous criminals.

[7] Source: http://www.mj.gov.br/data/Pages/MJ8F939E3DITEMID1252A3A4A59E44448925C8872CF1946BPTBRIE.htm

A. Concepts and Classifications

The Brazilian Penal System foresees, basically, two kinds of reprimand. They are the deprivation of liberty and the imposition of alternative penalties. There is also the fine, which can be combined with either reprimand.

The first reprimand involves restricting the offender's liberty by placing him or her in a correctional facility, where, depending on the regime (open, semi-open or closed), he or she can be confined. It can occur when an offender commits crimes considered highly offensive and has been sentenced to a punishment of between four and thirty years of confinement.

Under an alternative penalty the offender will have imprisonment changed for an other purnishment that does not restrain his or her freedom, such as rendering social service.

Crimes punishable with two to four years of prison, and for which the offender is not a risk to society, may be subjenct to alternative penalties. Among those crimes are: the use of narcotics, traffic accidents, slight physical harm, simple robbery, slander or defamation, domestic violence, etc.

Alternative penalties include:

- Rendering of Social Service – the offender is ordered to carry out activities, according to his or her aptitude, in social assistance organs, hospitals, schools, orphanages and other public establishments;
- Temporary rights interdiction – consist of prohibitions given to the convict, for the same period of the deprivation of liberty, of being deprived of carrying out public activities or elective mandate; any profession that needs specific abilities; driver's licence suspension, and the prohibition of going to certain places, etc.;
- Limitation for the weekend – during the substitution for the deprivation of liberty penalty, the convict is under an obligation to remain at the Shelter House or a similar place, on Saturdays and Sundays for a period of five hours, where he or she will participate in courses and educational talks.

Doubtless, the greatest difficulty in the effective application of the alternative punishments is the lack of human resources to control and to monitor people submitted to this kind of measure; for that reason, in 2002, the National Center for Supporting and Attendance to Alternative Penalties, linked to the Ministry of Justice, published the Manual Advising for the Penalties and Alternative Measures, which was handed out to all Brazilian States and contains the procedures to be adopted for the effective evaluation, referral and monitoring of convicts who are fulfilling alternative penalties.

The importance of this monitoring is mainly to give society the assurance that the offender effectively fulfilled the penalty that was imposed on him or her.

In Brazil, this monitoring is also done by means of reports sent by organs where the punishment and alternative measures are fulfilled, and eventually, with the visit of technical teams.

There is an interesting and innovative option of monitoring. It involves gathering inmates for meetings, having the objective of evaluating the fulfillment and discussion of subjects connected to the punishment, such as reintegration of the convict into society, reduction of recidivism, etc., as well as the inclusion of those groups in social programmes and guiding them to public services.

B. Fine

Fining is provided for in Brazilian legislation and consists of the patrimonial reduction of the convict to be reverted to the Correctional Facility Fund. It is a punishment with the intention of compensating society, and is a considerable way to inhibit the undertaking of new crimes.

Those who defend the application of the law emphasize its advantages, such as efficient greed punishment, that sometimes is the motivation for crimes, and, its application as a substitute for the deprivation of liberty, avoiding sending the convict to prison, which is sometimes considered an authentic school of teaching and development for offending.

The fine must be calculated by the judge according to the financial situation of the inmate and his culpability.

C. Conditional Suspension of the Punishment – Probation

The Brazilian Penal Code establishes in its Article 77[8] the possibility of the Conditional Suspension of the punishment.

When probation is applied, the judge does not determine the execution of the penalty imposed on the sentence: he or she gives the conditional suspension of the punishment, in other words, the convict will not begin the fulfillment of the punishment, but will be on conditional release, for a period called probation, that varies from two to four years.

There are many rules and particularities that must be observed during the concession of the probation and its term which, in case of default, will lead to revocation. Probation proves its efficiency when the purpose is to avoid prison overcrowding.

V. CORRECTIONAL FACILITIES AND THE MEASURES USED TO REDUCE PRISON OVERCROWDING AND RECIDIVISM

A. Parole, Remission of the Punishment by Working, Amnesty, Grace and Pardon

1. Parole

If the criminal is sentenced to a punishment longer than two years, after fulfilling more than a third of the sentence and meeting some requirements, such as good behaviour, for example, the convict can be released on parole for the remainder of the sentence. At the end of this period, if there is no reason for abrogation, the sentence is considered fulfilled.

The difference in probation consists of the fact that, in it, the inmate does not initiate the fulfillment of the sentence, as happens on parole.

If the inmate is a re-offender of a felony, he or she must fulfill more than half of the punishment to have the right to parole.

If the inmate was convicted of a heinous crime, the practice of torture, illicit traffic of narcotics, or terrorism, he or she must have fulfilled more than two thirds of the sentence.

During the period of parole, offenders are monitored by an organ called the Penitentiary Council. The prisoner must attend the Council monthly, where his or her monitoring portfolio is stamped.

We do not have electronic monitoring in Brazil.

2. Remission of Punishment through Work

Article 126, §1º of the Law of Penalty Execution provides the possibility of the remission of the punishment by work, and establishes that one day of punishment will correspond to three days worked, observing that the work journey cannot be under six hours or up eight hours daily, for the benefit to be allowed.

Work at the weekends is not allowed because, besides the rest insured by Law on Saturdays and Sundays, the number of public servants is reduced on the weekends and, consequently the surveillance becomes vulnerable.

Generally speaking, work inside the prison is not available to all inmates but only to those who merit this benefit. This philosophy maintains the organization of the prison, considering that those who work try their best in order not to lose the benefit and those who are not working yet can see that in fact work reduces the time spent in prison, and they endeavour to demonstrate that they also deserve this advantage.

[8] Art 77: "The execution of the freedom restraint punishment, not superior to 2(two) years, could be suspend, from 2 (two) to 4 (four) years…".

Re-socialization is one of the goals to be achieved by the prison system and, consequently, the reintegration into society is linked with the work that dignifies the man. Offering a work opportunity to the inmate, besides the habit of a disciplined daily activity, is also a contribution for him or her to form professional persona that will be helpful when he or she leaves the prison.

Therefore the remission of the punishment by work represents a simple way of encouraging the process of re-education, a fair prize for the imprisoned worker, that promotes the idea that work is really worthy.

3. Amnesty

In Brazilian Law, "amnesty" means the expunging of one or more political crimes committed by a group of people, extinguishing the effects of the penalty.

Amnesty in Brazil can be given only by the National Congress, in a form of a Law; according to constitutional foresight and they are generally applied to political crimes in order to extinguish the committed political crime. It is an eminently political measure (it is not granted by the judiciary); it has a wide and collective character, it is irrevocable and irrefutable, and it has immediate efficacy.

Law 6,683 of 28 August 1979, granted political amnesty for all who, between the period of 2 September 1961 and 15 August 1979, period of military dictatorship in Brazil, committed political crimes or crimes with political motivation. Those who were convicted of the crimes of terrorism, assault, kidnapping and personal attack were excluded of the benefit of amnesty.

According to the Ministry of Justice, this Law benefitted 29,000 Brazilians including inmates repealed, banished, exiled or simply dismissed from their work. About 12,000 of those received economic compensation for proven damages.

4. Grace and Pardon

This is another way for the State to show mercy the offender, as both are granted by the President of the Republic. Grace is individual and pardon is corporate. Generally grace must be requested, but pardon is granted spontaneously. Both extinguish the punishment, but the crime is kept and, if the convict who is the object of the favour commits another crime, he or she will be considered a re-offender.

Grace and pardon cannot be applied to crimes of torture, trafficking of drugs, terrorism and crimes defined as heinous.[9]

B. Innovative Programmes for the Treatment of Inmates

The deprivation of liberty penalty has the purpose of the re-socialization of the offender but this objective was not being reached. The history of the sentence passed through many alterations over the years, completely changing the execution of sentences, searching for its humanization, using mechanisms for the re-socialization of the inmates and trying to avoid recidivism.

Unfortunately the re-socialization of the inmates and their reintegration to the society are not easy, it is a great challenge that demands co-operation between government and society to avoid recidivism.

1. Association of Protection and Assistance for the Convicted (APAC)

In 1972, in a city called São José dos Campos, in the State of São Paulo, in southeast Brazil, a lawyer called Mário Ottoboni and a group of people connected to the Catholic Church started a volunteer assistance programme for inmates that resulted in changing of their behaviour. Due to huge local necessities, the administration of the correctional facilities was transferred to that group of volunteers.

The first APAC then began and its way of working was registered. It developed and its actions nowadays compose the APAC method.

[9] Article 5º, XLIII of the Constitution of the Federative Republic of Brazil. "The practice of torture, the illicit traffic of narcotics and related drugs, as well as terrorism, and crimes defined as heinous crimes shall be considered by law as non- bailable and not subject to grace or amnesty, and their principals, agents and those who omit themselves while being able to avoid such crimes shall be held liable".

In 1986 the second APAC was created in the city of Itaúna, in the State of Minas Gerais, where it was also founded by volunteers of the Catholic Church.

The APAC in Itaúna is considered an international reference on the treatment of offenders, being unique in world correctional facilities in administrating the three regimes of fulfillment of punishment (closed, semi-open and open) without using the police or correctional staff.

APAC is a non-profit civil association, with own legal status, and it has the purpose of treating the offender (already convicted), whom it calls "*recuperando*", preparing them for life after the fulfillment of the punishment.

Its philosophy is "to kill the criminal and save the man". It is an NGO (Non-Governmental Organization) that carries out its activities with straight and permanent contact with the Penalty Execution Court.

The monthly cost for a person who is fulfilling punishment at APAC is about US$300 whilst the cost in another correctional facility comes to US$790 per month.

The national rate of recidivism is 80%; however, at APAC this rate is 9%.

The APAC maintains its activities by means of contributions and donations made by the society, and because it has strong discipline, it holds only those inmates who are committed to fulfilling all its rules. The transference of the inmate to APAC happens after a decision between the administration of APAC and the judge of the Penalty Execution Court.

After being transferred to APAC, the inmate goes through a process of adaptation in this method, remaining in a special cell for 30 days. After this period, and knowing the APAC's rules and conditions, he is invited to sign the "Commitment Term" for the membership of APAC's method. In case of default on the signed "Term", he will have to return to the governmental correctional facility, among other penalties.

If the inmate wants to go back to the governmental correctional facility, he can do so any time he wants.

With the focus on the achievement of the effective re-socialization of the inmate, the APAC works up from relevant fundamentals as outlined below:

- First: The possibility of restoration – for the APAC all inmates can possibly be reformed, coming from the principle that all human beings are susceptible to change;
- Second: Religion – the reform occurs when the inmate is transformed spiritually, being born again as a new man;
- Third: Trust – the inmate participates in his own disciplinary process. The keys of the correctional facility are entrusted to them;
- Fourth: Work – considering that idleness is a terrible thing;
- Fifth: Respect – never shelter a number bigger than its capacity.

(i) APAC's Methodology

The APAC Method mainly comprehends twelve elements that must be observed during the work of reintegration. They are as follows:

- Participation of the Community: The APAC will only exist with the participation of the society and the volunteers;
- The solidarity between the inmates develops the collaboration and mutual help among at themselves;
- Work: as a Professional and Therapeutic possibility but also bearing in mind that it is not only work that restores the man;
- Religion: with a free choice, respecting the individual faith and being open to all kinds, religion is seen as an element of consciousness for the inmate;

- Dignity and Respect for the human being: putting the human being in the first place, transforming his self image, calling him by name, knowing his background and showing interest in his life and his future.

The APAC never admits a larger number of inmates than there are vacancies. Trust is applied in the practice, so there are no police and the keys of the prison are with the inmates.

- Health Assistance: medical, odontological, educational and psychological assistance is provided as support for their mental and physical integrity;
- Legal Aid: considering that 95% of the prison population lacks sufficient financial resources, legal aid provides lawyers for procedural situations;
- Family: the most important partnership in the correction of the inmate, emotional bonding and family company is stimulated in the APAC's methods;
- Volunteer Work: the APAC's work is based on the gratuity of serving one's neighbour;
- Social Reintegration Center: the APAC created this Center with separate wards for the regimes of fulfillment of punishment;
- Merit: the inmate is submitted to a constant evaluation that proves his reform in the prison period;
- Journey to Freedom in Christ Workshop (called the Jornada): an intensive retreat including presentations, time for prayer, and various other activities – it is considered a highpoint in the APAC methodology).

Today the APAC from Itaúna administrates two Halfway Houses (a male and a female one), with a total of 130 inmates. It is linked to the Prison Fellowship International which is a United Nations consultative organ for prison issues. For about 23 years it has successfully developed its activities, receiving visitors from all over the world, people who are interested in knowing the method and its application.

2. "New Ways Project" on the Penalty Execution

Before the high results of the APAC in Itaúna, the Court of Justice of the State of Minas Gerais – TJMG, in the southeast of Brazil, launched, in September 2001, the New Directions Project.

The Project is co-ordinated by the Presidency Adviser for Prison Issues and The Penalty Execution of the State of Minas Gerais, and was regulated by the Resolution Nº 433/2004 of the Court of Justice of the State of Minas Gerais, published on 1 May 2004.

The Project's slogan "All men are bigger than their faults" and has the purpose of encouraging the creation and development of Halfway Houses in the APAC pattern of Itaúna, by means of public hearings and seminars for the training of tutors and volunteers, in any interested city.

The New Directions Project is located at the Court of Justice of the State of Minas Gerais, in Belo Horizonte, the Capital, giving instructions to the APAC as regards the construction of buildings for the operation of the Social Reintegration Center, with three different wards – closed regime, semi-open and open, besides following the activities developed by the other APACs.

As part of the Judiciary Power, the Project New Directions gives more legality to the APACs, accomplishing, through public hearings, work to wake the community up to the fact of prejudice towards inmates, increasing the involvement of its members working with the re-socialization of offenders.

There are two cities nowadays, in the State of Minas Gerais, Itaúna and Nova Lima, which have Social Reintegration Centers, working completely with the APAC method. Twenty more other cities partially adopted the method and 61 cities are building the centres or they are studying the possibility of doing so.

There are about 100 correctional facilities in Brazil that partially use the APAC's method, and some units have already been implanted in other countries, such as: Argentina, Bulgaria, Chile, Costa Rica, Ecuador, El Salvador, England, Germany, Honduras, Latvia, Malawi, México, Mondávia, Namibia, New Zealand, Norway, Peru, Slovakia, the USA, and Wales.

VI. PROGRAMME OF RESTORATION AND REINSERTION OF EX-OFFENDERS INTO SOCIETY

A. Program of the Social Reinsertion of the Ex-offender and the Importance of the Participation of Society in this Process

With the intention of spreading the best practices of the national penal units and considering that the deficiencies of the Brazilian correctional facilities are completely diffused by the media, it is a good time to divulge the "Best Practices" that have been developed in the 27 States of Brazil.

According to statistical data published by the National Penitentiary Department,[10] in 2007, more than 90 best practice activities were carried out nationwide, aiming to promote the social rehabilitation of the offender in the work market; programmes of concession of loans to the sheltered and former offenders to create their own businesses; courses and workshops to enable the offenders to learn many different kinds of occupations, such as handicraft work, turnery, tailoring, mechanics, joinery, painting, sewing, cookery, waitressing, waitering, manicure, housekeeping, hand work wrapping and recycling of material; besides films exhibitions on correctional facilities, literacy courses and programmes of social and psychological aid for ex-offenders.

Because Brazil is a big country, two programmes from different regions are selected here, and briefly presented as follows.

1. Program Start Again

Launched in Brasília, on the 29 December 2008, by the National Justice Council and by the Federal Supreme Court,[11] the programme intends to draw the attention of the population to the question of the reintegration of the prisoners who have already fulfilled their penalty, to get back into the work market.

The programme focuses on actions that aim to give more effectiveness on the Law of Penalty Execution and the consequent modification of the current jail situation in Brazil.

Among the activities to be developed is the accomplishment of judicial community work in order to verify the situation of the inmates in relation to the fulfillment of their punishment. This kind of work will involve the analysis of many law-suits, with the purpose of promoting the progression of the regime of the fulfillment of the punishment or the release of the prisoner if he or she has fulfilled the punishment completely. The people who are able to act in this kind of judicial community work are judges, the representatives of the Public Prosecution Service, representatives of the Public Defense Council and court's servants.

Another activity provided in this programme is the celebration of covenants made among many competent institutions well-known in the area of training, reforming people, enabling them in human resources, bearing in mind the reintegration of offenders in the work market, after the fulfillment of the punishment.

The development of a mechanism called "Job Opportunity", is also part of this programme. It will be centralized in the National Justice Council, to be distributed later on the State Penalty Execution Courts. Offers of labour opportunities will be made by the enterprises, companies and institutions willing to join the scheme.

The Federal Supreme Court was the first institution to join this Program, through a covenant made with the Government of the Federal District of Brazil, which commits to receive, from 2009, 40 ex-offenders from correctional facilities. Only convicts who are fulfilling semi-open punishment will be selected for this Program. They will have a daily work schedule of between six and eight hours, and will work as a helper for to the Court administration, for a maximum period of one year. They will have a monthly salary of between

[10] Source: http://www.mj.gov.br/data/Pages/MJDA8C1EA2ITEMIDB6397CD625A644849D8D9D50156D22A2PTBRIE.htm

[11] The Federal Supreme Court is an organ of Judiciary Power whose competence is mainly the protection of the Constitution. Source: http://www.cnj.jus.br/

US$230 and US$270, besides other benefits such as transport[12] and food support.[13] It is good to bear in mind that the minimum salary in Brazil today is US$198.

The National Justice Council approved Recommendation Nº 21 of 16 December 2008, as a way to stimulate other institutions to join this Program. This action suggests that the State Courts adopt effective actions for the restoration and social reintegration of the inmate and of the ex-offenders of the prison system, emphasizing the necessity of professional valorization for the reinsertion of ex-offenders in the work market, through the covenant made with the State Bureau in charge of the administration of the correctional facilities.

For the advertisement of the "Start Again Program" two short films were produced for TV and a spot for radio, with a duration of 30 seconds each. These advertisements were produced for free, in January and February 2009, through the national radio and TV all over Brazil. The message of one of the films was: "Give a second chance to those who have already paid for what they have done. It is easy to ignore but to help is to be human".

This campaign had the objective of stirring the population to try to reduce prejudice towards ex-prisoners, and to draw attention to the necessity of their reintegration in the work market and in society. The slogan of this institutional campaign was "True freedom is having a second chance".

The participation of society in the process of the convict's rehabilitation is fundamental for the guarantee of the success of this Program, for society can help the State in this difficult and critical moment of the reinsertion of the convict in to society.

The first course of this programme was accomplished on 20 January 2009, in the State of Maranhão, in the northeast of Brazil. The course "Modelling and Cotton Confection", with a duration of 160 hours, was provided to female prisoners of the Reeducation and Social Inclusion Center for Convicted Women, promoted by the National Justice Council and Federal Supreme Court and implemented by the National Service for the Industrial Apprenticeship (SENAI).

This initiative of integration of the actions of many institutions has the aim of making the jail system more humanized all over Brazil, because, for the actual system of the Brazilian Prison Law to be more effective and to diminish the rates of recidivism, the partnership of the country and its States and private companies, as well as society, is very important.

2. Support Foundation for the Egress of the Prison System – FAESP

The Support Foundation for the Egress of the Prison System was created on 23 June 1997 in the State of Rio Grande do Sul, in the south of Brazil, and it is a philanthropic organization of social assistance, neither a political party nor profit-making entity, that helps the egress, released offenders, re-offenders, to be in charge of their own reintegration, with the participation of society, helping them with matters regarding work, education, health and material aid.

The people served at FAESP are re-offenders of the state prison system (90% of men and 10% of women). The age is mostly between 28 and 50 years old, with a low level of education and without professional qualifications.

At this Foundation, the released inmates are received, interviewed and guided to job opportunities available at the New Life Project, through partnerships with organs and institutions, or guided to a social co-operative called Laborsul, created to be an intermediatry in finding work.

The Social Foundation gives professional courses and formal education, such as literacy and elementary courses.

[12] The transport benefit is given to the employee by the employer in advance for travel expenses to and from work.
[13] Food benefit is a payment given to the worker each month to pay his or her daily food expenses.

Since the creation of this Foundation, more than 800 inmates have passed through, with recidivism of only 13%.

B. Treatment Program for Narcotics Dependents

With the Law Nº 11,343/06 there was a considerable change to the understanding of what is a narcotic substance. The former law established a freedom deprivation penalty,[14] but now the offender is liable to another kind of penalty, according to Article 28 of the new law.

"Article 28 – Who obtains, keeps, has in stock, transports or brings with him, for his own consumption, drugs without authorization or in disagreement with the legal determination will be liable to the following penalties:
I. Warning about the drugs' effects;
II. Rendering of Social Services;
III. Educative Measures of presence in educative courses."

It is important to stress that there was no decriminalization of the use and carriage of narcotics, only a modification to the reprimand to be imposed.

That measure manifested itself in a very important way; instead of attributing to the user the character of a delinquent he or she is considered a person who needs a suitable specialized treatment.

In 1998 in the city of Fortaleza, the State of Ceará, located in the northeast of Brazil, an Execution Court for Alternative Penalties was established, which develops projects related to offenders who are fulfilling alternative penalties.

This Court is composed of social workers and psychologists who are responsible for the personal evaluation of each inmate, in order to check their mental health, giving special attention to the cases of drug addiction.

Despite the fact that most of the inmates under treatment are drug users (about 60%), it was verified that only 14% of them were convicted of crimes foreseen in the Brazilian Law of Toxic Substances. Although they had been convicted of crimes such as murder, robbery and rape, many of them were drug addicts.

It concerns a highly important subject that deserves special attention in relation to social reintegration.

Some agreements were made with hospitals that offer special treatment to drug users and the hours spent in this treatment are counted as rendering of community service for those who are fulfilling alternative penalties.

Another measure adopted was the remission of the alternative penalty by the presence of the inmate at the meetings of Alcoholics Anonymous and Narcotics Anonymous, in which where they participate voluntarily.

According to recent data, in 2008, those who were the focus of the programme developed in Fortaleza, were marijuana users (20%); cocaine and crack users (15%); alcohol users (12%); users of other drugs (4%); and multi-users (49%).

The dependent use of drugs represents 60% of cases, whilst 25% indicate harmful use and only 15% recreational use. This classification is very important to consider personal differences (economic, psycho-social, family aspects, etc.) and to adopt solutions directed to each problem individually.

Since the beginning of this programme, 27 partners have joined this group, including centres of psycho-social attention in narcotics and alcohol, therapeutic communities, educational centres for youth and adults, and organizations such as Alcoholics Anonymous and Narcotics Anonymous (NA).

[14] Law Nº 6,368/76, in its Article 16, foresaw a punishment of six months to two years of imprisonment for carrying or use of drugs.

In one year, 120 people were guided to this programme and 80% of them complated the penalty transaction successfully. Obviously the word "cure" is not mentioned because chemical dependency is a compulsion and there is a risk of recidivism. This problem of recidivism is the next challenge to be faced by those who idealized this programme.

VII. CONCLUSION

There is no established form or recipe to magically reverse the actual situation of overcrowding in prisons and criminal recidivism.

The moment the prisoner is sent to a correctional facility is considered a delicate moment for him or her; however, the moment he or she leaves the prison is a moment that reflects on the society. For that reason, the treatment given to him or her during the imprisonment, under State custody, is very important and has a decisive influence on his or her behaviour after release.

Recidivism is a straight reaction to the conditions to which the convict is submitted during the fulfillment of the penalty and, also a reaction to how the community receives him or her after fulfilling the punishment. Society has a great responsibility in this process and there is no doubt that, for comprehensible reasons, it nourishes a kind of scorn towards those who are or were imprisoned. Therefore, it is important to work to make society conscious that the social restoration of the inmate demands the participation of the State and all society.

The practices outlined in this present work consist not only in giving worthy treatment to the inmate and to released offenders to reintegrate socially, but also to introduce a new way of thinking to the social group to which they belong, all with the objective of avoiding the commitment of new crimes, the growth of penalties and the overcrowding of prisons.

Society and the authorities must pay attention to the fact that the main solution to the problem of recidivism is via a policy support for released offenders, according to the Law of Penalty Execution; otherwise, the released inmate who is enjoying his or her freedom, in case he or she is not assisted, will be the recidivist criminal of tomorrow.

The Brazilian prison system cannot be considered of an excellent quality, but our nation has developed some strategies and is aiming to improve the system every day.

"The degree of civilization in a society can be judged by entering its prisons".
Crime and Punishment (1866) - Fyodor Dostoevsky (1821-1881)

EFFECTIVE COUNTERMEASURES AGAINST OVERCROWDING OF CORRECTIONAL FACILITIES

*Vanna L. Lawrence**

I. INTRODUCTION

Jamaica's strides towards developed country status have been hampered by deteriorating economic conditions which have been blamed for an increase in the country's crime rate. In 2005 the country was named by researchers as the "murder capital of the world", as approximately five people were killed daily (http:www.bbc.com.uk/). This rapid increase in serious crime has led to hardened public opinion about the treatment of offenders. Public opinion polls have reflected that the average Jamaican believes justice is best served when offenders receive long periods of incarceration. This places pressure on the criminal justice system to maintain the confidence of the people and results in longer periods of incarceration being given. The relative costs associated with maintaining inmates however, make alternatives to imprisonment a great priority.

The cost of maintaining custodial vs. non custodial offenders, 2008 (Exchange rate J$88: US$ 1)

INMATES	$689,644.87 per person per annum
JUVENILES/ CHILDREN	$622,930.83 per person per annum
REMANDEES	$480,032.99 per person per annum
NON CUSTODIAL CLIENTS	$69,854.90 per person per annum

Since 18 September 1962, Jamaica has been a United Nations (UN) member state. The country and its legislators have taken decisive steps to ensure that the criminal justice system upholds principles stipulated by the UN. Principles related to the treatment of offenders are reflected in laws, rules and standard operational procedures in the various agencies of the state.

II. THE CURRENT SITUATION

The criminal justice system in Jamaica consists of the Jamaica Constabulary Force (police), the courts (judiciary/magistrates) and the Department of Correctional Services (correctional facilities and probation/community services). Members of staff of the Department of Correctional Services, Jamaica (DCSJ) interface with the entire criminal justice system. Probation Officers interact with offenders from the pre-trial phase, Correctional Officers administer inmate management and Probation Officers again offer through care and after care services.

A. Pre-Trial

Every effort is made to ensure that suspects are not detained for unduly long periods while an investigation is in progress. The law empowers the police, within reason, to offer "station bail" to the suspect before he or she is brought before the court for the offence. This suspect is released upon his or her own recognizance if charged for minor offences or may be bailed by other person(s) using surety, where doubt exists.

In the event that station bail is not granted, the suspect may not be remanded for longer than a period specified by law, without being charged. If the suspect is charged, he or she must then be brought before the court. The judiciary herein possesses the discretion to offer bail to the suspect based upon prevailing circumstances. In some cases, if there is not sufficient evidence against the suspect the case will be adjourned *sine die* (without a further date being given).

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B. Trial

Within the Jamaican criminal justice system, like others, the proof of guilt remains the burden of the prosecution. Every suspect is presumed to be innocent until proven guilty. When proven guilty, a social enquiry report is requested at the discretion of the magistrate. Social enquiry reports usually assist in the area of sentencing.

Social enquiry reports seek to detail the background situation of the offender, which may have led to the committal of his or her crime (criminogenic factors). The Probation Officer is the authorized official who is delegated this function. The Probation Officer utilizes his or her professional knowledge to interpret the results of his or her investigations and makes recommendations for various sentencing options. Some magistrates will not sentence an offender until they have this expert report as it is sometimes used to guide even the length of sentences given.

It is mandated by law that social enquiry reports are requested and utilized for the sentencing of all child offenders. This strategy has led to an effective reduction in the number of children incarcerated as it is usually found that other social factors have contributed to the manifested behaviour. Many children therefore receive non-custodial sentences or are released without receiving an order of the court. Social enquiry reports are however not always requested for the sentencing of adult offenders and thus do not assist in diverting these cases from the possibility of incarceration.

C. Post-Trial Measures

The various laws of Jamaica place within the judiciary the authority to dispose of cases in a number of ways that would divert the offender from a period of incarceration. These non-custodial sentences may have a mandatory period of supervision or may allow the person to bear the burden of his or her own recognizance. These include:

- Suspended Sentences (with, or without supervision)
- Fines
- Probation Orders
- Community Service Orders
- Curfew Orders
- Electronic Monitoring
- Combination Orders i.e. Community Service Order with supervision
- Mediation Orders

(The Criminal Justice (Reform) Act, 2002, Sections 4 – 16)

Probation Officers also initiate other diversion and preventative programmes which are given credence by the court and are sometimes made a condition of the sentence. For example: the Trelawny Rehabilitation of Youth (T.R.Y.) programme, the Brothers for Change (domestic violence prevention) programme, Educational programmes, and Adult/Juvenile division programmes.

The judicial system bears the added pressure of reassuring the public that justice has been served. Based upon the gravity of the offence and the discretion of the court, some offenders will be sentenced to a period of incarceration. Current assessment of the inmate population shows that although the majority of inmates are serving sentences of fewer than three years, there remain an alarming number of offenders who will remain in correctional facilities for prolonged periods, thus contributing to overcrowding in particular correctional facilities.

Chart 1:

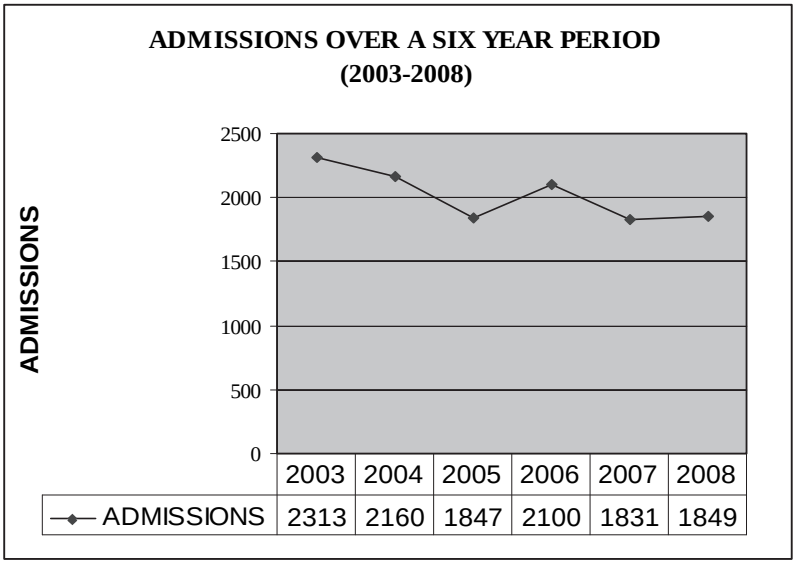


Chart 2:

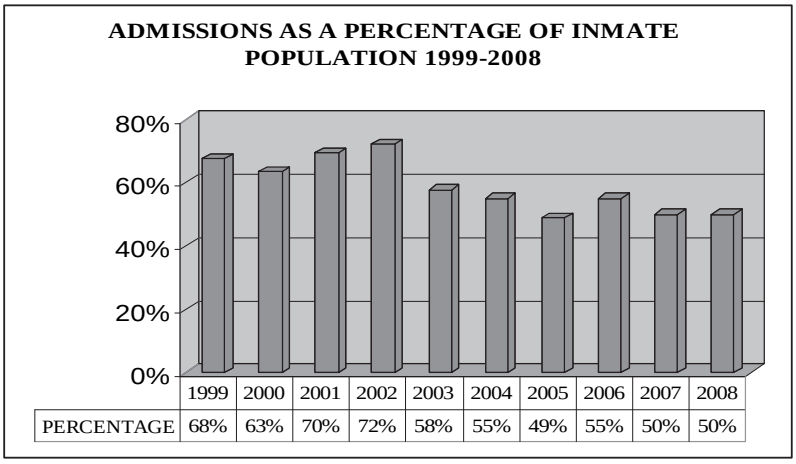


Chart 3:

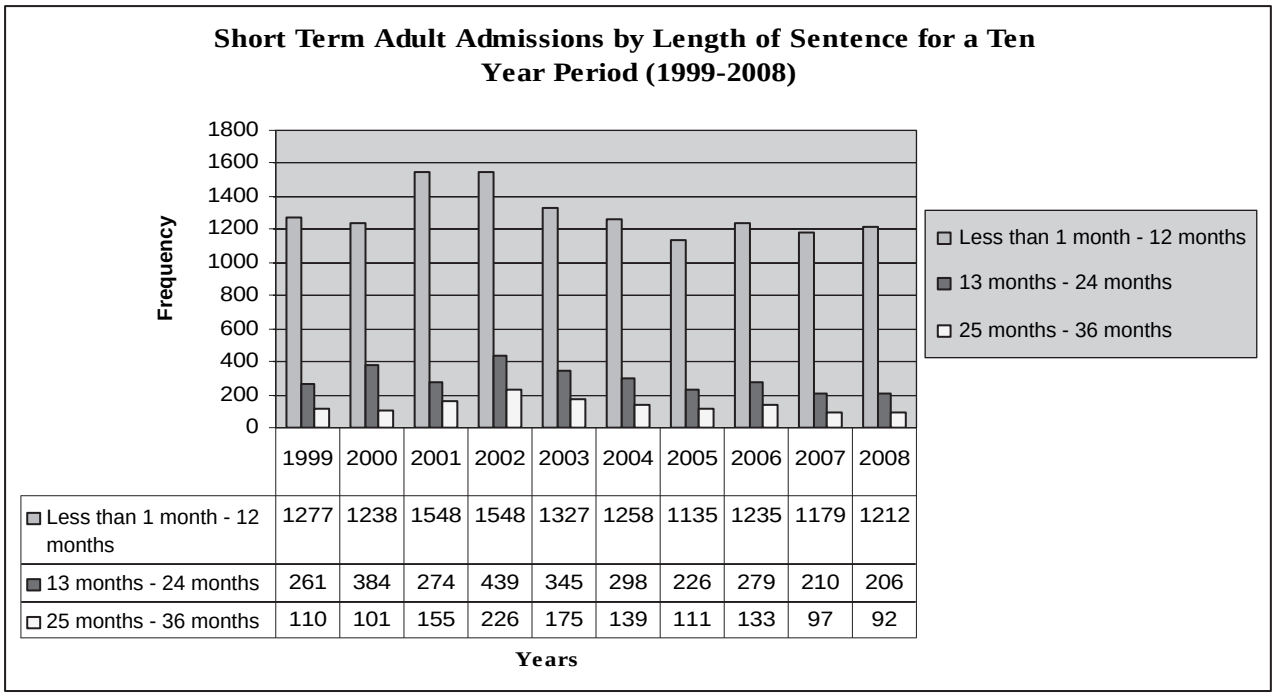
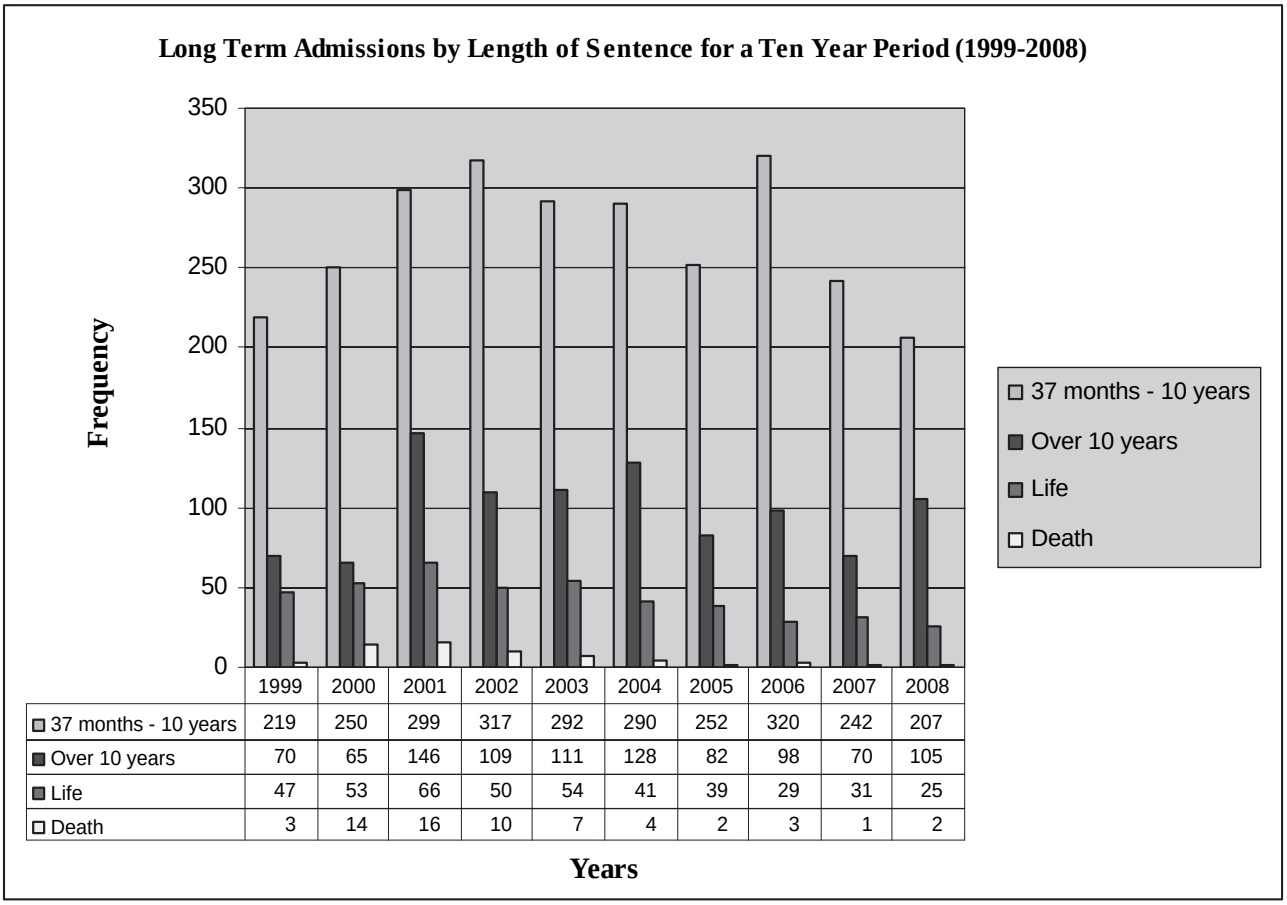


Chart 4:



	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
37 months - 10 years	219	250	299	317	292	290	252	320	242	207
Over 10 years	70	65	146	109	111	128	82	98	70	105
Life	47	53	66	50	54	41	39	29	31	25
Death	3	14	16	10	7	4	2	3	1	2

The Department of Correctional Services operates three reception facilities through which all inmates/ offenders must enter the system. These facilities are: Tower Street Adult Correctional Centre, St. Catherine Adult Correctional Centre and Fort Augusta Adult Correctional Centre [for females]. Overcrowding within these institutions remains a growing concern.

IDEAL CAPACITY COMPARED TO ACTUAL POPULATION					
Institutions	**Type**	**Classification**	**Ideal Capacity**	**Actual Population (31/12/08)**	**Remarks**
Tower Street A.C.C.	Male	Max. (Reception)	850	1683	
St. Catherine A.C.C.	Male	Max. (Reception)	850	1238	
South Camp A.C.C.	Male	Maximum	250	240	
Tamarind Farm A.C.C.	Male	Medium	350	259	
Richmond Farm A.C.C.	Male	Low/Open	300	99	
Fort Augusta A.C.C.	Female	Max. (Reception)	250	148	
New Broughton S.R.A.C.C.	Male	Low/Open	50	18	
Horizon A.R C.	Male/female	Max.	1036	484	Remand Centre
Juvenile Institutions					
St. Andrew J.R.C.	Male	Max.	48	45	Remand Centre

IDEAL CAPACITY COMPARED TO ACTUAL POPULATION					
Institutions	**Type**	**Classification**	**Ideal Capacity**	**Actual Population (31/12/08)**	**Remarks**
Hill Top J.C.C.	Male	Max.	98	110	
Armadale J.C.C.	Female	Max.	45	47	
Rio Cobre J.R.C.	Male	Max.	120	118	
Fort Augusta A.C.C.*				53	
Horizon A.R/C.C.*				36	
Montpelier J.C.R.C**			250		
Total					
A.C.C. Adult Correctional Centre, J.C.C. Juvenile Correctional Centre, J.R.C. Juvenile Remand Centre A.R/C.C. Adult Remand /Correctional Centre, S.R.A.C.C. Sunset Rehabilitation Adult Correctional Centre					

Note:
** Juveniles were housed in designated locations in adult correctional centres owing to overcrowding in juvenile facilities.*
*** The centre is being retrofitted and is therefore not yet operational.*

D. Current Effective Countermeasures against Overcrowding in Jamaican Correctional Facilities/ Institutions

1. Classification of Offenders: Classification by Age

The Corrections Act (1991) Section 177 (3) facilitates the classification of convicted persons during the period of incarceration in order to minimize the risk of contamination. The Superintendent of the institution classifies these inmates according to the following groupings:

1. *Young inmates class* – inmates under twenty-one years of age;
2. *Star class* – inmates over twenty one years of age who have been sentenced for the first offence and are not known to be habitually corrupt or of criminal intent;
3. *Ordinary class* – inmates not placed in the young inmates or star class.

This classification aids rehabilitation efforts and may lead to early release, in those institutions in which space permits classification by grouping.

2. Classification by Risk Levels

Upon entry into an institution an initial interview is conducted with every offender in an effort to begin the process of diagnosis. For inmates who have been accompanied by a social enquiry report this process is even better assisted as the information garnered may be verified. The information received is used to complete the important process of risk assessment.

Within thirty days of entry into the institution the authorized official is expected to have collected sufficient information on the inmate to complete the Level of Service Inventory – Revised (LSI-R), risk assessment instrument. The Canadian developed LSI-R has proven to be useful at predicting the inmate's risk of re-offending, and risk levels identified (low, moderate and high) are used to arrive at a treatment plan directed towards the rehabilitation of offenders and eventually toward conditional release programmes or full release programmes.

3. Classification by Institutions

Correctional facilities are rated by security levels according to the levels of risk of the inmate population. The Department of Correctional Services' Standard Operational Procedures Volume 2 empowers the Director of Security to empanel a group of corrections professionals who utilize locally developed security classification methods to transfer inmates between security institutions. Male inmates may therefore be transferred from the highest levels of security classification (Tower Street Adult Correctional Centre, St. Catherine Adult Correctional Centre and Horizon Adult Remand Centre) to a medium level facility (South Camp Adult

Correctional Centre, Tamarind Farm Adult Correctional Centre) and on to the lowest level (Richmond Farm Adult Correctional Centre & New Broughton Adult Correctional Centre [for inmates over 54 years old]) over time.

The transfer of inmates through these levels of correctional institutions has proved to be effective in reducing overcrowding. The situation is however affected by current practice which prohibits transfer of inmates serving sentences for certain violent crimes and those who have the greater part of their sentences still remaining. It should therefore be noted that some offenders who have been assessed and found to be of low risk levels remain within high risk facilities as this ensures public confidence in the judicial system and also in the agencies of the state entrusted with the responsibility for national security.

4. Remission of Sentences

The Chief Executive Officer/Commissioner of Corrections and his designates are empowered by The Corrections Act (1991) to exercise the privilege of remission of sentences under Sections 178, 179 & 180. The incarcerated time spent by an inmate may be remitted (shortened) if he or she has been sentenced to remain continuously in a correctional facility for a period not less than thirty days. The remission period may not exceed one third of the sentence for a first offender and one quarter of the sentence for subsequent offenders.

Remission of sentences may be gained by an inmate upon the conditions that he or she commits no breach/infraction and that he or her remains industrious during his or her period of incarceration.

For example: if an offender is sentenced to 12 months at hard labour for a first offence and he or she is found to be a model inmate, he or she would benefit from remission of one third of his or her sentence (four months). The inmate would therefore spend a total of eight months of the entire sentence and would be released as having completed his or her entire sentence.

RELEASE FROM ADULT INSTITUTIONS OVER TEN YEARS (1999 - 2008)

TYPES OF RELEASES	YEARS									
	1999	2000 unavailable	2001	2002	2003	2004	2005	2006	2007	2008
DISCHARGED	1752		1810	1939	1878	1802	1714	1512	1678	1582
FINE PAID	103		106	270	240	262	257	279	227	195
PAROLED	60		52	47	39	49	55	49	47	25
REPRIEVED	3		10	6	8	1	10	0	0	0
DEATH	11		40	16	7	5	19	14	16	21
QUASHED	6		32	9	4	10	4	11	8	6
EXTRADITED	0		0	0	48	6	3	5	11	55
RELEASE TO ATTEND COURT	12		7	10	78	41	49	88	138	97
TOTAL	1947	0	2057	2297	2302	2176	2111	1958	2125	1981

Remission of sentences, or the shortening of the term of incarceration imposed by the court, allows the DCSJ to effectively deal with the rising prison population. Despite this shortening of the period the frequency of inmates returning to facilities after having committed a previous offence continues to be low, although statistics for 2008 show a 7% increase in the readmission rate over the previous year.

Sex	Re-Offenders Admitted To Adult Institutions By Sex 2003 - 2008					
	2003	2004	2005	2006	2007	2008
Male	550	628	437	487	371	499
Female	1	5	8	9	11	16
Total	551	633	445	496	382	515
Re-offending Rate	24%	29%	24%	24%	21%	28%

5. Parole

The Parole of Offenders Act (1979) allows an inmate not sentenced to life imprisonment or death to be able to apply for parole or early release. Every such inmate is informed of his or her Parole Eligibility Date (P.E.D) and is facilitated by Officers to make this application, regardless of his or her current risk level. Although parole is an effective strategy against overcrowding in correctional institutions in Jamaica, it is not always granted for reasons such as:

- the inmate's risk level;
- the gravity of the offence committed;
- the period spent within a rehabilitative facility;
- the inmate's expression/exhibition of being rehabilitated;
- the community's readiness to receive the offender;
- the victim's readiness to receive the offender;
- the report of his or her institutional conduct,
- the Parole Board's discretion.

Parole Cases under Supervision (2007)

YEAR	PAROLEES ON SUPERVISION	PAROLEES RECALLED	RECALL RATE%
2003	162	0	0
2004	172	2	1.16
2005	182	1	0.55
2006	209	1	0.53
2007	163	0	0

6. Conditional Release

Conditional release refers to the temporary release of inmates or wards (children) from a correctional institution for a specified period. This is facilitated by the Corrections Act (1985) Part IV Section 58 – 63. Efforts towards population reduction are most obviously seen in the use of:

(i) Hostel Placement

Adult inmates are permitted to reside in half-way housing facilities on the outside of the correctional institutions. This helps reduce the difficulties of, and sets the stage for, community reintegration upon release.

(ii) Home Leave

Home leave is granted to low-risk adult and child offenders that they may return home for a specified period to spend time with family. Home leave for adults may not exceed seven days.

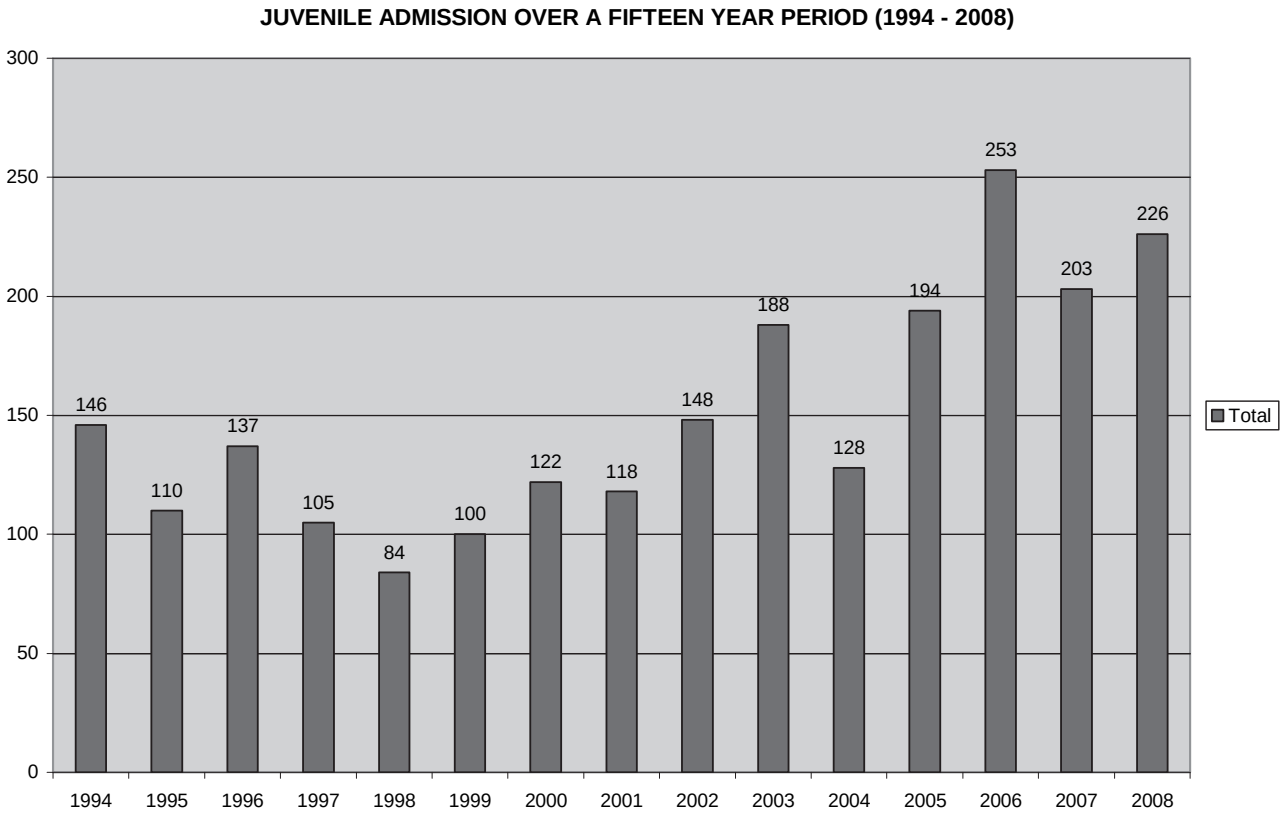
(iii) Compassionate Release

In the event that an inmate becomes indigent he or she may be released from the institution upon compassionate grounds. This is usually granted by a board/body outside of the Department of Correctional Services, Jamaica.

7. Licensing and Statutory Supervision

Licensing is similar to parole and is granted to child offenders living within institutions to facilitate a re-socialization within open society. Children qualify for this privilege by the behaviour exhibited and the support systems which exist at home and in the community. This reduction strategy provides many children the opportunity for early reintegration with families and the community.

Statutory supervision is a period of intense supervision which is provided by a Probation Officer to a child who was released from an institution before his or her 18th birthday. The institution's population is reduced as it is guaranteed that a child offender is being assisted/supported through the process of change. He or she may however be returned to the institution upon court action if he or she appears to be headed towards further re-offending.



8. Payment of Fines

The Magistrate may administer a sentence upon the offender which gives him or her the option of paying a fine or being confined. Many offenders are unable to pay these fines, regardless of how insignificant the amounts stipulated. The DCSJ, through its external alliance programme, has been able to secure assistance to have fines paid for many inmates, thus facilitating their release and a reduction in the inmate population.

9. Weekend Sentences

The Criminal Justice (Reform) Act (2002) Section 19 empowers the court to administer a short period of imprisonment upon an offender (a weekend sentence) not exceeding six months. A weekend sentence is served in incremental periods commencing at six o'clock in the evening of every Friday and ends at six o'clock in the evening of every Sunday.

Weekend sentences reduce the inmate population significantly as this period may also coincide with the absence of another inmate who is away on Home Leave. A sentence served on weekends essentially reduces the population for entire periods of four days. It is unfortunate however that this sentencing option is rarely utilized by magistrates.

10. Community Care, Through-care and After care by Probation Officers

Probation Officers represent the Community Services arm of the DCSJ. This arm is multi-faceted and provides services to the courts, community and the correctional centres. These services include:

- Social Investigations
- Public Education
- Parole Monitoring/Supervision
- Supervision of offenders on non-custodial sentences
- Administration of Reintegration/Aftercare – Statutory Supervision, Rehabilitation Grant
- Home leave – Wards and Inmates
- Conditional release programmes
- Persons Seeking Assistance
- School based programmes/activities
- Parenting Activities/Programmes
- Programmes – Challengers' Camp, Brothers for Change, 'TRY'
- Diversion – diverting some juvenile and adult cases from unnecessary court action
- Through-care
- Training of Social Work Students.

Probation Officers oversee a range of sentences that have either been administered by the court, mandated by other bodies or voluntarily undertaken by themselves.

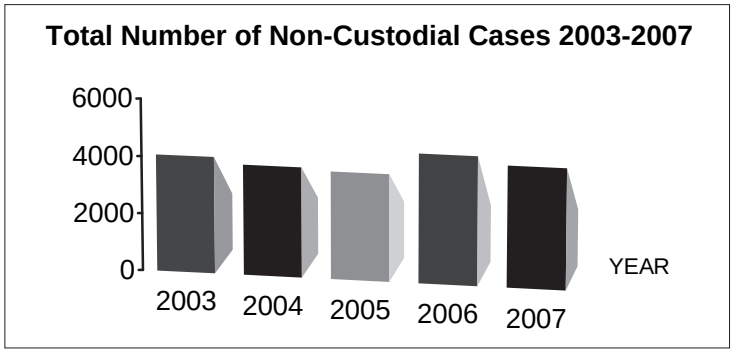
Probation Officers' Caseload (2007)

Types of Order	Number of Cases
	2191
SUSPENDED SENTENCE SUPERVISION ORDER	380
COMMUNITY SERVICE	1427
PAROLE	163
SUPERVISION ORDER (JUVENILES)	14
VOLUNTARY SUPERVISION	66
TOTAL	**4241**

The services provided by Probation Officers in the community accounts for a vast amount of the DCSJ client base.

The DCSJ client base as of September 2008 is as follows:

Inmates	4145
Wards	412
Community-based Clients	4829
TOTAL	**4829**



Inmates and wards that are released from correctional institutions by means of reduction strategies are usually given the after-care support of Probation Officers. These officers are located across the island and offer in-depth supervision, counselling and community support for various categories of offenders. While being supervised some offenders learn acceptable social behaviour. Many decide never to re-offend, thus reducing the recidivism rate and by extension, the inmate population.

III. THE WAY FORWARD

A. Automatic Parole

At present inmates who have attained their Parole Eligibility Date (P.E.D) and are adjudged to be of low risk (to society and for re-offending) must apply to the Parole Board for consideration and a decision. Automatic Parole is pending legislation which will give discretionary powers to the Superintendent of the institution in which the inmate resides, under specific conditions, to grant parole to some offenders without making a submission to the Parole Board. It is believed that this will assist in reducing overcrowding, based upon a shorter transaction time.

B. Increased Number of Hostels

Presently there are no hostels/half-way houses for children. It is the Department's belief that this group of offenders will benefit greatly from behaviour modification, social skills training, vocational training and employment assistance in this setting. Negotiations are currently in progress to establish one child hostel using donor funding. With this in operation, some children will reside outside the institution even before their date of release.

C. Electronic Monitoring of Offenders

The pilot testing of Global Positioning System (GPS) assisted electronic monitoring devices was concluded in January 2009. The Government of Jamaica has received reports outlining the success of this pilot period and the benefits to be gained from observing the whereabouts of certain categories of offenders within the community. It is expected that electronic monitoring of offenders will be used to reduce the population within detention facilities as more offenders could be granted bail. It will also enhance the current Conditional Release programme as more inmates will be released from correctional facilities for longer periods.

D. Construction of a New 5,000 Bed Correctional Facility

The Government of Jamaica is in the process of seeking expressions of interest from companies to construct a new 5,000 bed correctional facility. This state-of-the-art facility will be one of the greatest countermeasures against the current overcrowding in the Jamaican correctional institutions as it will adequately accommodate the current inmate population. It is also expected that this institution will provide better facilities for rehabilitative efforts and thus will contribute greatly to the productivity of the society by the changes exhibited in inmates upon release.

IV. CONCLUSION

Like many other developing countries, overcrowding of correctional institutions does exist in Jamaica. This is however limited to high-risk/maximum security level institutions and is continually fuelled by the public's perception that lengthy periods of incarceration constitutes justice being served. The agencies of the state that are entrusted with the nation's security therefore have the added responsibility of ensuring that the treatment of offenders also meets the public's expectations. These expectations sometimes do not contribute to efforts directed at reduction strategies within correctional institutions.

Countermeasures against overcrowding are built into the criminal justice system and continue to be effectively applied. One of the most effective countermeasures against overcrowding currently used in the Jamaican context however has proven to be the rehabilitation of the offender, as he or she may benefit from early release and acquire the tools never to re-offend, thus not re-entering the criminal justice system and contributing to further overcrowding. In this regard, pending legislation and developments that will further prove to be beneficial towards rehabilitation and should be relentlessly pursued.

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EFFECTIVE COUNTERMEASURES AGAINST OVERCROWDING OF CORRECTIONAL FACILITIES

*Ben S. Buchane**

I. INTRODUCTION

Namibia is a signatory to the United Nations Standard Minimum Rules for the Treatment of Prisoners and has adopted a mission statement for the Department of Prisons and Correctional Services which reads: "The Namibian Prison Service, as an integrated part of the Justice System, contributes to the protection of society by providing reasonable, safe, secure and humane custody of offenders in accordance with universally acceptable standards, while assisting them in their rehabilitation and social reintegration as acceptable law abiding citizens".

The purpose of this paper is therefore to present facts on how the Namibian Prison Service is grappling with the problem of overcrowding and the approach taken to reduce recidivism. The paper is inclusive of high level national progressive initiatives currently being pursued by Government in accordance with the third National Development Plan (NDP 3) 2007/8-2011/12 sub-sector goal 2: Lawful Detention and Reduced Re-offending.

The options are in the form of remission, parole, amnesty, pardon, reprieve, prison population management strategies, community services orders and more importantly, addressing the issues of recidivism and factors in regard to overcrowding of correctional facilities.

II. WHAT DOES OVERCROWDING MEAN?

Overcrowding is interpreted in the current pocket Oxford dictionary as "fill beyond what is usual or comfortable". This definition is not far away from our context in the prison administration. In prison, overcrowding describes the situation when the total number of inmates in prison is beyond the authorized holding capacity.

III. FACTORS THAT LEAD TO OVERCROWDING

Some individuals think about offenders, and even treat them, as if they are not human. Ideas such as these are haboured by some technocrats in the criminal justice system (Radzinowicz 1991), e.g. police officers, crime investigators, prosecutors, magistrates, and even judges. They perceive imprisonment as a way to isolate those members of society accused and found guilty of committing crimes. This notion impacts severely on correctional services as follows:

- Infrastructural related issues and demography, coupled with the world recession, mean that most of the inherited structures do not provide enough accommodation for the ever-increasing prison population. Plans are at an advanced stage to extend existing prisons, build new ones, introduce unit management, construct halfway houses and construct offices for the Namibian Community Service orders. etc.;

- Magistrate courts, which handle the majority of criminal cases, are backlogged with cases, resulting in prolonged postponements. The investigation of crimes is very slow, to the extent that sometimes no cogent reason is given to presiding officers in court to deny or grant bail. Judicial officers seem to be very slow in processing appeals from convicted inmates to an extent that they even have their

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appeal dates set after they have been released from prison. However, this is expected to change with a new High Court in place in the North where the prison with a high number of admissions is situated.

IV. PRISON POPULATION MANAGEMENT STRATEGIES

Combating prison overcrowding is being discussed in criminal justice circles. In March 1996 for example, the overcrowded prisons were Windhoek Central Prison, Omaruru and Grootfontein. In response, during the First Workshop on Management of Prisons, held at Harmony Seminar Centre in 1996, the then Permanent Secretary in the Ministry of Prisons Services, Mr. Frans Kapofi, had this to say at length: "The situation of overcrowding is very much closely monitored after introducing classification of prisons. The maximum-security prisons of Windhoek Central, Walvisbay, Hardap, and Oluno are responsible for incarceration of long-term prisoners. Once prisoners are received in receiving centres which include Luderitz, Keetmanshoop, Omaruru, Grootfontein and Swakopmund, they are immediately sent to the nearest maximum security prison. Also with open prison farms like Divundu and Elizabeth Nepemba Juvenile Centre, is yet another method of dealing with overcrowdness, as selected first offenders from maximum security prisons are transferred to these centres. This move is expected to ease and control congestion in the prisons".

Discussions were held on associated problems and side effects and finally a plan of action to effectively deal with this matter was designed. With the available resources, Farm Scott Open Prison is now operational, training inmates in animal husbandry. The management of the inmate population is effective. Every day, criminals are arrested, sentenced, and placed into the care of correctional services, but they are well managed.

Being the final recipients, Namibian Prison Services is braced to admit criminals as per international standards and procedures. With the Corrections and Conditional Bill in its final stages, it is expected to bring new strategies to effectively address re-offending attitudes of inmates and reduce overcrowding of correctional facilities. This law will lead to a complete re-engineering of the rehabilitation system to address recidivism. To appreciate crime trends, refer to Tables 1 and 2 in the Appendix.

A. Remission

Remission of sentence is a tool of stabilizing prison discipline and order. It is a deduction from a sentenced prisoner's total sentence and thereby shortens the term of imprisonment. It is a reward to inmates to promote good conduct and co-operation. Section 92(1) subject to subsection (2), (3) and (5) of the Prisons Act, 1998 (Act No. 17 of 1998) stipulates that "a person sentenced to a period or periods of imprisonment may, by reason of meritorious conduct and industry, during such period of imprisonment earn remission of part of such period, equivalent to one third of the total of the period in question."

B. Parole

Parole is an instrument in the hands of the Service to supplement, the testing, outside the prison walls, of genuine signs of recovery. It is a further stage after remission. If the administration through its disciplinary and observation machinery is satisfied that such a prisoner has displayed meritorious conduct, self-discipline, responsibility and industry after a certain period, may qualify for consideration for parole. Such a prisoner must be serving a sentence of three years and above, must have served one third of his or her sentence. Usually, consideration is given to prisoners whom it is believed will not revert to crime. By so doing, the prisoner may benefit as follows:

- He or she enabled to contribute to the support of his or her dependants, also relieving especially juveniles and first offenders who know that punishment entails the stigma of imprisonment, while influencing prisoners by means of certain conditions to lead an honest life, whilst the threat of an unexpired sentence hangs over their heads;
- The authorities can determine whether the effect of imprisonment is such that the prisoner will be able to refrain from committing further crimes during parole and even after.

In support, the Commissioner of Prisons Mr. Evaristus Shikongo stated that: "It is through this belief that we are seriously thinking of strengthening and improving the parole activities. We are intending to appoint the so long missing Release Board which is going to work effectively on issues of parole, remission

and release dates of prisoners. The people involved in the prison, heads of prisons, social workers and heads of sections, should work according to the laid down regulations and submit the necessary inputs to allow the release board to work efficiently".

C. Amnesty

In terms of the Prisons Service Act, section 93(1), (Act 17 of 1998) it reads "In the exercise of his or her powers to pardon or reprieve offenders under sub–Article (3) (d) of Article 32 of the Namibian Constitution, the President may call upon the Minister to recommend to him or her any offender for such pardon or reprieve, and may invite the comments of the Minister of Justice thereon".

V. ALTERNATIVES TO IMPRISONMENT

A. Legal Framework

Two aspects of non-custodial sentencing are highlighted, namely, international guidelines and alternative sanctions provided for by national legislation on non-custodial measures.

1. International Guidelines

The need for non-custodial sanctions is recognized at the international level. Relevant here are the Guidelines contained in the United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules). As a proud member of the civilized international community, the Namibian Prison Services adheres to and respect international obligations, including these standards.

2. Non Custodial Measures

At the national level, the necessity of non-custodial sanctions is highly recognized and provided for by lawmakers. Various pieces of legislation make provision for alternative sentences, including: fines, discharges, compensations, security for keeping the peace, probation, reconciliation, extra-mural labour, and addition or discharge with bound. Part of Section 297 of the Criminal Procedure Act (No. 51 of 1977) on Conditional or Unconditional Postponement or Suspension, and Caution or Reprimand, is worth quoting at length:

"Where a court convicts a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment;

The court may in its discretion – postpone for a period not exceeding five years the passing of sentence and release the person concerned – (i) on one or more conditions whether as to – (aa) compensation; (bb) The rendering to the person aggrieved of some specific benefit or service in lieu of compensation for damage or pecuniary loss; (cc) The rendering of some service for the benefit of the community; (dd) Submission to instruction or treatment; (ee) Submission to the supervision or control (including control over the earning or other income of the person concerned) of a probation officer as defined in the Children's Act, 1960 (Act 33 of 1960); (ff) The compulsory attendance or residence at some specified Centre for a specific purpose; (gg) Good conduct; (hh) Any other matter; although there are Legal provisions on the statute books, the sanctions are rarely used, preference being given to imprisonment. Etc."

B. Community Service Orders

This project began after a national seminar on Community Service Orders was held at Safari Court Hotel in Windhoek in 2001. In attendance were relevant Ministers, Regional Governors, NGOs, Community and spiritual leaders. Thereafter, the Minister of the then Prisons and Correctional Services conducted consultative meetings with Regional Leaders to reach consensus on how to implement this very important programme, relevant to rehabilitating offenders within the community. In the ensuing consultations, district committees were formed followed by the launching of the pilot project in 2005. In that same year, three significant seminars on Community Service awareness were conducted for members of Parliament, Members of the Press and Members of Law Societies.

1. Road Map for the Implementation of Community Services

The project was piloted at five Magistrate Districts Courts in four Regions: Katima Mulilo, Opuwo, Ondangwa and Rundu. Guidelines were set and adopted in 2008 as follows:

- Review, monitor, budget, train, develop guidelines, design programmes, set up a National Steering Committee to influence decision makers, introduce the project to policy makers, revise existing models through exposure visits to neighbouring states and create public awareness campaigns.

Stakeholders were convinced that Community Service Orders were needed for selected first-time offenders who have committed non-serious crimes, to perform unpaid work for communities as part of their rehabilitation. Not every one can pay a fine and therefore many persons are sent to jail.

2. Current Progress

Another National Conference was held in Windhoek in August 2008 to counteract crime with the following aim:

- To examine progress achieved, critically examine challenges, address them for better results, consolidate support for the amendment of the Criminal Procedure Act, enact new enabling legislation, seek a mandate for continuation, and resolve the plight of remand prisoners, etc.

3. Actual Challenges

The law has provisions for alternatives to imprisonment (non-custodial sentences.) The main issue is that those provisions are rarely utilized. In this section, the non-utilization of those provisions is explained; constraints and limitations likely to be encountered in the introduction of community service nationwide.

Combating crime and criminal justice administration are sensitive areas involving multiple stakeholders. Like all sensitive areas, it is very difficult to secure agreement, be it on matters of policy or strategy. In the past, criminal justice had many shortcomings as powerful stakeholders dominated weaker ones during final decisions. That dominance has been found obsolete, hence collaborative strategies, including community service.

4. Limitations and Constraints

- There are established views and perceptions about crime and severity of punishment. Some people think community service is a soft option; some stakeholders, victims of crime, communities and some members of law enforcement agencies are reluctant to use it, feeling that community service rewards crime;
- There is misconception and misunderstanding of the scheme, associated with prevailing economic conditions. There is a public perception that in the light of levels of massive unemployment, jobs for law-abiding citizens may be lost due to the availability of free labour provided by criminals;
- Political will is essential for the success of community service. Policy and opinion makers must be able to appreciate the limits of inherent dangers in imprisonment as well as to understand the benefits that accrue from community service. There should be willingness at the political level to sensitize communities in the constituencies;
- Mobilization of human and financial resources needs to be carefully planned and the resources made available, especially in the start-up phase;
- Planning, organizing and co-ordination of community service activities need to be thoroughly explained and rigorously checked to reduce margins of error;
- The success of the programme is dependent upon supervision of Community Service Orders; supervisors need to be carefully selected and properly trained;
- Beneficiaries of Community Service Orders should be carefully selected and monitored.

VI. CORRECTIONAL PROGRAMMES TO PREVENT RE-OFFENDING

A. Raison d`etre

The rationale of rehabilitation, values and beliefs are the re-integration into society of offenders as law-abiding citizens capable of leading honest and industrious lives after imprisonment, having fully developed self-respect and sense of responsibility. Therefore, Namibian Prison Services' main aim is to provide services of which the public can be proud. This is regarded as a standard of excellence locally and at international level, as per the Mission statement. Currently there are positive indications that the fight against recidivism is fast gaining momentum, as explained hereunder.

B. Public-Private Partnership

Addressing the offending attitude of inmates is a correct way of combating crime. Repeat offenders are known to be a problem. Some of them commit very serious crimes while on bail or awaiting trial. In this way they become even more dangerous to public safety. In a bid to involve Non-Governmental Organizations, a public-private partnership commenced in August 2003, between the Namibian Prison Services and Bank Windhoek on Entrepreneurial Skills training programme for inmates at Windhoek Central Prison.

The programme was executed by Development Consultants for Southern Africa (DECOSA). A total number of 88 participants were trained. For the sake of long sustainability without external assistance, three long-term inmates were trained to run the course with limited assistance.

Research is being conducted on the result of rehabilitation programmes. It indicates that for the last four years, 38.2% of the released offenders have successfully started their own businesses. They have employed thirty-one employees and a number of part-time staff. Bank Windhoek further processed loans to two companies owned by released offenders to the amount of N$219,000.00. The benefits which accrued to ex-offenders are:

- Practice oriented training;
- Knowledge gained convinced family members that ex-offenders want to run their own businesses and cannot wait for funds after release;
- Creation of new enterprises in that 54% of them are registered entities;
- Participants gained self knowledge to survive, fight competition, identify business ideas, opportunities, flexibility, reliability, increase knowledge in marketing, customer care, negotiation skills, costing, pricing, procurement, stock keeping and knowledge in preparing business plans;
- Research shows that 32.3% of the participants are currently employed in different sectors, whereas 14.7% are doing further studies at Polytechnic of Namibia and Windhoek Vocational Training Centre, while five are still resettling.

Furthermore, all sentenced inmates are eligible for training with due cognizance of their qualifications, previous experience, aptitude, abilities, psychological and physical condition. The aim of training inmates is to equip them in such manner that they can lead an honourable, independent and decent life after their release. Here is a package of the rehabilitation programmes being offered to inmates by the Namibian Prison Services:

(i) Vocational Training: a prisoner can obtain a Diploma or Certificate which enjoys National recognition. Refer to Table 4.
(ii) Specialized Training: This is all training in which a period of at least one month's intensive training precedes production in that training area.
(iii) Constructive Unskilled Labour: (CUL): this is all work which does not fall under any of the abovementioned categories.

On 24 February 2009, the Minister of Safety and Security, the Honourable Dr. Nickey Iyambo, stated that: "In the same process of reducing recidivism, reduction of overcrowding should also enjoy a special emphasis. You cannot offer rehabilitation programmes effectively if the institutions are overcrowded. Therefore, programmes aimed at easing overcrowding should be intensified." This high level instruction is being worked on and the results are already showing.

VII. HUMAN RESOURCE DEVELOPMENT

Namibian Prison Services require competent staff capable of carrying out their day-to-day duties with zeal and commitment. Members are carefully selected based on qualification and suitability. In the same vein, promotions are based on integrity, honesty and other competencies associated with capabilities to effectively render the administration of justice to offenders.

In this regard, qualifying applicants are recruited and trained to supplement the existing number of serving members. Professionals and specialists such as teachers, nurses, social workers and trade instructors have been appointed after going through a tough interview session.

Through proper adherence to the Commissioner's Directives, the code of conduct, Prisons Act, (Act 17 of 1998), prison regulations and other administrative circulars, the system is perfecting its respect of the fundamental human rights of offenders.

The Namibian Prison Service has over the past years invested heavily in recruiting and training its personnel to reduce the shortage of manpower. As of 2009, the staff to prisoner ratio stands at 3:0. The Prison training curriculum is being retailored to suit the purpose of the Corrections and Conditional Bill currently under debate in parliament.

VIII. CONCLUSION

The Namibian Prison Service is genuinely concerned about imprisonment trends. It is for this reason that the call is always made to other government agencies and stakeholders to appreciate these concerns, and to seriously start thinking about how to implement appropriate measures. The total occupancy rate in Namibian prisons is only 4,315 as of 11 May 2009, against the total national carrying capacity of 4,347.

This is good news, even though warning signs in terms of crime increase are already apparent. A policy decision is being taken to introduce non-custodial measures in the form of community service as one of the options that can help alleviate problems associated with the rehabilitation of short-term prisoners.

Criminals come from and belong to society. Therefore society has an important role to play in their treatment. Non-custodial measures provide an opportunity for criminals to reconcile with communities from where they come, as observed by Dr. Andrew Coyle (1993:315), the governor of Brixton Prison, London.

As the world moves towards setting effective counter measures against overcrowding of correctional facilities, making sure that people can establish crime free lives, helping those who have been in prison to lead law abiding lives on release, then support mechanisms can only be sought in the community to eradicate the fear of miscarriage of justice. It is quite apt that people are very much less likely to commit crime if they have somewhere to live, if they have means of earning a living, if they have a personal support system. Refer to Table 3.

APPENDIX

Table 1: Namibia Prisons: Capacity and Total Inmates admitted per Year

Prison	Capacity	Number of inmates					
		2002-2003	**2003-2004**	**2004-2005**	**2005-2006**	**2006-2007**	**2007-2008**
Windhoek	912	882	1047	1047	1337	696	815
Hardap	941	276	258	214	180	251	102
Oluno	557	1242	1414	1256	1054	829	1038
Walvis bay	300	218	245	208	253	175	200
Omaruru	59	416	371	573	380	331	327
Grootfontein	70	21	34	43	147	292	376
Swakopmund	88	251	178	271	305	294	333
Keetmanshoop	110	683	707	597	395	433	423
Luderitz	290	150	105	95	58	77	78
Gobabis	220	392	289	504	318	322	362
Divundu	480	-	-	-	-	-	-
E/Nepemba	320	-	-	6	-	-	-
Farm Scott	-	-	-	-	-	-	-
Total Admitted	**4347**	**4531**	**4440**	**4576**	**4427**	**3700**	**3723**

Table 2: Namibia: Imprisoned Inmates Population according to Duration of Sentence

	2002-2003	**2003-2004**	**2004-2005**	**2005-2006**	**2006-2007**	**2007-2008**
Up to 6 months	2088	2043	1830	1768	1564	1502
Over 6 months-2 years	1456	1382	1701	1371	1116	1228
Over 2-3 years	180	284	312	312	247	221
Over 3-5 years	159	151	200	174	139	144
Over 5-10 years	111	76	99	112	96	89
Over 10 years	108	50	65	117	54	115
Habitual	4	3	-	-	3	1
Lifers	-	-	1	1	1	1
Total	**4106**	**3990**	**4208**	**3855**	**3220**	**3301**

Table 3: Community Services Workers in 2008

Region	**Total combined hours**	**No. Of offende**	**Average hours**
Caprivi (Katima Mulilo)	11,100	29	383
Oshana (Ondangwa)	2,610	12	218
Kunene (Opuwo)	1,620	11	147
Total	**15330**	**52**	**295**

Table 4: Education Report for Oluno Rehabilation Centre 2006 – 2009

Education Level	2006	2007	2008	2009
Tertiary Diplomas/Degrees	1	1	1	1
Senior Secondary Certificates	7	10	9	30
Junior Certificate	6	4	10	19
Literacy	71	109	146	185
Number of Rooms used and capacity	85	85	85	85

Source: nps january to march 2009 report

Table 5: Inmates and Members Ratio per Institution

Stations	Inmates	Members	Ratio
Windhoek Prison	1247	401	3.1
Oluno Rehabilitation Centre	872	164	5.3
Hardap Prison	728	186	3.9
Walvisbay Prison	359	131	2.7
Grootfontien Prison	133	48	2.8
Swakopmund Prison	98	41	2.4
Keetmanshoop Prison	111	48	2.3
Luderitz Prison	52	53	0.98
Gobabis Prison	134	30	4.5
Omaruru Prison	82	42	1.9
Divundu Rehabilitation Centre	338	108	3.1
E. Nepemba Juvenile Centre	79	79	1
Farm Scott	82	93	0.9
Total	**4315**	**1424**	**3.0**

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OVERCROWDING OF PRISON POPULATIONS: THE NEPALESE PERSPECTIVE

*Mahendra Nath Upadhyaya**

I. INTRODUCTION

Overcrowding of prisons is a common problem of so many countries, developing and developed. It is not just the problem of correctional authorities; it is now a serious challenge and threat to criminal justice systems. With the increasing use of imprisonment as punishment, prison administrations are facing varieties of problems due to overcrowding of prisoners.

More than 9.25 million people are held in penal institutions throughout the world. In Tihar Jail, Delhi, India, alone, 8,500 prisoners are in custody against a capacity of 2,500 persons. In Nepal more than 9,000 prisoners are in custody. In some prisons, the population is more than twice the capacity of the institution. Overcrowding of prisons is the root cause of many problems experienced in correctional institutions, such as deterioration of the living and working conditions of both inmates and staff.

It is evident that prison overcrowding causes a wide variety of problems in terms of both prison management and the treatment of offenders, which often lead to problems with finance, human rights and effective reintegration of offenders. When a prison environment become unduly painful, it also becomes harmful, and prisoners carry the effects or consequences of that harm back into the free world once they have been released. The use of imprisonment as a form of punishment and incapacitation is increasing in most countries and overcrowding in many places is becoming a significant problem.

Article 5 of the Universal Declaration of Human Rights, 1948 says "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".

The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment which was adopted by UN General Assembly on 9 December 1988, has some provisions which are relevant here:

Principle 1
All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.

Principle 8
Persons in detention shall be subject to treatment appropriate to their unconvicted status. Accordingly, they shall, whenever possible, be kept separate from imprisoned persons.

Principle 24
A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.

Principle 28
A detained or imprisoned person shall have the right to obtain within the limits of available resources, if from public sources, reasonable quantities of educational, cultural and informational material, subject to reasonable conditions, to ensure security and good order in the place of detention or imprisonment.

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* Under Secretary, Parsa District Court, Birgunj, Nepal.

Principle 38
A person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial.

Article 10 of International Covenant on Civil and Political Rights says "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person". The same article also says "The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status".

Rule 10 of the United Nations Standard Minimum Rules for the Treatment of Prisoners says, "All accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation."

Overcrowding itself is more than just a shortage of bed space; it has implications for the levels of programme activity, hygiene, violence, etc. It can be an obstacle to the realization of many of the objectives of a modern correctional system.

II. CURRENT SITUATION OF NEPALESE PRISONS

A. Brief History of Nepalese Prisons

Nepal's first prison was established in 1914 in Kathmandu, the capital city. It was called the Central Jail. The jail administration was under "Mukhtiyar" and the chief was Rana General. After the people's revolution of 1950, prison administration came under Ministry of Home Affairs. In 1963, the Prison Act came into force and the Prison Rules were enacted in 1964. Before 1993, the management of prisons was administered by the Ministry of Home Affairs. In 1994, the Department of Prison Management was established under the Ministry of Home Affairs.

Now, the management and administration of prisons is governed by the Department at central level and the Chief District Officer is responsible for local levels. We have 75 administrative districts. There are 73 prisons in 71 districts. Four districts have no prison and two districts have two prisons. Only one remand home, which is located in Kathmandu, is allocated for detainees. Usually, detainees are accommodated in prison with convicted prisoners.

There are two child correction centres for juveniles. They are located in Kathmandu valley. All the prisons are managed by the government and the child correction centres are established and operated by NGOs with funding from the government. Another jail has just been completed but is yet to receive transfer red prisoners from other prisons.

We do not have separate prisons for females. Generally, male and female inmates are housed in separate blocks within the same prison. However, in Central Prison in Kathmandu, there is a fully separated compound for females.

All Nepalese prisons were established many years ago.

In Nepal, except for the one mentioned above, there are no remand homes especially for those on trial and detainees. During the investigating period, after arresting the accused, the investing authority has to bring him or her to court within 24 hours. If the court gives an order to detain the accused he or she will be housed in police custody. The Public Prosecutor will prosecute the accused and refer him or her to the court with the charge sheet. Then court decides whether the accused will have to stay at prison for the trial period or get bail.

Due to over pressure of detainees and convicted persons both are accommodated in the same prison in Nepal. All the prisons are closed prisons. We have statutory provision for open jails but thus far it has not come into force. The government is prioritizing infrastructure i.e. suitable land in appropriate areas.

B. Prison Population

The prison population, as of 13 March 2009, is 8,491. There are 86 dependents also. The two child correctional centres accommodate 156 juveniles. Among the prisoners, there are 7,916 males and 575 females. Among them, 501 are foreigners. There are 5,003 detainees and 3,488 convicted prisoners. 59% of the prison population are under-trial whereas only 41% are convicted.

Under Trial			Convicted			Total		
Male	**Female**	**Total**	**Male**	**Female**	**Total**	**Male**	**Female**	**Total**
4711	292	5003	3205	283	3488	7916	575	8491

The official accommodating capacities of the 73 prisons is 7,233, but there are 8,491 inmates. The prisons were established many years ago, and the infrastructure and other physical facilities are same as when they were built. Besides this, it is better not to use some buildings in the prison premises.

C. Staff

There are 621 staff for 73 prisons. Among them, 600 are administrative and 21 are medical personnel. We have a hospital for prisoners in Kathmandu. There are 13 staff; among them, five are medical staff. The staff-to-inmate ratio is 1:14. The medical staff-to-inmate ratio is 1:404.

Administrative	Medical	Total
600	21	621

D. Medical Facilities

There is a prison hospital in Kathmandu. In other prisons, health workers and assistant health workers oversee the medical section. Inmates will get medical treatment in other hospitals near the prison.

E. Situation of Overcrowding

As explained, the capacity of 73 prisons is 7,233 but there are 8,491 inmates now. It clearly shows that overcrowding of prisons exists in Nepal. The capacity of prisons varies from prison to prison. Prisons located in urban areas have greater capacity than those in rural areas.

Kathmandu prison can accommodate 1,500 inmates whereas the prison in Manang district only has capacity for six. Of the 73 prisons, 41 are overcrowded. In 12 prisons, inmate numbers are more than double the capacity. One prison is overcrowded by 400 percent and another by 300 percent. The prison in Chitwan has capacity of 55 but now there are 246 inmates.

Sample of comparative data of four prisons is given below.

Prison	Prisoners		Staffs	Ratio
	Capacity	**Inmates**		
Kathmandu	1500	1505	26	58:1
Jhapa	200	328	17	19:1
Chitwan	55	246	13	19:1
Rukum	15	21	10	2.1:1

III. CAUSES OF OVERCROWDING

There are so many causes of overcrowding of prisons. They vary from nation to nation. Rising crime rates, socio-economic conditions, and the effectiveness of criminal justice systems affect overcrowding.

A. Delayed Criminal Justice System

One of the causes of overcrowding of prison is the increasing number of detainees on trial. Like Nepal, in most countries. where this problem exists, more than 50% of inmates are on trial. In Nepal, the ratio of

detainees to convicted prisoners is 1.43:1.The delay in bringing offenders to trial is commonly accepted as a main cause of prison overcrowding.

In our criminal justice system, there are procedures which courts must follow. They are time-consuming, and because of these procedures, the final hearing of detainees can take a long time. There are so many cases pending in our courts. Backlogs are so high. This is a cause of overcrowded prisons.

B. Tougher Sentencing

In some countries, like Nepal, imprisonment is considered an effective punishment. The legal system of many countries emphasizes imprisonment as an effective and powerful weapon against crime. The general public always demands that the offender be punished severely and imprisonment is the last resort. Like other countries, the legal system supports tougher sentencing.

C. Increase in Crime Rate

One of the major causes of the increasing prison population is the increasing crime rate worldwide. Socio-economic conditions are responsible. Unemployment and poverty lead young people towards criminal activities. Exposure to electronic media is also a factor in the increasing crime rate.

D. Effectiveness in Police and Prosecution Operations

An effective criminal justice system is also a component of overcrowding of prisons. Effective and proper investigation and appropriate prosecution lead to conviction and that affects the prison population.

E. Lack of Alternative Measures to Imprisonment

We have few alternative measures to imprisonment except fine. In our penal system, an accused, if convicted, will get imprisonment or a fine. Alternative measures such as probation and parole have been not accommodated in our legal system so far. In petty offences, the courts can impose a fine on the accused, but in other cases, he or she will be imprisoned as prescribed by law.

F. Inadequate Bail System

In Nepal, there is a statutory provision that directs courts to place an accused on remand and send him or her to prison if he or she is charged with an offence punishable with more than three years' imprisonment if convicted. Bail is applied only for offences which are punishable with less than three years' imprisonment or only a fine. In some specific cases, if there is a probable cause or reasonable ground for the court to suspect the accused is guilty at the first hearing, the court can issue an order to remand the accused to prison.

G. Fine Defaulters

In Nepal, there are many laws under which an accused will be fined if found guilty. Due to the socio-economic condition of our country, some are really unable to pay that fine and others don't want to pay and are prepared to go to prison for a certain period of time. The maximum term of imprisonment for non-payment of a fine is four years. After four years' imprisonment, he or she will be released whatever the unpaid sum is. In our country, there is another special statutory provision of imprisonment in civil matters. If the defendant is unable to or unwilling to pay the sum ordered by court to the plaintiff, the plaintiff can apply to the court to keep the defendant in jail. The cost of keeping the defendant in prison will be paid by the plaintiff.

IV. EFFECTS OF OVERCROWDING OF PRISONS

Overcrowding of prisons is not only the problem of inmates but also of concerned authorities. It affects the criminal justice system and correctional programmes of the countries concerned.

A. Lack of Space and Facilities to Accommodate Inmates

The major problem of overcrowding of prisons is lack of space for inmates. Every prison has its own specific capacity and facilities. If the prison is built for 100 persons, how can the authority provide space and facilities for 150 persons? For example, a prison in Jhapa, eastern Nepal, has 328 inmates. But the capacity of that prison is only 200. This is just an instance; there are so many prisons where the number of inmates is twice the capacity.

B. Strain on Staff

Overcrowding always has an adverse effect on administration. Staff cannot provide basic facilities. They don't have sufficient space, logistics, and medical facilities for inmates. They have to work overtime, and the quality of their work detenorates. It also causes health problems because they are exposed to an unhealthy environment. The staff of overcrowded prisons are stressed, which affects them physically and mentally also.

C. Tension and Stress Among Inmates

Overcrowding also increases tension and stress among inmates. There are few facilities for many persons. Space, logistics, and medical facilities are insufficient. It leads to competition for resources, less co-operation and more social withdrawal. It will increase disruptive behaviour. It may have physical and psychological effects on inmates.

D. Effect on Correctional Programmes

We cannot expect a good outcome from overcrowded prisons. Correctional facilities are for correction of inmates but nobody can be corrected in an overcrowded situation. They have insufficient facilities to feel secure and at ease. If somebody is not feeling at ease, how can he or she go on in a positive way? He or she will face many problems througout the day. The management cannot run correctional programmes smoothly in a correctional facility because of lack of facilities. They cannot provide work opportunities, books for the library or recreational materials effectively.

E. Violation of Human Rights and Dignities

As mentioned above, Principles 1, 8, 24 and 28 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (A/Res/43/173, adopted by UN General Assembly on 9 December 1988) and Rule 10 of the United Nations Standard Minimum Rules for Prisoners set some international standards.

In an overcrowded prison, no one can expect the above standards to be met, and that clearly violates human rights and human dignity also.

V. ALTERNATIVES TO IMPRISONMENT

We do not have so many alternatives to imprisonment in the Nepalese legal system. The following measures contribute as alternatives.

A. Use of Bail

If statutory provisions for bail are properly exercised, they can help in minimizing the prison population. In our legal system, there are so many provisions under which the accused will be liable to a fine or imprisonment for more than three years. Cases punishable with more than three years' imprisonment such as human trafficking and transportation and espionage, are unbailable.

B. Speedy Trial

In our prisons, there are more detainees than convicted criminals. This is because of delays in the administration of the criminal justice system. We have so many backlogs in our courts. The detainees have to a long time for their final hearing. To clear the backlog and for an effective justice system, the Judiciary of Nepal has adopted a strategic five year plan. This is the final year and the results are positive. The plan sets a timeframe for disposal of backlogs. The plan has fixed core functions and areas of strategic intervention for court management and speedy justice.

C. Early Release

This is a better solution to prison overcrowding. We have statutory provisions for remission or pardon. If a convict serves 50% of his or her imprisonment and is of good character, he or she may be released. The government releases convicted prisons on various national occasions, giving a pardon for their remaining imprisonment. If the quantity of pardon increase, the prison population will surely decrease.

D. Resources

The prisons in Nepal were established and built many years ago. They have same the space and facilities now as at the time of their establishment. Old buildings, problems in sanitation, and little space for inmates are common phenomena. So we have to enhance prison infrastructure and resource allocation. The Government is constructing new buildings in various prisons and increasing budgets for other facilities.

E. Open Prison

The Prison Act of Nepal has a provision for open jail. It has not come into force yet. The government is busy locating a suitable area and infrastructure for that purpose. If this provision came into force, it would be another effective countermeasure. If the prisoner is sentenced to more than three years' imprisonment and serves one third of that sentence, he or she can be sent to open jail. The prisoner has to apply to the Department of Prison Management for this purpose. We have exceptions: prisoners who are convicted of human trafficking, rape, narcotic drugs, corruption, espionage, trafficking in protected wild life etc. are ineligible and cannot be recommended for open jail. This system is the main focus of this paper and is why it is discussed in detail in part VI below.

F. Community Service

We have another effective countermeasure in our jail law. According to that provision, the court can send an offender who is liable to less than three years' imprisonment to complete community service.

G. Conversion of Imprisonment into Fine

There is a statutory provision that says the court can convert imprisonment to a fine. If the accused has no criminal record and if the offence is punishable with less than three years, the court can order him or her to pay a certain sum and go free. The sum will be fixed by court at Rs. 25 per day.

VI. OPEN PRISON: AN EFFECTIVE COUNTERMEASURE AGAINST OVERCROWDING

In the Nepalese legal system, there are some countermeasures which can be applied against overcrowding of prisons. They are bail, fine, early release, community service and open prison. Bail can be applied at the trial stage and others at the stage of conviction. The Prison Act 2009 provides for open prison and community service. These provisions were introduced in August 2009 by amending that law. According to the Prison Act, prisoners who are sentenced to more than three years' imprisonment can be sent to open prison and those sentenced to not more than three years can be sent for community service.

Among the prison population, there are higher numbers of offenders who were sentenced to more than three years' imprisonment than those who were sentenced to less than three years. That is why open prisons will be the most effective countermeasure against overcrowding.

Article 2(j) of the Prison Act has defined an open prison as a certain area to accommodate convicted prisoners, from where they can go outside for work at a given time.

A. Rationale

Article 10 of the Prison Act gives a rationale for sending prisoners to open prison. It says that the Nepal Government can send detainees and convicted prisoners to other work if it feels it is necessary for the health and financial betterment of prisoners.

In open prison, the prisoner can live with his or her family. He or she can take any job. It helps him or her to socialize with other members of society. He or she feels his or her duties and responsibilities towards society and his or her family. When in a closed prison, there is no responsibility to bear. Prison is not only for detention, it is also for correction of certain thinking and behaviour patterns. The main purpose of correctional institutions is to change or reform positively. Open prison will help in achieving that purpose.

B. Eligibility

The basic requirement to be in open prison is that the prisoner should be sentenced to more than three years' imprisonment and already have served one third of that. Prisoners convicted of human trafficking, rape, narcotic drugs, corruption, espionage, trafficking in protected wild life or archeological goods,

absconding from prison and customs defaulting, are not eligible for open prison. Prisoners who are not of good character in prison or who are mentally abnormal are also ineligible.

Rule 16B of the Prison Rules lays down the process for recommending prisoners to open prison. Prisoners who are eligible according to Article 10C can apply to the Department of Prison Management. The Department will forward the application to the central committee for Community Service and Open Prison, the composition of which is described in chapter D. The committee will examine the following issues and decide whether or it should recommend open prison:

(i) the circumstances in which the prisoner committed the crime,
(ii) his or her character in prison;
(iii) age; and
(iv) nature of self-employment and benefit and conditions of employment fixed by the employer.

According to rule 16B, if the committee recommends that a prisoner be sent to open prison, the Department of Prison Management gives such permission. Before that, the prisoner has to sign a bond. The bond consists of certain conditions. If the prisoner is being employed as an employee, the Department will make a memorandum of understanding with the employer. If the prisoner wants to do something on his or her own, the Department will state that in the bond.

C. Conditions

The prisoner has to obey some rules while he or she is in open prison. The conditions are fixed by rule 16B (6). According to that rule, the prisoner has to go out and come in at a given time. They are supposed to reside within the area fixed in the bond. They are not allowed to keep persons other than his or her family members within the prison camp. If the inmate breaches these conditions, he or she will be sent back to closed prison and become ineligible for open prison after that.

D. Open Prison Management Committee

According to rule 16C(1), there will be a committee at the central level to give advice and recommendations on the operation and management of open prisons to the Department of Prison Management. It will be headed by the Director General of the Department of Prison Management and the members will be a Senior Superintendent of Police from Police Headquarters, a Legal Officer from the Ministry of Home Affairs, the Under Secretary from the Ministry of Law and Justice, and two representatives from NGOs working in the sector of prison reform and social service. The secretary will be the Director of the Department of Prison Management. At district level, there will be another committee for this purpose which is chaired by the Jailor and members will be representatives from the District Police Office, the District Administration Office, the Office of the District Government Attorney and one from an NGO.

VII. CONCLUSION

The problem of overcrowding of prisons exists in almost all countries, and is due to many factors, as discussed above. Establishment of more prisons is not the best solution.

Each stakeholder is responsible for these problems and each has to take them seriously. Police, public prosecutors, the judiciary, correctional authorities and the people in general, all have to pay attention to minimizing the prison population. We have to expand the use of non-custodial measures. What we have to bear in mind is that human rights instruments require that the use of imprisonment must be the last resort. Speedy trials, wider use of non-custodial measures, early release of prisoners, sending the person in question to open prison and community service can reduce overcrowding of prison. There are so many effective countermeasures which vary from nation to nation. We have to adopt the measures which are appropriate for our legal system. In our context, open prison may be the most effective countermeasure against overcrowding of prisons.

EFFECTIVE COUNTERMEASURES AGAINST OVERCROWDING OF CORRECTIONAL FACILITIES

Che-leung Lam *

I. INTRODUCTION

Continuous growth of prison populations and overcrowding in correctional facilities is a serious problem facing the Government of many parts of the world. As one of the world's well developed cities, Hong Kong is no exception to encountering the same stress of overcrowding in correctional facilities. As it has tremendous adverse effects on prison discipline and order as well as the rehabilitation of offenders, sufficient and effective countermeasures have to be taken in tackling the problem.

In the past decade, Hong Kong has suffered from overcrowding in correctional facilities. In 1999, the total penal population was 10,358. With the total number of penal places in all 20 penal institutions standing at 9,045, the overall occupancy rate was 114.5%. In 2003, the total penal population was 11,682 and the overall occupancy rate was 122.6%. It was not until 2008 that the situation improved slightly with a total penal population of 9,343 and an overall occupancy rate of 96.7% (Appendix A). Nevertheless, it is still projected that there will be a serious shortfall in penal places in Hong Kong in the near future.

In view of such, the Correctional Services Department (CSD), as an integral part of the Hong Kong criminal justice system, took various measures, including redevelopment and collocation of penal institutions, enhancement of ageing penal facilities and proposals for establishing a super prison, to forestall the situation from worsening. To a certain extent, the situation has been slightly alleviated with immediate improvement noted.

However, it is anticipated that the situation may not be so desirable and long lasting with countermeasures at the CSD level alone. A comprehensive review of the criminal justice system to effect changes in each stage of "due process", from arrest to adjudication, sentencing, and correction, and enhancement in public education, are necessary. That is to say, innovations and enhancement at the Pre-sentencing stage, Penal custody stage and Post-release stage of the criminal justice process, as well as the Public level ("the 4Ps") are worth considering.

II. THE EXISTING CRIMINAL JUSTICE SYSTEM IN HONG KONG

Before going further, it may be necessary to provide a full picture of the criminal justice process in Hong Kong. The criminal justice system in Hong Kong is one of the world's most fair and well-developed systems. From the arrest of a person by police or other law enforcement agencies to incarcerating a convicted person as ordered by a court, there are statutory steps and procedures at every stage of the proceedings (Appendix B). The time for the whole process may vary from a few days to years, depending on the progress of investigation as well as the hearing of the courts. Anyhow, the procedures outlined below must be strictly complied with.

A. Police Interview/Investigation

Upon arresting a person, the police will interview him or her with a caution statement taken from the person arrested and conduct a preliminary investigation into the case if it has criminal elements. Depending on the findings of investigation, the police may decide either to discharge the person because of insufficient evidence, to release the person with a caution (for teenagers with minor offence(s)), or to proceed with formal prosecution.

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B. Prosecution

Once prosecution of the person is decided, he or she will be formally charged and may either be released on police bail or detained in police custody pending a court appearance. In some cases, especially for juveniles under the age of 18, where evidence is sufficient for prosecution a police officer of Superintendent rank may exercise his or her discretion to caution rather than prosecute, with a view to offering him or her a chance to mend his or her ways and save the juvenue from the bitterness of legal proceedings. This actin is under the Police Superintendent Discretion Scheme.

C. Court Proceedings

Standing trial by court, the offender will be asked for his or her plea, and may plead guilty or not guilty to the charge(s) laid against him or her. Once he or she pleads guilty and is convicted, sentence will be imposed and the case closed. Where he or she pleads not guilty to the charge or pleads guilty without agreeing to the facts of the crime(s) he or she has committed, the case will be adjourned for trial and he or she may either be released on court bail or detained in jail custody. The case will be terminated after trial and sentence.

D. Sentencing

Before imposing a sentence on a convicted person, the court will take into consideration the background of the individual, the nature of the offence(s) and the response from the public through various documents and reports. Of course, some philosophies behind sentencing adopted by the judge such as retribution, deterrence, rehabilitation, incapacitation, restoration and reparation, etc. may also affect the decision of the court. There are quite a lot of sentencing options in the Hong Kong criminal justice system but they can generally be categorized as non-custodial and custodial sentences.

1. Non-Custodial Sentences
   - (i) Absolute discharge;
   - (ii) Conditional discharge (Bond);
   - (iii) Fine;
   - (iv) Compensation Order;
   - (v) Suspended sentence; and
   - (vi) Community-based sentences:-
     - (a) Probation Order;
     - (b) Community Service Order; and
     - (c) Curfew Order.

2. Custodial Sentences
   - (i) Imprisonment;
   - (ii) Training Centre;
   - (iii) Detention Centre;
   - (iv) Rehabilitation Centre;
   - (v) Drug Addiction Treatment Centre;
   - (vi) Reformatory School; and
   - (vii) Hospital Order.

III. THE SITUATION OF OVERCROWDING IN HONG KONG CORRECTIONAL FACILITIES

A. Statistical Figures of Penal Population in Hong Kong

As mentioned before, Hong Kong has been suffering from the problem of overcrowding in penal facilities in the past decade. With reference to the statistical figure (Appendix A), from 1999 to 2008, the occupancy rate was over the certified capacity. In 1999, the total penal population was 10,358 and the overall occupancy rate was 114.5%. It was most alarming that the total penal population reached 11,472 with the overall occupancy rate at 121.3% in 2002. In 2003, the total penal population was 11,682 and the overall occupancy rate was 122.6%. It is not hard to imagine how bad the situation was. It was not until 2008 that the overcrowding at the aggregate level improved slightly as compared with the preceding year. By the end of 2008, the total penal population was 9,343. With the total number of penal places in all 19 penal institutions currently stands at 9,657, representing an overall occupancy rate of 96.7%.

Notwithstanding the slight improvement at the aggregate level, there is still a significant shortfall in the number of penal places at maximum security prisons, remand facilities and female institutions. In the case of male institutions, the occupancy rate in remand facilities and maximum security prisons was 106%, representing a shortfall of 213 places. Similar to the situation in male institutions, overcrowding was more serious in female remand facilities and maximum security prisons, where the occupancy rate was 162%, representing a shortfall of 230 places. Worse still, according to the latest projection conducted by the Correctional Services Department in 2008, the penal population is expected to increase to 11,960 by 2010 and 12,970 by 2015.

B. Staff Strength of Correctional Services Department of Hong Kong

In order to effectively manage such a huge number of offenders and rapid growth of the penal population, an increase in staff strength of the Correctional Services Department seems to be necessary and inevitable. However, it is frustrating that the staff strength of the Department has declined continuously in the past ten years.

Due to the Asian financial turmoil in 1997, there was an economic recession in Hong Kong. The Hong Kong Government has since 1999 taken more stringent control over expenditure and accelerated the pace of civil service reform by reducing the number of civil servants from around 198,000 in early 1999 to about 160,000 by 2007–2008. In this connection, the Department deleted 560 permanent posts in staff establishment and 473 permanent posts in staff strength between 1999 to 2008 (Appendix C) through organizational restructuring and work process re-engineering.

Faced with the continuous growth of the penal population and declining in staff strength, the administration and management of the Department was severely challenged. At the end of March 2009, the total penal population (including inmates, Halfway House residents and detainees of Castle Peak Bay Immigration centre) in Hong Kong is 10,575 and the strength of frontline custodial staff is 3,713. The ratio of staff to prisoners is 1: 2.85. The great pressure and heavy workload of staff, as well as the huge burden of management of the Department are not difficult to imagine.

C. Adverse Effects caused by the Overcrowding in Correctional Facilities in Hong Kong

There may be a wide diversity of causes of the overcrowding problem in Hong Kong correctional facilities and the cores of the problem is really complicated. It may be attributable to the combination of factors like the rise in the crime rate, the upsurge of illegal immigrants, legislative changes in sentencing policy and public preference for punitive reactions to crime and criminals. Anyhow, as the last law enforcement agency in the chain of "due process" to detain and rehabilitate convicted offenders, the Correctional Services Department is hardest hit with the burden by the overcrowding of penal population.

1. Breach of Discipline and Order in Prison

Most obviously, the overcrowding of the penal population directly causes greater pressure on the already stressful prison life. Living in a restricted and congested environment, prisoners' emotional and psychological states are most affected. Scuffles, quarrels or even fighting among prisoners are not uncommon. Under such circumstances, the peace of the prison is difficult ot maintain and good discipline and order is seriously challenged. It really places great pressure and burdens on the prison management and administration.

2. Hygiene Problems

Difficulty in maintaining discipline aside, overcrowding in penal facilities also raises the problem of personal hygiene. In a crowded and congested living environment, it is not hard to imagine that the quality of ventilation, cleanliness of dormitories and a good standard of prisoners' personal hygiene may not be easily maintained. As such, infectious illness such as influenza, skin disease, avian flu or even tuberculosis may easily break out. It poses hazards and threats to the health of both prisoners and staff, and adds to burden of medical care.

3. Hindrance to the Rehabilitative Programmes of Prison

Overcrowding in penal institutions also defeats the fair use of the facilities and treatment/training programmes of prisons. Apart from punishment by deprivation of liberty, incarceration aims also at

rehabilitating the offenders with its facilities and treatment/training programmes. In an overcrowded situation, the common facilities in prison such as dining halls, counselling rooms, vocational training workshops, multi-function rooms, chapels, etc. cannot be fairly and fully utilized by all prisoners. With disruption to institutional life, the designated treatment/training programmes such as counselling groups, hobby classes and religious classes may not cater for all the population in the prison. It deprives prisoners of benefits from the treatment/training programmes and thus hinders the primary objectives of correctional facilities to rehabilitate and re-socialize prisoners.

IV. MEASURES TAKEN BY THE CORRECTIONAL SERVICES DEPARTMENT AGAINST THE OVERCROWDING PROBLEM

In face of the continuous growth of the penal population and the resultant overcrowding problem in correctional institutions, the Correctional Services Department endeavoured to take various measures including launching the Rehabilitation Centre programme, collocation and redevelopment of correctional institutions, enhancing development of early release schemes, taking initiatives in rehabilitation programmes, and a lot of re-offending preventive initiatives to address the problem. The result was encouraging and the pressure of overcrowding was to a certain extend alleviated.

A. Launching the Rehabilitation Centre Programme

With a view to meeting the rehabilitation needs of young offenders, the Department launched the Rehabilitation Centre programme in 2002. It consists of four Rehabilitation Centres, namely the Lai Chi Rehabilitation Centre (for males), the Lai Hang Rehabilitation Centre (for males), the Chi Lan Rehabilitation Centre (for females); and the Wai Lan Rehabilitation Centre (for females). The Lai Chi Rehabilitation Centre and the Chi Lan Rehabilitation Centre run the Phase I programmes emphasizing discipline training whereas the Lai Hang Rehabilitation Centre and the Wai Lan Rehabilitation Centre offer the Phase II programmes focusing on community-based training. The training period in Phase I is two to five months and Phase II is one to four months but the date of release of the inmates is not fixed and depends on their progress during training.

Before the rehabilitation Centre programme came into operation, young offenders who were convicted and needed custodial sentences might either be sentenced to a Detention Centre (1 to 12 months) or a Training Centre (3 to 36 months). As the a Detention Centre was fit only for first offenders, most of the recidivists were usually sentenced to a Training Centre of which the training/detention period was much more longer that that of Detention Centre. The launching of the Rehabilitation Centre programme not only provided a new sentence option to the courts, but also bridge the service gap between the Detention Centre and Training Centre to relieve the overcrowding of the penal population of young offenders.

B. Collocation and Redevelopment of Correctional Institutions

With a view to alleviating overcrowding in female institutions and grasping the opportunity to refurbish the outdated penal facilities, the Department converted the now defunct Lai King Training Centre into a penal facility for young female offenders to relieve overcrowding of the Tai Tam Gap Correction Institution (for young females). Before commencing the conversion work, two Training Centres, Lai King Training Centre and Cape Collinson Correctional Institution for males, were combined and the Lai King Training Centre was collocated to the site of the Cape Collinson Correctional Institution. Upon completion of the conversion, 80 additional penal places for female offenders were provided.

In addition, the Department started a redevelopment project in Lo Wu Correctional Institution in 2007 and it was expected that the new institution would commence operation in early 2010. Comprising two medium security and one minimum security institution, the redeveloped Lo Wu Correctional Institution will provide 1400 female penal places, which will substantially relieve the overcrowding situation in female institutions. Moreover, an extension project in Lai Chi Kok Reception Centre (for males) also provided 144 additional male penal places.

C. Enhancing the Development of Early Release Schemes

There is no parole system in the criminal justice system of Hong Kong. However, there are some early release schemes which are similar in nature to the parole system. Since 1987, the Release Under

Supervision Scheme (RUSS) and the Pre-Release Employment Scheme (PRES) has been enacted. Under the Release Under Supervision Scheme, prisoners who are sentenced to three (or more) years' imprisonment and have served half of their sentences with good performance may be granted early release from prison to undergo a period of aftercare supervision. For the Pre-Release Employment Scheme, prisoners who are sentenced to two (or more) years' imprisonment and have good performance during incarceration may be granted early release from prison six months before their date of discharge to undergo a half year of statutory aftercare supervision.

As one of the measures to relieve overcrowding of long term prisoners, the Department greatly enhanced the development of these two schemes in the past ten years. In 1997, there were only ten prisoners released under the schemes. In 2007, a total of 67 prisoners were released under the schemes (Appendix C). The upward trend of prisoners eligible for early release is obvious and it does help a lot in diminishing the population of long-term prisoners.

D. Initiatives in Rehabilitation Programmes

Apart from taking various measures to tackle overcrowding in penal facilities and increase the penal places, the Department also endeavoured to improve the rehabilitation on of offenders by taking initiatives in rehabilitation programmes to help reduce crime rate and recidivism.

1. Initiatives for Reforming Offenders and Facilitating their Reintegration into Society
   In this regard, actions were taken to:
   (i) develop the Risks and Needs Assessment and Management Protocol for Offenders;
   (ii) run Relapse Prevention Course for offenders with substance abuse problems;
   (iii) launch an Offending Behaviour Programme for prisoners;
   (iv) organize an Adventure-Based Counselling Programme (ABC) for young offenders;
   (v) refine the Inmate-Parent Programme to foster offenders' family relationships.

2. Initiatives for Enhancing Offenders' Employability
   For enhancing offenders' employability, initiatives were taken to:
   (i) refine the Employment Guidance Programme;
   (ii) introduce a new Information Technology Course for young offenders;
   (iii) provide accredited vocational training courses for prisoners.

E. Preventive Measures to Reduce Crime Rate and Recidivism

Special efforts for offenders' rehabilitation and reintegration aside, the Department also took initiatives at the social and community level as preventive measures to enlist public support with a view to reducing crime rates and recidivism. It included:

(i) organizing a series of publicity campaigns to appeal for public acceptance of offenders and public support for offenders' rehabilitation;
(ii) launching of the Rehabilitation Pioneer Project to let students and youth meet with some rehabilitated offenders and share the serious, far-reaching consequences of crime;
(iii) running of Continuous Care Projects involving eight Non-Government Organizations to follow-up those supervisees whose statutory aftercare supervision had expired to sustain the services provided to those in need;
(iv) organizing an employment symposium to appeal to the public for job offers for ex-offenders.

V. POSSIBLE MEASURES IN THE CRIMINAL JUSTICE SYSTEM OF HONG KONG

With the implementation and launching of various measures and initiatives by the Correctional Services Department, the pressure of overcrowding of penal populations is obviously alleviated and the situation is improved to a certain extent. However, as mentioned before, it is projected that there will still be a serious shortfall of penal places in 2010 and 2015. The existing policies and measures taken may not suffice to tackle the problem then. Thus, a comprehensive review of the whole criminal justice system to make changes at each stage of the "due process" and enhancement in education and of the public are deemed necessary in the long run.

Herewith, some possible measures or enhancements at the 4 "P" stages and level, namely the Pre-sentencing Stage, Penal Custody Stage, Post-release Stage and Public Level, are suggested for a long lasting solution to the problem.

A. Pre-Sentencing Stage

1. Release on Bail

This stage includes the processes from an offender being arrested to prosecution and then sentencing. With a view to effectively controlling the remand population in correctional institutions, more release on bail for minor offences should be granted during the processes of police investigation and court adjudication. To safeguard security loopholes and forestall the arrested person from jumping bail, Global Positioning System (GPS) technology may be used to trace the the targets.

2. Extended Use of Police Superintendent Discretion Scheme

On the other hand, the Police Superintendent Discretion Scheme should be further extended to young adults first offenders who commit crimes of a minor nature, rather than confining its use to juveniles under the age of 18. It is believed that a large portion of the criminal population may be exempted from the legal proceedings as well as penal custody.

3. Community-Based Sentences

Regarding the court sentencing level, more community-based sentences, including Probation Orders, Community Service Orders, Curfew Orders, etc. should be imposed instead of the custodial sentences. Moreover, non-custodial sentence options other than the conventional ones should be incorporated into the judges' decision lists.

4. Work Camp for Women

With respect to the overcrowding situation in female penal institutions in Hong Kong, the concept of the Work Camp for Women is worthwhile considering. In general, female offenders are usually non-violent, pose less threat to society, and their offences are mostly minor in nature or commercial crimes. Under the sanction of the Work Camp, a term of work training is imposed on female offenders whose daytime work inside the camp is compulsory. They are allowed to stay overnight at home after working at the camp. While staying outside the camp, their behaviour is monitored by their supervising officers. This sanction may serve both the purposes of relieving overcrowding of female penal facilities and repaying society for their crimes.

5. Restorative Justice

Another sentencing option which can be taken into consideration is restorative justice. The concept of restorative justice is to settle some minor crimes through a reconciliation and mediation process by involving the three parties, namely the offender, victim and community, instead of going through the traditional legal proceedings by imposing a custodial or non-custodial sentence. Under the sanction of restorative justice, the elements of healing, victim-offender mediation, and apology and reintegration will be part of the reconciliation and mediation process. Apart from helping to contain the growth of the penal population, restorative justice may also benefit the rehabilitation of offenders as well as the recovery of victims.

B. Penal Custody Stage

This stage mainly focuses on the incarceration of prisoners and relates to the core business of the Correctional Services Department.

1. Redevelopment of Correctional Institutions

There is no doubt that the redevelopment of correctional institutions to increase penal places and update the aging penal facilities is the most tangible and effective measure in tackling the problem of overcrowding in correctional facilities. Other than redeveloping the existing penal institutions, the Department may consider exploring more suitable locations for establishing new penal institutions with modern rehabilitation facilities.

2. Parole System

Unlike other well-developed countries, there is no specific parole system in the criminal justice system of Hong Kong. Though the aforesaid two early release schemes serve a similar purpose in releasing some long-term prisoners, the applicability of the schemes is virtually restricted to those prisoners with a comparatively longer term of imprisonment. To reduce the penal population in the long run, a comprehensive parole scheme open to most of prisoners is necessary and worthy of development.

3. Transfer of Sentenced Persons

Besides, the Department may endeavour to study the feasibility and technicality of transferring persons of other nationality sentenced here in Hong Kong to their home countries to serve their remaining terms of imprisonment. According to the statistical figures (Appendix D), in Hong Kong correctional institutions, the total number of illegal immigrants in prison and prisoners of other nationality in 1998 was 3,749 (2,363 illegal immigrants and 1,386 of other nationality) or 31.47% of the total penal population. In 2004, the total number was 2,750 (1,488 illegal immigrants and 1,262 of other nationality) or 21.65% of the total penal population whereas there was 2,414 (967 illegal immigrants and 1,447 of other nationality), or 23%, in 2008. Though there has been a slow down in the number of illegal immigrants incarcerated in Hong Kong, the number of prisoners of other nationality has risen slightly. The total number remains high and forms quite a large portion of the total penal population. As such, to transfer these sentenced persons to their home countries to serve the remainder of their sentence is considered to be one of the effective measures to ease overcrowding of the penal population in Hong Kong.

C. Post-Release Stage

The post-release stage is the last but not the least stage of the criminal justice system. To the contrary, it is a crucial stage in controlling the rate of crime and recidivism through rehabilitative initiatives and monitoring of offenders released from penal institutions.

1. Enhancement of Aftercare Supervision

With legal provisions in Hong Kong, all prisoners/inmates released under the Post-Release Supervision of Prisoner Scheme or special correctional programmes such as the Training Centre, Detention Centre, Rehabilitation Centre and Drug Addiction Treatment Centre must undergo a period of statutory aftercare supervision for one to three years after their release. During the supervision period, supervisees' behaviour and employment status are closely monitored. A breach of the supervision requirement or relapse to crime will result in their recall to the correctional institutions for re-imprisonment or further training or treatment. With the monitoring and guidance of the aftercare supervision, the ex-offenders can effectively be kept on the right track and engage themselves in gainful employment. It is really an effective tool to rehabilitate ex-offenders and contain their re-offending behaviour. In view of such, the Department may inject more resources to enhance and develop her aftercare service, especially in staff strength, with a view to minimizing the rate of crime and recidivism. With the trimming down in the crime and recidivism rate, overcrowding in penal facilities may no longer occur in future.

2. Development of Social Enterprise

There is no denying that steady and gainful employment is one of the prerequisites of offenders' rehabilitation and reintegration. However, it is not easy for ex-offenders to get a desirable job given their criminal background and lack of work skills. Feeling discriminated against and looked down upon, they may be so frustrated that they resort to their former criminal path. To achieve both the aims of eliminating discrimination against offenders and enhancing their employability, the Department may adopt a proactive attitude to join hands with some merchants to form various social enterprises with a view to providing job offers for ex-offenders. With job satisfaction and steady financial income, the path for offenders' rehabilitation and reformation are much broader and more vivid. Greater success in offenders' rehabilitation means less risk of overcrowding in penal institutions.

D. Public Level

1. Enhanced Publicity Campaigns

As mentioned before, discrimination and stereotyping by the public are one of the greatest obstacles to offenders' rehabilitation. It is not rare for offenders who have sufficient determination and family support to feel frustrated and inferior because of discrimination at work, school or even in the community. They

eventually re-associate with their former dubious peer groups to seek identity and validity. In this regard, the Department may channel more resources into publicity campaigns, for examples, announcement of public interest on radio or TV, TV programmes and episodes, voluntary social services for offenders, exhibitions, seminars, symposiums, etc. extensively and intensively until the completion of public education, introducing the rehabilitation services provided by the Department and appealing for public acceptance and support of offenders' rehabilitation. Strong support from the community and the public can directly foster offenders' reintegration and reduce the penal population.

2. Enhancement in Prevention Programmes

To effectively control the crime rate and penal population, it is wise to prevent new offenders from the criminal path. In this connection, the Department has launched a Rehabilitation Pioneer Project covering a series of educational talks, visits and forums for youth. Under the scheme, young students may visit penal institutions and meet with inmates who share their experiences and lessons learned. It is a crime fighting tool by deterring youth from committing crime after getting them to realize the consequences of crime.

Taking it as a crime prevention programme to further control the penal population, the Department may consider extending the programme to the scope of adults rather than only focusing on youth groups in order to extend the service and benefit more members of the public to avoid their stepping on the track of crime. Similar programmes with specific topics such as drug abstinence, sex offences or violent offences would be worthwhile. With the implementation of sufficient crime prevention measures, desirable control of penal population may not be troublesome correctional administration.

VI. CONCLUSION

Overcrowding in penal facilities burdens and pressures correctional administration worldwide. The causes of the problem are complicated and inter-related. It is not possible to attribute it to a single factor. With the aforesaid illustrations of the "4Ps", namely the Pre-sentencing Stage, Penal Custody Stage, Post-release Stage and Public Level, it is not hard to note that there is a causal, vicious circle in the criminal justice system and each stage of which may cause overcrowding in penal facilities. Besides, other systems of the society may also consider extending the variety and contain, if not eliminate the development of the causal, vicious circle.

Each stage of the "4Ps" may be the start of the overcrowding problem. In the Pre-sentencing Stage, abuse of remand with less bail granted and imposing custodial sentences rather than non-custodial may result in an increase in the penal population. In the Penal Custody Stage, lack of foresight in penal places planning under or poor use of early release schemes, if not the parole system, and ineffective rehabilitation programmes may worsen the situation and foster recidivism and overcrowding. In the Post-release Stage, poor management and development of aftercare services, making no good use or under utilization of social resources, and incompetence in implementation of crime prevention measures may undermine the rehabilitation of offenders and accelerate crime and recidivism rates as well as overcrowding. Of course, at the Public Level, discrimination, stigmatization and low acceptance of offenders may also impede the rehabilitation and reintegration of offenders and boost the crime and recidivism rate and overcrowding. As such, it is explicit that each stage is inter-related and a deficit at any one stage or level may affect the next and trigger a vicious circle.

Besides the "4Ps", other social systems, such as economy, education and community, may also have a great impact on the issue. Economic downturn, incapable education system and grievances in society or hostility towards or dissatisfaction with government may all cause an upsurge in crime and the recidivism rate and penal population as well. Therefore, in order to thoroughly reduce overcrowding in penal facilities, the government should take initiatives or make remedial policies in the relevant social systems in addition to a comprehensive review with effective innovations and measures at each of the "4Ps".

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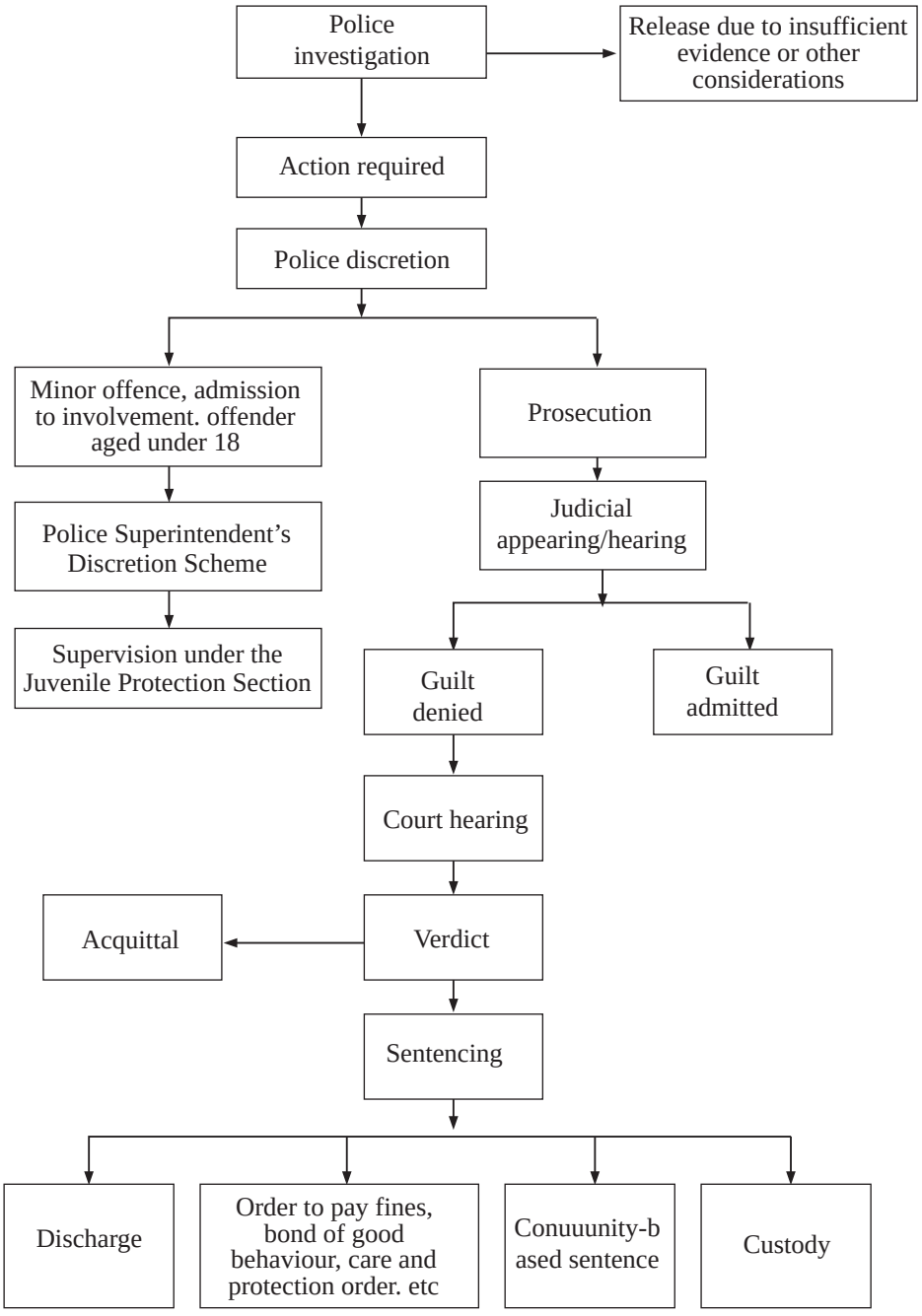
APPENDIX A

Table 2 : Prison Population and Accommodation

Year	Prison Population	% Change over Preceding Year	Certified Accommodation	No. of Prisons	Occupancy Rate (%)
I. Year End Position					
1996	11,044	-1.3	8,574	18	128.8
1997	10,056	-8.9	8,572	19	117.3
1998	10,627	+5.7	8,631	19	123.1
1999	10,358	-2.5	9,045	20	114.5
2000	10,696	+3.3	9,115	20	117.3
2001	10,852	+1.5	9,204	20	117.9
2002	11,472	+5.7	9,459	20	121.3
2003	11,682	+1.8	9,527	20	122.6
2004	11,437	-2.1	9,729	20	117.6
2005	10,063	-12.0	9,190	19	109.5
2006	10,110	+0.5	9,784	19	103.3
2007	9,819	-2.9	9,576	19	102.5
2008	9,343	-4.8	9,657	19	96.7

APPENDIX B

"Due Procedure" in the Hong Kong Criminal Justice System



APPENDIX C

Table 35 : Establishment and Strength of Correctional Services Department (as at end of year)

Rank	1996		1997		1998		1999		2000		2001		2002		2003		2004		2005		2006		2007		2008	
	E	S	E	S	E	S	E	S	E	S	E	S	E	S	E	S	E	S	E	S	E	S	E	S	E	S
CCS	1	1	1	1	1	1	1	2	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
DC	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
AC	3	3	3	2	4	2	4	2	4	4	4	4	4	4	4	3	4	4	4	5	4	2	4	3	4	4
CS	2	2	2	3	2	4	2	3	2	2	2	2	2	2	2	3	2	2	2	2	2	2	2	2	2	2
SS	15	12	15	9	14	11	15	15	14	12	13	13	14	15	12	12	12	12	12	13	12	16	12	13	13	12
Supt	41	35	38	36	38	35	38	33	38	32	38	33	36	31	34	30	34	30	33	22	34	18	37	25	36	31
CO	81	76	72	61	69	69	72	64	71	60	70	63	69	66	63	65	62	56	66	75	63	76	62	69	63	65
PO	316	261	287	262	280	256	288	274	282	271	272	265	271	250	247	237	240	233	231	197	225	211	223	230	223	221
Offr	669	655	675	634	655	642	671	627	621	619	644	639	658	665	632	643	621	621	613	622	601	596	613	622	615	637
AO I	2,205	1,863	2,049	1,913	2,021	1,886	2,061	1,847	2,059	1,821	2,042	1,895	2,047	1,919	1,979	1,864	1,916	1,771	1,888	1,721	1,876	1,702	1,868	1,670	1,869	1,648
AO II	2,851	3,100	2,973	3,065	2,927	3,016	2,955	3,043	2,843	3,027	2,880	2,989	2,831	2,938	2,807	2,911	2,808	2,917	2,803	2,872	2,799	2,861	2,778	2,863	2,811	2,963
Offr (VM) *	25	13	2	1	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.
AO II (VM) *	217	192	73	32	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.
Sub-total	**6,427**	**6,214**	**6,191**	**6,020**	**6,012**	**5,923**	**6,108**	**5,911**	**5,936**	**5,850**	**5,967**	**5,905**	**5,934**	**5,892**	**5,782**	**5,770**	**5,701**	**5,648**	**5,654**	**5,531**	**5,618**	**5,486**	**5,601**	**5,499**	**5,638**	**5,585**
CSI Staff	361	350	358	344	360	352	370	355	359	356	365	358	367	353	346	344	344	327	342	312	339	305	339	303	339	295
Civilian Staff	775	726	737	718	725	712	737	716	733	721	727	708	719	705	700	700	693	677	682	674	680	665	682	654	678	629
Total	**7,563**	**7,290**	**7,286**	**7,082**	**7,097**	**6,987**	**7,215**	**6,982**	**7,028**	**6,927**	**7,059**	**6,971**	**7,020**	**6,950**	**6,828**	**6,814**	**6,738**	**6,652**	**6,678**	**6,517**	**6,637**	**6,456**	**6,622**	**6,456**	**6,655**	**6,509**

Notes : Establishment (E) excludes supernumerary posts.
Strength (S) refers to substantive rank.
Civilian staff refer to General Grades and Common Grades Staff.

APPENDIX D

Table 34 : Parole Applications

	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
Application for RUSS											
Success *											
Recommended by CSD	5	3	2	2	4	1	2	0	2	3	13
Not recommended by CSD	0	0	0	0	0	0	0	0	3	1	3
Failure *											
Recommended by CSD	1	3	1	3	0	0	0	1	0	1	1
Not recommended by CSD	21	10	11	5	5	3	6	2	4	3	2
Withdrawal	1	1	1	0	1	0	0	1	1	0	1
Total	**28**	**17**	**15**	**10**	**10**	**4**	**8**	**4**	**10**	**8**	**20**
Application for PRES											
Success *											
Recommended by CSD	5	1	2	4	5	13	17	12	29	46	46
Not recommended by CSD	0	0	0	0	0	0	0	4	2	2	5
Failure *											
Recommended by CSD	7	10	5	9	9	4	4	1	1	2	1
Not recommended by CSD	39	24	17	12	18	17	20	12	8	12	38
Withdrawal	4	6	1	1	0	3	0	2	1	0	2
Total	**55**	**41**	**25**	**26**	**32**	**37**	**41**	**31**	**41**	**62**	**92**

Notes : RUSS = Release Under Supervision Scheme
PRES = Pre-release Employment Scheme
* Based on Decision made by the Release Under Supervision Board.

APPENDIX E

Table A3 : Penal Population by Sex by Broad Nationality (as at end of year)

Sex / Year	Local Chinese	Mainland Chinese			Other Nations / Territories#	Total
		Illegal Immigrant	Legal Entrant@	*Sub-total*		
Male						
1998	6,909	2,043	389	*2,432*	1,142	**10,483**
1999	6,767	1,943	359	*2,302*	1,019	**10,088**
2000	7,329	1,579	330	*1,909*	1,010	**10,248**
2001	6,999	1,613	314	*1,927*	892	**9,818**
2002	7,047	1,593	369	*1,962*	934	**9,943**
2003	6,962	1,675	574	*2,249*	954	**10,165**
2004	6,823	1,160	1,015	*2,175*	1,022	**10,020**
2005	6,427	885	864	*1,749*	846	**9,022**
2006	6,282	984	825	*1,809*	1,033	**9,124**
2007	6,190	785	766	*1,551*	1,027	**8,768**
2008	5,804	615*	803	*1,418*	1,037	**8,259**
Female						
1998	528	320	339	*659*	244	**1,431**
1999	531	328	374	*702*	224	**1,457**
2000	559	433	564	*997*	213	**1,769**
2001	606	605	781	*1,386*	244	**2,236**
2002	674	337	1,533	*1,870*	257	**2,801**
2003	691	138	1,760	*1,898*	258	**2,847**
2004	723	328	1,394	*1,722*	240	**2,685**
2005	698	405	914	*1,319*	272	**2,289**
2006	676	424	810	*1,234*	330	**2,240**
2007	727	413	607	*1,020*	431	**2,178**
2008	762	352	708	*1,060*	410	**2,232**
Both Sexes						
1998	7,437	2,363	728	*3,091*	1,386	**11,914**
1999	7,298	2,271	733	*3,004*	1,243	**11,545**
2000	7,888	2,012	894	*2,906*	1,223	**12,017**
2001	7,605	2,218	1,095	*3,313*	1,136	**12,054**
2002	7,721	1,930	1,902	*3,832*	1,191	**12,744**
2003	7,653	1,813	2,334	*4,147*	1,212	**13,012**
2004	7,546	1,488	2,409	*3,897*	1,262	**12,705**
2005	7,125	1,290	1,778	*3,068*	1,118	**11,311**
2006	6,958	1,408	1,635	*3,043*	1,363	**11,364**
2007	6,917	1,198	1,373	*2,571*	1,458	**10,946**
2008	6,566	967	1,511	*2,478*	1,447	**10,491**

Notes : Penal population includes prisoners, inmates, remands, VMs, VIIs, ECVIIs and other detainees and civil prisoners in penal institutions but excludes infants, half-way houses residents and detainees in CIC.

@ refers to Mainland Chinese 2-way permit / passport holders.
# Including VII(S.32) detained in GIRC since June 1998 after closure of all VM centres.
* Including 2 detainees in SLPC.

REPORTS OF THE COURSE

GROUP 1

EFFECTIVE COUNTERMEASURES AGAINST OVERCROWDING OF CORRECTIONAL FACILITIES

Chairperson	Mr. Oleskyenio Enrique Florez Rincon	(Colombia)
Co-Chairperson	Mr. Hiroshi Suda	(Japan)
Rapporteur	Mr. Ricky Iomea	(Solomon Islands)
Co-Rapporteur	Ms. Marialda Lima Justino da Cruz	(Brazil)
Members	Mr. Jean Claude Ngoie Mutombo	(DR Congo)
	Mr. Mahendra Nath Upadhyaya,	(Nepal)
	Mr. Takahiro Sumikawa	(Japan)
Advisers	Prof. Naoyuki Harada	(UNAFEI)
	Prof. Fumiko Akahane	(UNAFEI)

I. INTRODUCION

On 22 May 2009, Group 1 commenced its workshop. The Group appointed, by consensus Mr. Florez as its Chairperson, Mr. Suda its Co-Chairperson, Mr. Iomea as its Rapporteur and Ms. Justino da Cruz as its Co-Rapporteur. Lively discussions occurred during the course of the sessions. The Group had its last workshop session on 15 June 2009.

II. SUMMARY OF THE DISCUSSSIONS

A. Alternatives to Pre-Trial Detention

1. Police Power in releasing Suspects on Bail

The powers available to police in fixing bail in some cases and releasing suspects without being indicted varies from one jurisdiction to another. However, in some countries, the discretionary powers of police during investigation appear to be similar in some ways. For instance, in the criminal justice systems of Brazil and the Solomon Islands, police can fix bail in less serious offences, and in Brazil, only the judge has the power to release a suspect on conditions. In Nepal, the police can release a suspect with the consent of the public prosecutor.

One participant from Japan stated that in Japan, police can release suspects but sometimes public prosecutors view this as not proper. The reason is that although police might think that the case is not serious the public prosecutors might think otherwise. Thus, it is believed that police judgments in some cases are not adequate at times.

The above views show that although having power to release suspects by police would contribute to avoiding unnecessary detention and overcrowding in correctional facilities, the objectives and principles of justice must also be carefully observed.

At the close of the discussion, some members support the idea that police should have discretionary powers to release suspects and on the contrary, some participants think that it is not a good idea to give these powers to the police because of the possibility that the powers might be abused.

2. House Arrest or Detention by Police

The first subject of discussion was house arrest or detention by police. In some countries, after a suspect has been arrested, he or she must be referred to a judge who decides whether the suspect should be released or not. In some countries which are represented in the group, if a judge releases a suspect restrictions can often be imposed.

In some jurisdictions, such as Japan, the police arrest and then refer the suspect to public prosecutors (within 48 hours) who then decide whether to seek detention or not. If a prosecutor decides not to ask a court for detention then the suspect can be released without any restrictions. The police sometimes release a suspect to his or her home but no restrictions may be imposed.

In discussing the issue of house arrest, the use of monitoring systems was also touched on. It is understood that this system is used in some countries. Some expressed the view that this system is not appropriate pre-trial because the suspect is yet to be convicted. Also, it might be against human rights principles.

It was pointed out by some members that although house arrest is an effective measure against overcrowding, the rights of the suspect/accused must also be considered. It was also expressed that there should be a balance between the rights of the suspect and the need to protect evidence from destruction. Some participants argued that house arrest is only necessary for serious offences.

In spite of the various views expressed, the group agrees that house detention is an effective measure to alleviate overcrowding. However, the issues such as human rights and costs also need to be considered. These must also be balanced with the need to protect the destruction of evidence, the need to avoid absconding and the need for maintenance of public safety.

3. Submission to Supervision of a Person or an Institution

As far as the countries represented in the group are concerned, this alternative to incarceration is practiced in some countries and not in others.

This supervision is practiced only in relation to juveniles and some participants expressed the view that this is not effective. The importance of the responsibility of supervisors was also discussed. It is a good measure against overcrowding but only if supervision is effective.

4. Electronic Monitoring

As far as the countries represented in the group are concerned, this system is yet to be introduced in their respective systems. Most members commented that the system is hard to implement and would be very expensive. On the contrary, one argued that although the system might be expensive, it is better than keeping innocent persons on remand in jail for a long period of time. Some expressed the view that this system is necessary in some societies, especially in relation to sex-offenders. Others think this system is infringes upon human rights.

5. The Prohibition of the Suspect from Leaving a Particular Area

It appeared from the discussion that this is used in some countries and not in other countries. In countries where this is used, the procedural stage where this is used varies. For example, in Japan the above measure can only be used after indictment, as a condition attached to bail, by a judge. In other countries, this measure is used even before indictment and is often a condition attached to bail. In most countries this measure is applied only in relation to petty offences.

According to the discussion, this is believed to be effective and working well on the presumption that suspects who are released with this condition attached often observe this order because of fear of being detained again for breach of the condition.

In Japan, as in other countries, one reason why suspects are detained during investigation is because of the need to prevent interference with investigation or destruction of evidence. Also, accomplices are sometimes not released during the investigation period because of the possibility that they might conspire to defeat the course of justice.

In conclusion, of the discussion regarding the above subject, it appears that all members of the group agree that this is a good measure, but there is a need for effective supervision to avoid issues such as interference with investigation or the destruction of evidence.

6. Investigation without Arrest

Each member of the group explained the system in their respective countries regarding arrest during and after investigation. In some countries, police can arrest a suspect during investigation; however there are some cases in which the police must obtain a warrant of arrest from a judge before arresting a suspect. In relation to minor offences, suspects can be released within a few hours of arrest.

In Japan and other countries, for minor offences, whether a suspect is arrested or not, the investigation continues and the suspect is usually not detained. In some countries the arrest of the suspect is mandatory, but the decision to release a suspect can only be made by a judge or a prosecutor.

In conclusion, in some countries it is difficult for investigators to investigate without the arrest of the suspect because of the possibility of destruction of evidence, absconding and safety of the suspect, victims and witnesses. The group agrees that police having the discretion to release suspects in minor cases can contribute to alleviating overcrowding. Some participants were quite sceptical about giving that discretion to the police because of the possibility of the abuse of power.

7. Prohibition of the Suspect/Accused from appearing at Identified Places or meeting Named Individuals

Most of the participants indicated during the discussion that prohibiting a suspect or an accused from appearing at identified places or meeting named individuals is an order which courts often impose.

In Japan and the Solomon Islands, this is sometimes imposed as a bail condition when a judge grants bail to a suspect or an accused. The objective is mainly to prevent the destruction of evidence and to prevent accomplices from conspiring to defeat the course of justice.

In Brazil, this is stipulated in the law, with the aim of protecting victims, such as victims of family disputes, but it is not applied as a bail condition.

The group agrees that this is a good alternative to pre-trial detention but sometimes lacks effective supervision. However, some participants argued that this seemed to work well as people often report to Public Prosecutors any breaches or failure to comply with the condition/order by the suspect.

The group accepts that in developing countries, sometimes suspects cannot afford to meet certain bail requirements such as the need to deposit certain amounts of money.

However, this may not be a big problem as one participant from Japan pointed out that in Japan, when a suspect is unable to pay the bail bond required of him or her, an association does exist and can assist in paying the bond.

The group unanimously agrees that the payment of bail bonds is a good measure and it is important for the establishment of associations to assist suspects regarding bail bonds.

8. Confiscation of Passport of the Suspect

This measure is used in most of the countries represented. Some participants also indicated that the courts can also have the discretion to make an order preventing the suspect from applying for a passport if it considers that there is a flight risk.

In Nepal, the investigating authority can make this order in relation to suspects that have been indicted for corruption offences. It is interesting to know that in Nepal, foreigners indicted for offences that carry a maximum penalty of more than six months' imprisonment are not entitled to bail, unless they show exceptional circumstances. This is different from Japan where there is no restriction on bail no matter the severity of the offence. In the Solomon Islands, suspects charged with murder and treason are not entitled to bail unless they show exceptional circumstances. In Brazil, terrorist crimes, practice of torture and drug-related offences, such as drug trafficking, are non-bailable.

Despite the different approaches in applying this measure, the group agrees that this is a good alternative to incarceration and recommends that there should be flexibility in bail to avoid overcrowding.

9. Release with an Order to Pledge Financial or other forms of Property, such as Bail

It is understood that there is criticism of bail because it is believed that it is not applied equally. Some suspects can afford to meet such orders but others cannot.

In concluding this topic, the group agrees that this is a good system however; it is recommended that it is important and necessary for countries that are yet to have associations that can assist suspects with meeting

bail requirements to establish such an association.

B. Diversion from Criminal Justice Procedure

1. Absolute or Conditional Discharge

In most of the countries represented in the group, absolute or conditional discharge is a course applicable by courts and prosecutors.

In Japan, once a case is prosecuted, the prosecution cannot be suspended but withdrawal is possible. In many countries,[1] the decision to suspend or withdraw a matter must be approved by the bosses of the prosecution department and the government. In countries where such a decision is solely made by the prosecutor having carriage of the matter, it was argued that victims who do not agree with any decision to suspend prosecution should be provided with an opportunity to request an independent review of such decision.

2. Decriminalization

Some participants believe that decriminalization of some minor offences is important because it reduces overcrowding and also because judges and prosecutors do not have to be burdened with more cases. One participant however, thinks that decriminalization should not happen because of overcrowding. There are other factors that must be considered before any decision could be made whether to decriminalize or not.

The group seems to agree that the situation differs from one country to another and in some cases, decriminalization of minor offences is effective. However, public opinion must first be ascertained before any decision is made.

3. Restorative Justice

The other topic of discussion was restorative justice. In some countries represented there is no restorative justice. In one or two countries, although there is no requirement under law for restorative justice, it is practiced in the form of reconciliation or compensation. This is often done in minor cases and is used in the criminal justice process.

The participant from Colombia informed the group that Restorative Justice is an alternative mechanism which is practiced in his country. He explained what restorative justice is and its different forms which include:

- Restitution/Compensation;
- Community work;
- Individual reparation;
- Collective reparation;
- He further indicated that the period for completing restorative justice is 60 days. If not completed within this period then prosecutors will proceed with the case in court. Resolving a case through this system prevents a case from entering the criminal justice process. In Colombia more offences are resolved through an established Reconciliation Office. This is an independent office.

In some countries represented, there is no restorative justice and in some countries, there is no strict or formal legal requirement for it but it is used in the criminal justice system, for instance, matters are sometimes resolved by way of reconciliation. Although this is not in a strict sense restorative justice, it is somehow appears to be a form of restorative justice.

The group then identified the merits and demerits of Restorative Justice. The merits are:

- Alleviates overcrowding;
- Saves time and money;
- It lessens the burden or workload on police, public prosecutors and judges;
- It satisfies victims;
- It avoids stigmatization of offenders.

The demerits are:

- Lack of specific and general deterrence;
- Recidivism cannot be avoided;

[1] Countries represented in Group 1.

- Possibility of victim being disadvantaged in the mediation process;
- Possibility of unfair treatment for some offenders (risk of injustice to some offenders);
- Public insecurity.

The group agrees that what may be considered a serious offence in one country may not be a serious offence in another country. What may be seen as minor offences in some countries might be serious offences in other countries.

However, the group tends to agree that Restorative Justice may and should only be applied to offences which are considered to be minor offences in each country.

The group recommends that the establishment of an independent and neutral mediating body in the process is fundamental.

C. Speedy Trial Measures

1. Summary Proceeding and Speedy Trial

Each participant from the countries represented informed the group of the current situation in their countries in relation to speedy trial.

In Japan, there are two processes, one is the summary proceeding and the other is the speedy trial. In a summary proceeding, if the punishment for an offence is equivalent to a fine, trials may not be held. Instead, the evidence documents are sent to the judge after indictment and the judge then makes a decision.

Speedy trial in Japan is used to shorten the time period between indictment and trial and is used mainly in minor drug offences, immigration related offences, etc., where the execution of an imprisonment sentence must be suspended.

It is obvious from what was said by the participants that in most of the countries, there is lack of such a speedy trial procedure. Suspects therefore have to be detained for longer periods of time in prisons.

The group identified some common factors of lack of speedy trials. These include:

- No fixed timeframe for investigation and prosecution;
- Minimum number of judges in some countries;
- Legal frameworks, such as procedures, sometimes unclear and lengthy;
- Behaviour of stakeholders such as defence lawyers (e.g. intentional delaying of cases).

2. Pre-Trial Preparation System

Discussion started with the focus on the new pre-trial preparation system which was introduced in Japan in 2005. The process, as explained by a Japanese participant, allows for the screening of the facts and the legal issues. This is where the public prosecutor, the suspect or his or her lawyer and the judge discuss what evidence would be produced in court. The judge cannot scrutinize the content of the evidence.

It is designed with the aim of reducing the trial period, court sessions and time between conclusion of hearing and the pronouncement of judgment/sentence. One participant from Japan explained that based on his personal experience, some of the cases were finalized within two months, so this system is not disadvantageous for the accused.

The new pre-trial preparation/trial arrangement is similar to pre-trial conference in the Solomon Islands. In the Democratic Republic of Congo, pre-trial preparation is done only for minor offences. This is not practiced in other countries represented.

The group therefore agrees that this is a very good system because it:

- reduces the length of detention (remand period) and reduces the time period for trial;
- reduces and avoids overcrowding;
- avoids wasting of court resources and allows for speedy trials.

III. RECOMMENDATIONS

1. There is a need to fix timeframes for investigation and prosecution; however, the timeframe may be extended depending on the nature of each case;
2. There is a need for flexibility in the recruitment procedure or policies and appointment of sufficient numbers of judges;
3. The use of summary proceedings is recommended to avoid wasting time and resources;
4. There is a need to utilize pre-trial preparations or arrangements.

GROUP 2

SENTENCING AND ALTERNATIVE PUNISHMENT

Chairperson	Ms. Sumithra Rahubaddhe	(Sri Lanka)
Co-chairperson	Mr. Masaya Yamamoto	(Japan)
Rapporteur	Ms. Vanna Lawrence	(Jamaica)
Co-rapporteur	Mr. Kentaro Hirate	(Japan)
Members	Ms. Marta Raquel Flores Ramirez	(Guatemala)
	Ms. Misae Kato	(Japan)
	Mr. Ritendra Thapa	(Nepal)
	Mr. Salim Qawariq	(Palestine)
Visiting Expert	Prof. Dr. Dr. h.c. Hans-Jörg Albrecht	(Germany)
Advisers	Deputy Director Takeshi Seto	(UNAFEI)
	Professor Jun Oshino	(UNAFEI)
	Professor Junichi Watanabe	(UNAFEI)

I. INTRODUCTION

It was agreed that as the members all represent countries at various stages of development, consideration will be given to the diverse cultural, political and socio-economic backgrounds of each country. Recommendations will take into consideration each country's readiness for change. The Tokyo Rules 8.1 and 8.2 give a sample of the alternative sentences which should be implemented by countries according to need.

The group agreed that overcrowding exists in the correctional facilities of each country represented. Measures to reduce overcrowding should begin even at the sentencing of an offender, with judges or magistrates utilizing alternatives to imprisonment. Utilizing alternatives to imprisonment is a sustainable way of effecting behavioural change within the community, and serves the interest of both the offender and the society.

II. ALTERNATIVE PUNISHMENTS TO CUSTODIAL SANCTIONS

A. Types of Non-Custodial Sanctions

Sanctions applied to offenders differ among countries based on the legal provisions and powers conferred on the various authorities. A verbal sanction such as an admonition, reprimand or warning may be used by the judge as a settlement for any minor offence in one country, even in a criminal case, while this same sanction is only given to a juvenile in other countries. A verbal sanction is not currently used in Japan. However in the case of Japan, the prosecutor has the power to resolve a case by means of a suspension of prosecution, which is often accompanied by an informal admonition.

Status penalties are however utilized in a diverse manner. The sanction is indirectly seen in the fact that inmates in most countries except Nepal are not permitted to vote and thus lose the right of adult suffrage. In Japan, however, even offenders who are not imprisoned may have this right suspended based upon the offence committed.

Fines are used as a sanction in every participant's country. All represented countries also have laws which permit confiscation or an expropriation order. Confiscation or an expropriation order is however used as an additional sentence in many countries, but in some countries it depends on proof of guilt in another case. As a result, it complicates the execution of this sanction and is seldom used.

Criminal offences are regarded as an act against the state, thus in some countries, like Japan, a compensation order is not used as a sanction for criminal cases. Thus the victim can only be compensated through civil proceedings. In Jamaica, however a figure may be paid if the matter is settled through mediation. The agreed conditions are made a part of the sanction.

Probation of offenders and suspended or deferred sentences are commonly used in most of the countries

represented. Although the methods and agencies of supervision differ, it was agreed that many offenders benefit from these sentences.

The group agreed that house arrest could contribute greatly to an offender's rehabilitation within society. Representatives from developing countries however pointed out that this may be hard to implement with immediacy based on the cost related to surveillance systems. It was noted however that Guatemala has already implemented house arrest, but it seems to be limited to some offenders. It was also pointed out that it could reduce overcrowding in Nepal since some offenders could be released for the pre-trial process, and it may serve well for political purposes in other parts of Asia. Whilst it was agreed that it could be useful in Jamaica it was clarified that its use may be limited by the high incidence of domestic-related crimes.

B. Prioritization of Sanctions

As for which alternative punishments are effective countermeasures against overcrowding, priority order should be given based on each country's own situation, like the development of the economy or the historical, social or cultural ideology behind sentencing. Whether an alternative sanction is effective or not depends on the individual case.

C. Functions and Dysfunctions of Non-Custodial Sanctions

Verbal sanction like admonition is simple and easily introduced, but this is suitable only for minor cases because of its appearance of leniency. For example, in one country an advertisement is made that alerts the community when an offender is to be verbally sanctioned. The group agreed that verbal sanction should not be used for public shaming.

Community service orders are economical and a good option to allow first time offenders who have committed minimal crimes an opportunity to pay back to society and to learn from their mistakes. It is necessary to set up proper services or mechanisms and to gain co-operation from the community before this is introduced.

Fines are easily used, but this is not effective for the poor. It would increase the overcrowding in institutions since fine defaulters may be imprisoned. Other more affluent citizens would be able to pay for their offences when committed. The government's expenditure on prisons would also be increased as the prison population increases.

Probation is used by itself as a sanction or connected to a suspended sentence. In the former case, when probation conditions are broken, the subject person would need to be re-sentenced; in the latter case, sentence would be executed automatically. It has been noted that some judges apply longer periods of imprisonment when attached to suspended sentences, and as a result defaulters' punishments will differ from their counterparts. This situation could prove to increase overcrowding.

House arrest would be an effective alternative where there is an effective monitoring system. In Jamaica, electric-monitoring was piloted but it may be too expensive to be introduced for some countries. However, in Guatemala's relatively small city, the fact that police have information about those who are under house arrest makes monitoring effective because the police know and can monitor residents.

D. Administrative or Other Structures that Support Alternative Punishments

The group agreed that without the proper legislative structures, human resources, support systems, necessary infrastructure, etc., legal reform efforts to support alternative sentences can be ineffective.

Power is usually vested in the respective Ministry of Justice, Ministry of National Security, Ministry of Home Affairs, etc. It was felt that non-governmental agencies themselves could effect change. All agencies who can effect change in policies and their administration should work together to ensure that alternative sentences are adopted and implemented as appropriate for the country.

There should be a link between the courts, police, probation officers, etc., so that when sentences are given the conditions are clear and are obeyed by the offender.

The budget is usually requested according to need but is never allocated to cover the exact figures requested in many countries. Therefore more needs to be spent in the area of security.

As for fines, it is necessary to set up a proper fine collection system through co-operation with the monetary bureau to prevent corruption and to ensure collected money is delivered to the government. The system should also make allowances for remission on fines. In cases where confinement is the alternative punishment for being unable to pay a fine, a daily value should be calculated and the offender should be allowed to reduce the time spent by paying in instalments.

As for probation, to set up a system establishing and training probation officers is important.

When introducing community service orders, it is important to prohibit employers from utilizing offenders' labour for their private interests. Thus, a monitoring system that supervises the employers should be prepared. In Japan the implementation of Community Service Orders may be difficult, especially in urban areas, owing to there being less community cohesion. In Guatemala the system may be less effective based on the shortage of resources.

Especially for drug cases, the drug abuse prevention centre should be established. For this, the mass media would have an important role in enhancing public understanding.

E. Sentencing Policy

1. How to Apply the Scale or Criteria of Existing Penal Value

Almost all countries have different systems for adult cases and juvenile cases. Some countries, like Jamaica, have a social inquiry/investigation report before judges make a decision of sentence. Other countries like Japan and Palestine, do not have social inquiry reports for adult cases, so sentences are decided based mainly on the importance of the case. Having such a report to assist with sentencing is more easily utilized within those systems that separate the stages of finding of guilt from the decision on sentencing. There should however also be a scale or criteria that ensure fairness among cases of a similar nature.

In Japan judges research the precedents in how a particular offence was dealt with before an offender is sentenced. In countries like Nepal the law outlines the priorities of sentencing and provides a range of possible sentences but leaves the particular choice to the judge.

Fairness is however a procedural principle. There appears to be the possibility of sentencing disparity in cases where community orders are widely used instead of imprisonment. However, this will always be hard to compare because of the sentencing range available to judges; thus, sentencing will inevitably seem to be subjective. Also if the public has no way of deciding how community sentences are equal to prison sentences, there will also be a problem of perceived disparity. Having a hierarchy of sentences that appear to be proportional to the crime and the criminal could reduce this effect.

The group agreed that if punishment is too light or too heavy it may not deter offenders and it may not convince the society that justice has been served. Also, in countries where public officials are not paid a high salary, this may undermine the efforts to use alternative sanctions since these officials may yield to corruption and utilize the system for private gain. Although fines may be used effectively, if they are set so high that they prevent offenders from meeting other basic needs this may add to the situation of overcrowding of correctional facilities.

2. Difficulties in Utilizing Non-custodial Sanctions and Practical Methods to Overcome the Difficulties

Non-custodial sanctions have a merit in that they prevent first-time offenders' contact with and being affected by gangsters in prisons. But in some countries, the number of serious crimes is increasing and the society seeks severe punishment. Therefore, non-custodial sentences might be considered too lenient. This may lead to the victim feeling the need to exact revenge on the offender or judges being threatened.

There is a concern about net-widening: do alternative sentences cause an increase in the punishment for offences which were previously considered too minor to be punished? If there are some kinds of guidelines

that the court or other related officials can follow/refer to, then there will be a lesser chance of misuse of these options.

III. ALTERNATIVE PUNISHMENTS AND OTHER INTERESTS

A. Victim's Rights and Alternative Punishments

The victim's opinion should not be ignored when deciding what kind of punishment is suitable for a particular case. If the offender is granted alternative punishment that the victim is against, it might seem to violate the victim's right to recovery from the effect of crime. Considering this, a compensation order could be helpful.

As for the definition of "a victim", it should not be limited to one person but should also include all those who are affected by the crime. In several countries, there is a system wherein the judge or the court receives the victim's opinion regarding the offender and the punishment directly in a trial or through a social report or prosecutor's activity. These are worthwhile to ensure the victim's rights.

Should victims have the right to withdraw a case after the indictment? Should society's rights receive greater consideration in these cases? It was agreed that there should be a balance between the victim's and the society's rights based upon the particular case.

B. Social Security and Alternative Punishments

It is also important to ensure social security. Therefore, some kind of dangerous cases, such as shooting, or highly-dangerous offenders, like gangsters or recidivists, may not be the best persons to be granted alternatives to imprisonment, even if the victim agrees not to take an action against the offender or there is no victim.

C. Penal Function and Alternative Punishments

Penal functions are intended to give retribution to the offender, deter people from committing a crime and educate the offender not to reoffend. Through these functions we can control crime and protect our societies. We should pay attention to whether these functions are maintained by imposing alternative punishments. As for fining, it would likely deter property crime by imposing the amount of money that exceeds the gain from property crime. However, it would not likely deter violent crimes like murder because these kinds of crimes are not always committed for financial reasons.

D. Offender's Human Rights and Alternative Punishments

Every human being has rights. If an offender's human rights are withheld, he or she may consider him or herself to be less human and may be more willing to commit other offences. Because alternative sentences are still punishments, some restriction of an offender's human rights is unavoidable considering the rights of the victim and the society. Every country that ratifies UN conventions relating to human rights should ensure that at least the minimal standard of human rights for all categories of people are observed.

It is important to maintain offenders' dignity as human beings. Therefore, it is not necessary for offenders who are serving community service orders to wear a uniform, which may bring about stigmatization and double punishment.

Family relationships have an important role for offenders' reintegration to the society. Under house arrest, there would be conditions that restrict the offender from contacting or visiting a particular person, however, restricting family contact should be avoided as much as possible. If an offender's risk decreases, restrictions for him or her should be also diminished.

IV. OTHER ISSUES RELATIVE TO JUSTICE POLICY

A. Speedy Trial

In some countries speedy trial is affected by prevailing conditions such as shortage of judicial staff, lack of training/knowledge in some court officials, the power of the defence attorney to retard the process by using stalling tactics, and other resource constraints. As such, an offender may spend up to five years or more in the pre-trial process. In Sri Lanka, for example, approximately 80% of the total inmate population consists of

detainees. In this case, speedy trial would significantly reduce overcrowding.

Establishing a law that prohibits lengthy detention could be one solution to this situation in some countries. It would force some judges, prosecutors and other public officials to be more interested in resolving cases. Moreover, the offenders should have a right to appeal against a judge's detention order to avoid unreasonable and/or too-long detention.

Japan has achieved speedy trial by screening and separating offences according to how serious they are. There is summary trial for small offences and more formal trial for more serious offences. This comes from the standpoint that offenders are firstly presumed innocent, thus the period of detention should be as short as possible. This practice could be used by other countries that have a similar justice system.

B. Decriminalization

Some countries have decided that certain offences warrant rehabilitative treatment instead of punishment. Referral centres should be therefore used as treatment.

The group agreed that culture plays an important role in deciding on whether a country is ready for this move. Timing is also a major factor as some developed countries may be at an advanced stage of readiness based on the educational level of the population, etc. Decriminalization should however be limited to situations where it does not offend against cultural norms and where it serves the purpose of improving the offenders' behaviour.

This topic is important under the conditions of globalization. However, because of differing customs, religions and cultural norms, decriminalization cannot go beyond geographic boundaries. It therefore makes the transfer of prisoners between some countries more difficult as criminal conduct in one country may not have the same status in another. A good criminal policy should however seek aftercare treatment for people who will only be harmed by imprisonment.

It is also necessary to consider whether decriminalization of offences will lead to increasing undesirable behaviour.

C. Restorative Justice

Particular countries (e.g. New Zealand and Canada) have chosen to adopt a justice system which considers the impact of crime on the victim, the society and the offender. These countries have sought to ensure that sentences given consider these three parties, and have facilitated mediation as one means of settling some cases.

This concept of restorative justice can be used in a combination of various methods and at various stages, some of which can be used as countermeasures against overcrowding. Compensation would play an important role in this restoration. Yet, it should be pointed out that money cannot solve all problems and the victim's participation should be voluntary.

The group agreed that the idea sounded interesting and is already being used in some cases in Sri Lanka and Jamaica that utilize mediation. For some cultures that still favour retributive justice, however, this new idea may be difficult to implement.

It was agreed that this concept is not perfect, but can be utilized, especially for minor crimes like motor vehicular accidents.

V. CONCLUSIONS AND RECOMMENDATIONS

1. Each non-custodial sentence has its own merits and demerits, the most appropriate sentence should be imposed on an individual case basis with comparison and consideration to the level of criminality, the victim's feeling and balance between the crime committed and punishment given;

2. There are many related agencies within criminal justice systems, including non-governmental organizations. All should collaborate in order to ensure the system works smoothly and seamlessly

when implementing and utilizing non-custodial sentences;

3. There should be open dialogue through public fora to allow the public to understand the functions and dysfunctions and advantages and disadvantages of both custodial and non-custodial sentences. Individuals who believe that punishment is the most effective way of changing an offender could be made to see that offenders deserve a second opportunity;

4. Imprisonment has been proven to be more expensive than non-custodial sanctions. This fact should be calculated and made public in every country. This would serve to change the mindset of some systems which have adopted a more retributive justice policy;

5. Countries that cannot immediately establish a large probation service should utilize the services of reputable people as Voluntary Probation Officers, with a core of professional advisers;

6. There should be a system of assessing an offender's ability to pay a fine at the sentencing stage. If the offender is found to unable to pay a fine, the order should allow the offender to pay the fine in instalments;

7. Social enquiry reports can be an important tool for deciding the sentence that an offender should receive;

8. Certain offences should be decriminalized; thus these persons would be sent to rehabilitation centres and not to prison;

9. Speedy trial should be implemented as a feature of the law as it is the most important step to prevent unnecessary detention;

10. Administrative changes and legislative reform are required in many systems to facilitate the introduction of alternative sanctions.

GROUP 3

POST-SENTENCING DISPOSITION AND TREATMENT MEASURES

Chairperson	Mr. Che leung Lam	(Hong Kong)
Co-Chairperson	Ms. Aurea Moraes	(Brazil)
Rapporteur	Mr. Ben Siambango Buchane	(Namibia)
Co-Rapporteur	Mr. Henele Telefoni	(Tonga)
Co-Rapporteur	Mr. Yuichiro Wakimoto	(Japan)
Members	Mr. Hiroyuki Hayashi	(Japan)
	Mr. Masami Goda	(Japan)
	Mr. Kyueon Park[1]	(Korea)
	Mr. Allen Maliki	(Solomon Islands)
Visiting Expert	Prof. Neil Morgan	(Australia)
Advisers	Prof. Tatsuya Sugano	(UNAFEI)
	Prof. Toru Kawaharada	(UNAFEI)
	Prof. Ayako Sakonji	(UNAFEI)

I. INTRODUCTION

The group unanimously elected Mr. Lam (Hong Kong) as Chairperson, Ms. Aurea (Brazil) as Co-Chairperson, Mr. Buchane (Namibia) as Rapporteur, Mr. Telefoni (Tonga) and Mr. Wakimoto (Japan) as Co-Rapporteurs (the group structure is indicated above).

The assignment was to discuss matters concerning "post sentencing dispositions, treatment measures and other issues relative to institutional and community based treatments, including entrusting the private sector with the management of correctional programmes". The agenda was adopted.

In accordance with the agenda, group members unanimously agreed to divide the discussion hereinafter into two: discussions on "post-sentencing dispositions" that can reduce prison population; and "effective treatment programmes" that lower recidivism. Each topic is further subdivided into several categories. Thus the structure of the agenda is as follows:

A. Post-Sentencing Dispositions
- a) Parole
- b) Halfway houses
- c) Work/study release
- d) Remission
- e) Pardon
- f) Other measures related to early release
- g) Other forms of early release

B. Effective Treatment Programmes
- a) Assessment and classification of inmates
- b) Evidence-based treatment programmes
- c) Other effective programmes
- d) Administrative structures
- e) Functions and dysfunctions of correctional programmes

C. Other Issues

D. Recommendations

In addition, though the group's main concern is the post-sentencing stage, the group agreed that the members would talk briefly about the pre-sentencing stage so long as dispositions in the pre-sentencing stage

[1] Mr. Park left UNAFEI returned to Korea to resume his official duties on 6 June; he did not participate in the discussions after that date.

have significant influence upon post-sentencing treatment of offenders. (In some jurisdictions, the courts' decisions are binding upon specific treatments the prison service can provide; under such circumstances, pre-sentencing dispositions, too, should be considered when debating post-sentencing treatment programmes).

II. POST-SENTENCING DISPOSITIONS

A. Parole

Before discussing parole, early release schemes utilized in participants' countries were discussed. Korea, Namibia and Japan have parole. Tonga has an early release scheme, called 'release on probation'. However, it is not actually practiced. In theory, offenders must serve part of their sentences in prison; the probation officers supervise released inmates and place them under programmes when deemed appropriate. In the Solomon Islands there is no parole; inmates can be released on license, however. In Hong Kong inmates cannot be paroled either; they can be released under RUSS (Release Under Supervision Scheme) or PRES (Pre-Release Under Employment Scheme).

Regardless of the type of early release scheme, participants agreed on the effectiveness of such schemes in general in reducing prison overcrowding. Some participants raised two concerns, however. One is victims' negative attitude toward early release of offenders. The other is the possibility of releasing high-risk offenders. They went on to, therefore, point out the need to scientifically identify inmates appropriate for early release; the issue of false negatives and false positives were debated in this respect.

B. Halfway Houses

Halfway houses are another alternative to imprisonment. Some participants argued that halfway houses, used only for temporary shelters, cannot solve the problem of prison overcrowding; offenders should be accommodated for sufficient time to effectively alleviate prison overcrowding.

However, this argument raised two issues that should be addressed. The first issue is the fact that the public in general do not want halfway houses in their neighbourhoods. A participant from Hong Kong commented in this respect that the locations of halfway houses should be carefully selected. That is, the locations should be close enough to downtown so that offenders can easily obtain jobs; but should be far enough away from residential areas to avoid negative reaction from the neighbourhood. The second issue concerns the effective way to monitor the behaviour of offenders. In halfway houses, unlike in prisons, offenders cannot be monitored well; absconding, drug use, and other forms of misbehaving are likely.

Therefore, the requirements are: 1) clear rules/regulations; 2) statutory supervision/monitoring of residents; and 3) careful location of halfway houses.

C. Work/Study Release

Work/study release can be a countermeasure against prison overcrowding in three ways.

To begin with, under the scheme of work/study release, the authority can place a portion of inmates in the community instead of in prisons.

In addition, recidivism can be reduced; this is because unemployment, a notable risk factor of recidivism, is expected to be avoided due to work release, which helps offenders find jobs after their discharge.

Lastly, work/study release, if combined with an early release scheme, can maximize the effect of reducing overcrowding. In fact, work/study release can be easily integrated with an early release scheme, where the time spent for work/study release is deducted from inmates' original sentences.

D. Remission

The ways of managing remission are different from country to country. For example, a participant from Hong Kong said that inmates were eligible for a one third remission of their original term of imprisonment for good behaviour during their incarceration; according to a participant from Brazil, a certain period of an inmate's incarceration is deducted from his or her original sentence; in Japan, remission, rarely applied and practiced, is considered one of the subcategories of pardon. Korea does not have remission.

Before discussing the advantages and disadvantages of remission in terms of reducing prison overcrowding, the group identified differences between 'remission' and 'parole'.

Table: Comparison between Remission and Parole

Remission	Parole
Automatic	Conditional/Discretionary
Prisoner absolutely discharged	Prisoner must undergo supervision; may be recalled back to prison
No supervision	Aftercare available

(Note: Findings are based upon the discussions.)

A participant from Namibia gave an example of remission in Namibia:

Case: A person is sentenced on 3 May 2009 for an offence of theft to a term of six months.

Sentence without remission

Day of Admission:	3 May 2009	plus six months
Day of Expiration:	2 Nov 2009	
Day of Release :	2 Nov 2009	

Sentence with remission

Day of Admission:	3 May 2009	plus six months
Day of Expiration:	2 Nov 2009	minus two months (= 6 multiplied by 1/3)
Day of Release:	2 Sept 2009	

On the surface of it, remission works in the sense that sentences are automatically and substantially shortened, resulting in the reduction of the prison population. A participant from Hong Kong raised concerns, however, from another perspective. According to his argument, the public consider remission to be too lenient; the public outcry ("miscarriage of justice") is likely if the sentences are not executed as prescribed. A participant from Japan dissented; remission can be managed in a tough manner. A participant from Brazil dissented, too, from a different point of view; remission can be rehabilitative. In this respect, an advantage of remission was argued: inmates are, remission being in operation, more motivated to change to obtain early release.

Subsequently, the group discussed administrative measures necessary for the practice of remission. Recommendations based upon the discussion for administrative measures were as follows:

- Computerization
  - Computerization with a sufficient data base is recommended; counting of periods/sentences, good conduct and other factors related to remission is complicated: manual calculation is not efficient.
- Monitoring
- Public education
  - Public awareness of remission should be raised; if not, the public will react negatively toward remission.
- Conditions
  - Conditions under which inmates are eligible for remission should be set. These conditions should be designed and tailored: 1) to maximize the effect of reduction in recidivism; and 2) to be motivating incentives for inmates.

E. Pardon

Differences among countries were discussed. Pardon is granted mainly on ceremonial days in Korea; two forms of pardon, i.e. general pardon and special pardon, are practiced, depending upon the inmate and the

nature of the offence. In Hong Kong, only those prisoners with serious health problems or who are suffering from fatal illnesses would generally be released on pardon. In Namibia, pardon is granted by the President, whereas in Hong Kong it would by the Chief Executive/Governor on the advice/recommendation of the administrative office.

A participant from Japan said that in his country pardons are strictly and conservatively practiced. Subsequent to his comment, the effectiveness in terms of reduction in the prison population was called into question. Some participants gave negative views of pardons; their argument is that pardons are, in careful consideration of the public opinion upon administration of justice, rarely granted; therefore, substantial reduction in prison population is unlikely. Another participant pointed out, however, that an advantage of pardon lies in its flexibility; pardons can be granted even when other measures are inapplicable. In addition, a participant from Tonga said, negative labelling ('stigma') can be removed if pardon is granted; the effect in rehabilitation and smooth reintegration into the community should not be neglected as well.

F. Other Measures related to Early Release

In order for more offenders to be eligible for: 1) parole; 2) release to halfway houses; and 3) work/study release, a participant recommended introducing electronic monitoring for high-risk offenders and urinalysis for drug addicts; offenders considered ineligible for parole, he argued, can be placed under parole if electronic monitoring and urinalysis are introduced to the system.

Another participant dissented, however: experiences in England and Wales show that such measures have actually resulted in 'a revolving door phenomenon', i.e. lots of parolees are re-institutionalized due to technical violations of parole terms.

G. Other Forms of Early Release

Other forms of early release were discussed. However, their applicability was questioned; a scheme specific to one system is not always applicable to other countries' systems. Thus this topic was not much explored.

III. EFFECTIVE TREATMENT PROGRAMMES

A. Assessment and Classification of Inmates

A participant from Namibia shared with other participants the assessment and classification of inmates administered in Namibia; when inmates are admitted, information on each inmate, such as criminal history, medical conditions, family background and so on is collated; inmates are assessed and classified upon the information. A participant from the Solomon Islands said that inmates are classified according to their need for rehabilitation and risk to the community, staff and prisoners; moreover, that country utilizes a systematic classification system; under their classification, inmates are classified into low, medium and high-security inmates. In Japan, a participant argued, the assessment is mainly conducted for the purpose of safe management of prisons; the emphasis has been upon the prevention of escapes, violations of prison rules, "contamination" of criminal tendency and so on. An assessment from the viewpoint of preventing recidivism is now under development.

Other participants likewise touched upon their systems' methods of assessment and classification: overall, the seriousness of the crime committed, types of offences, length of sentences, security risks posed to the staff/prisoners are vital information[2] for assessment and classification; in some jurisdictions, social workers, probation officers and other officers as well as prison workers are involved in the process.

To put what is in theory into practice, a participant from Hong Kong said that standardized assessment methods, scientifically-proven assessment mechanisms, appropriate and sufficient training for assessment officers and computerization of the system should be considered. He continued to say that there are two types of assessment; one is categorization of inmates (Cat. A, B, C and D) according to security risk levels as identified by types of offences, length of sentences and so on; the other is a risk-needs assessment based

[2] Note, in passing, that empirical study of recidivism shows major predictive factors of recidivism as follows (Andrews, D. Bonta, J.): history of antisocial behaviour, antisocial personality pattern, antisocial cognition, antisocial associates, family/marital circumstances, school/work, leisure/recreation, substance abuse.

upon scientifically designed tools, which have been developed, standardized and introduced under world-acclaimed Canadian guidance, to assess the risk of prisoners' re-offending and their rehabilitation needs.

A participant from Tonga asked what would happen if an inmate rejects assessment? This would raise ethical and administrative questions as well as implications for the effectiveness of the programmes.

B. Evidence-based Treatment Programmes

Before discussion, the definition of the word "evidence-based programmes (EBP)" was identified. EBP refers to programmes whose effectiveness in reduction of recidivism has been proved through rigorous statistical reviews; well-known examples are skills training, cognitive behavioural therapy and so on.

According to some pieces of research, evidence-based programmes are part of, not the extent of, the penal interventions that can reduce recidivism; some critics even supported the effectiveness of traditional approaches in the probation service.

In order to avoid argument against the evidence-based approach of the existing treatment programmes in different countries, discussion was then focused on the strengths, weaknesses and administrative structures/facilities required of various effective treatment programmes implemented in different countries.

C. Other Effective Programmes

1. Discipline

Participants went on to discuss, for example, disciplinary measures implemented in prison; among others, the principle of discipline training with an emphasis on the 3Ss, i.e., short, sharp and shock,[3] was called into question. Some expressed negative views; discipline could be used as an excuse for abuse, retaliation and so on. A participant from Tonga said that discipline is not compatible with religious/spiritual interventions widely practiced there. The Hong Kong participant brought forward that although the effectiveness of the 3Ss discipline training is questioned with reference to some research, the training is adopted in various countries and the result is encouraging (e.g. in Hong Kong, the success rate of Detention Centres with 3S discipline training is over 95% in the past decade). Others supported discipline, however, as it can instil well mannered habits in inmates. A participant from Japan gave an opinion that bridges the pros and cons of discipline; he insisted upon combining discipline with other programmes. According to his opinion, "to be disciplined" paves the way for rehabilitation programmes, i.e., readiness as well as motivation for rehabilitation is expected to be instilled due to good discipline. In addition, clear guidelines/instructions for staff and sufficient staff training were recommended to prevent the abuse of discipline.

2. Family Participation

Participants unanimously agreed upon the importance of family participation; family support helps inmates' smooth reintegration to the community. A participant from Hong Kong commented that: 1) existing visiting facilities with glass shields may distort the meaning of unity, thus, family participation meeting programmes are favourable; and 2) however, the said programmes may also induce negative feelings in those prisoners/inmates who have no family ties. In addition, technical issues were discussed; first of all, how can the system know who are the real parents or other family members?

3. Sports Activities

Obviously, sports activities have little to do with reduction in recidivism, but sports activities as well as other recreational activities, however, are important in the sense that these measures can alleviate inmates' stress in an overcrowded environment.

4. Education/Vocational training

Participants agreed upon the positive effects of education/vocational training in general. Besides, participants argued, participation and performance in education/vocational training can be one of the conditions under which inmates are eligible for remission or parole.

A participant commented, however, that vocational skills taught in prison do not always match the

[3] Short: Short detention period; Sharp: Prisoners become sharp in discipline and behaviour after receiving the training, Shock: The shock of detention, with tough disciplinary training.

demand in the market. Vocational skills on demand in the market change from time to time; it is difficult for the prison administration, on the other hand, to change the vocational training available in prison in accordance with the volatile market.

5. Psychiatric/Psychological Service

Psychiatric/psychological interventions were up for discussion; these interventions were, for the purpose of organized discussion, classified into: 1) psychological treatment programmes; and 2) psychiatric interventions for mental illness.

As to the first category, the target groups are subcategorized into violent offenders, drug addicts, sex offenders and so on.

One disadvantage is that these measures cannot be provided to every inmate in need of psychiatric/psychological attention due to the small number of professionals available. Note, however, that group counselling for offenders who share similar problems can be a realistic option whilst man-to-man counselling is out of the question due to limited resources.

6. Religious/Spiritual Services

Some recidivists, due to religious services they received in prison, may change themselves. A participant from Hong Kong shared his experience, saying that he once saw drug addicts stay away from drugs forever due to religious services. A Namibian participant commented that religious facilities and workers are in place in prisons. In Korea, Christian followers have even established private facilities for offenders.

The strengths of religious/spiritual services are as follows: it helps offenders have confidence, a sense of belonging and a motivation to change. These factors, it is argued, eventually contribute to rehabilitation. Cost-effectiveness is another notable strength; obviously no huge investments are required. In addition, even security is maintained because of the prevailing atmosphere of religious peace, a Brazilian participant commented. Another participant said that religious services to offenders sentenced to life imprisonment do work.

Weaknesses, on the other hand, are as follows: in secular nations in which the State is constitutionally separated from the church, the prison service cannot provide religious services to inmates; only volunteers can be involved in such programmes. A Japanese participant pointed out that the constitutional separation of the State and the church in Japan was introduced in view of the pre-WWII practices where one nationally-certified religious sect imposed religious services upon nationals at the cost of the their freedom of religion.

A participant from Tonga, where an enthusiastic belief in the Bible is prevailing, said partnership among concerned parties is necessary to implement faith-based community correction; however, in a jurisdiction where different religious beliefs exist, collaborations as found in Tonga are difficult to implement, according to other participants.

7. Aftercare Supervision of Discharged Offenders

A participant from Hong Kong said that there is “through care” for offenders in Hong Kong; “through care” refers to a continuous, seamless and tailor-made treatment provided to offenders in Hong Kong from their admission to correctional institutions. In Tonga, conditional and non-conditional release upon parole is available; when released on condition, offenders are supervised. A participant from the Solomon Islands said inmates are released on license; there is no parole. According to a Japanese participant, programmes that cater to sex offenders, violent offenders and drug addicts are available; these programmes are oftentimes provided on a man-to-man basis.

Subsequently, parole revocations were discussed. A participant argued that parole officers should not be too strict with their clients; in the cases of minor technical violations of parole terms, parole officers are advised to give verbal warnings instead of officially filing petitions of revocations; parole officers should give second chances to offenders. A participant from Japan concurred from a slightly different point of view; filing petitions of revocations, unless carefully considered, will result in prison overcrowding.

The issue of protection of the community was raised, however; a good and carefully calculated balance

between rehabilitation of parolees and protection of the community is expected. This issue is debatable, or rather, controversial. When revocations are strictly applied, prison overcrowding is likely. On the other hand, lax use of revocations will result in fostering of recidivism and arousing negative reactions from the general public that demand community protection.

Next, clarity of terms/conditions was discussed. A participant from Hong Kong said that the rationales of supervision and parole terms and conditions should be clearly explained to offenders. If not, parolees become embarrassed, upset or even angry when placed under aftercare supervision, wondering why supervision is necessary once released from prison. Also, revocation procedures, when dealt in the (quasi-) court proceedings, cannot be defended if the criteria applied for revocations are ambiguous. A Japanese participant dissented; front line probation officers would like to enjoy wide discretion whether to file petitions for revocation and insisted that they deserve such wide discretion because of their expertise in the treatment of offenders. He went on to say that the procedures for revocation should consider the nature of parole and be on a case-by-case basis with wide professional discretion attached. He added, though, that probation officers are always under attack, especially when they decide not to file petitions for revocation, even if these decisions are based upon careful consideration. A participant from Tonga commented in this respect that 'a model of a parole case', rather than criteria, should be set.

Advantages of aftercare are as follows: to begin with, recidivism is prevented due to aftercare. Moreover, reduction in prison population is possible due to early release.

Disadvantages of aftercare are as follows: For one thing, as compared to prison, to implement programmes in the community has administrative limitations, despite the fact that programmes provided in the community are, in theory, more effective than ones provided in prison. Furthermore, high-risk offenders cannot receive aftercare services, which are indispensable for their smooth integration to the community, because high-risk offenders are excluded from early release schemes; high-risk offenders are mainly released upon the expiration of sentences, not upon parole. Lastly, unless carefully considered, revocations oftentimes result in prison overcrowding.

The necessary administrative structure/facilities are: 1) treatment programmes, which should be included in addition to simply monitoring parolees; 2) careful and balanced use of revocations; and 3) aftercare services for those who are released upon the expiration of their sentences (most of them are offenders at high risk of recidivism); though treatment for such ex-inmates will be on a voluntary basis and should not be made compulsory; governmental financial/legal supports are important as well; and 4) continuous care projects for ex-offenders, who are legally out of the criminal justice system, are recommended.

A VE commented that in his jurisdiction discharged inmates are involved in community services; these contributions to the community are these days highly regarded.

8. Social Service Treatment Programmes for Discharged Inmates

Community services were discussed. A participant from Hong Kong said that it can be a kind of social service treatment programme to involve NGOs and ex-prisoners or supervisees to carry out some social services in the community. Likewise, ex-convicts are invited to school seminars to share their experiences, encouraging students to stay away from delinquency.

The Namibian participant said there are no community services for discharged inmates. So did a Brazilian participant.

The strengths of community service are as follows: the public can have confidence in the rehabilitation of offenders due to these projects; also, by having offenders involved in community services under these projects, the negative view of offenders' rehabilitation (stigma, labelling) is expected to be removed.

Weaknesses are as follows: to maintain offenders' motivation to participate in the programme is difficult, especially when applied on a voluntary basis. A participant from Tonga pointed out that some offenders, when placed on community service, would like to go back to prison because of the food, clothing and shelter provided there. In addition, to select offenders appropriate for these programmes is sometimes difficult.

The necessary administrative structures and facilities are: 1) to keep close contact with offenders to motivate them; and 2) to have a close relationship with NGOs.

9. Offenders' Criminal Records

Offenders' criminal records were up for discussion. Some ex-offenders are discriminated against, prejudiced and even ostracized, oftentimes finding themselves unemployed, mainly because of these previous criminal records. Ironically enough, governmental offices do not hire ex-convicts though these offices put emphasis upon a 'second chance for ex-convicts'!

10. Public Education, Campaign and "Awareness Raising" for the Prevention of Crime and the Rehabilitation of Offenders

A participant from Hong Kong said a multi-agency project such as "the Yellow Ribbon Project" in Singapore helps the prevention of crime and the rehabilitation of offenders. In Hong Kong, there was a 'Pioneer Rehabilitation Programme' under which students of secondary schools or some other youth groups would be invited to visit some correctional institutions and share their feelings with prisoners. The project aimed at the enrichment of students'/youths' knowledge of the consequences of crime.

A Singaporean example was discussed. In Singapore, there is a quasi-private organization that helps the Prison Service provide rehabilitation programmes, implement vocational training and sell prison products.

IV. OTHER ISSUES

A. Evaluation Measures of Programmes

All agreed that evaluation is an important measure in reviewing the effectiveness of the treatment programmes implemented.

Items necessary for evaluation were discussed. Possible items were as follows:

- Recidivism;
- Cost-effectiveness;
- Success rate (i.e., to what extent the target population have achieved the desired goals. For example, how many juveniles continued education after discharge, how many offenders obtained employment after having completed vocational training?).

Evaluation is multi-faceted. Evaluation is viewed from the two perspectives:

- Macro: Programmes' effectiveness regarding outcomes/results;
- Micro: Each offender's progress.

Also, the timing of evaluation was also discussed:

- Evaluation is conducted at the time of discharge/completion of the said programmes;
- Evaluation is conducted later enough to gauge the effectiveness of the said programmes.

Subsequently, methodology was discussed.

Firstly, a standardized method of evaluating the changes of offenders' behaviour/attitudes is required.

Secondly, a participant pointed out that "offenders' satisfaction" should be included in evaluation because most evaluations are actually conducted from the view point of the Authority, not from that of offenders. A participant from Tonga said that they ask (ex-)offenders to complete a questionnaire on programmes to understand the effectiveness; he also said that employers, too, are required to answer questionnaires on the performance of ex-convicts. In this respect, however, how accurate/honest/comprehensive answers the authority can obtain was called into question. Sometimes offenders' family members can be good/accurate sources of information about the offenders.

Thirdly, who conducts evaluation is another issue that should be addressed. Actually, there has been research on crime/criminals in which the authority entrusted the evaluation to a third party (academics).[4]

[4] "Liverpool Desistance Study" by S. Maruna, L. Porter and I. Carvalho is a notable example.

Sometimes it is an appropriate option to entrust evaluation to a third party because: 1) findings are independent of the Authority, i.e., are neutral, objective, and thus more accountable; and 2) the cost is expected to be reduced.

Strengths of evaluation are that: 1) the Authority can understand the effectiveness/ineffectiveness of the said programmes; 2) the quality of the programmes is also maintained; and 3) the Authority can show the effectiveness of the programmes to the finance department as well as the public.

Weaknesses of evaluation are that: 1) the definition of success, depending upon the viewpoints, could be ambiguous. And standards of evaluations are not easily set; 2) the authority to conduct evaluation is not always rendered.

Possible solutions are: 1) to invite a third party to conduct evaluation to obtain unbiased results cost-effectively; 2) to utilize measures/standards widely accepted in conducting evaluation.

V. RECOMMENDATIONS

This group discussed effective countermeasures against prison overcrowding, dividing the topic into two, i.e. post-sentencing dispositions and effective treatment programmes.

It is agreed that all post-sentencing dispositions and effective treatment programmes discussed were effective in tackling the overcrowding problem in penal institutions. It is recommended to develop and endeavour in the following areas:

- Acquisition of support from government policies;
- Exploration of resources;
- Soliciting of public acceptance of and support for rehabilitation of offenders;
- Comprehensive and matching strategies between post-sentencing dispositions, treatment programmes and publicity campaigns, i.e., there should be a comprehensive and matching strategy to ensure the post-sentencing dispositions, treatment programmes and publicity campaign adopted are correspondent and in line with the aims of reducing overcrowding problems in penal institutions and rehabilitation of offenders.

PART TWO

Work Product of the Twelfth International Training Course
on the Criminal Justice Response to Corruption

UNAFEI

VISITING EXPERTS' PAPERS

CORRUPTION CONTROL IN SINGAPORE

*Soh Kee Hean**

I. INTRODUCTION

Since Singapore attained self government in 1959, corruption control has been top of the government agenda. When we took over from the British, corruption was prevalent. The law of Prevention of Corruption Ordinance was weak. Corruption was not a seizable offence and the powers of the Anti-Corruption Bureau were inadequate. Public officers were poorly paid and the population was less educated, did not know their rights and often the way to get things done was through bribery.

For a small city state, it was therefore vital for Singapore to control corruption for our national survival. It was necessary in order to provide a conducive climate and a level playing field to spur economic growth. It is a competitive advantage to attract foreign businesses to invest in our land.

Corruption control has become a strategic tenet for our system of governance. The smooth conduct of government affairs had to be grounded on a rational basis, with clear rules for all to follow. It provides the predictability and the confidence for the public to rely on the government to discharge its duty without bias. There had to be no room to tolerate those who hope for windfalls from powerful friends or from greasing contacts in high places. For Singapore to succeed, we had to operate on a meritocratic principle, where people can see that rewards are tied to the efforts that they put in, and not to corrupt means.

There was much reform required. The law was strengthened. Rigorous enforcement took place. Government administration was improved. All these provided the impetus for Singapore's transformation from a corruption-infested city state to one that is consistently placed very favourably in the league of least corrupt countries in the world by Transparency International and in Asia by the Political and Economic Risk Consultancy. TI has ranked Singapore the fourth least corrupt country in the world and PERC has ranked Singapore the least corrupt economy in Asia.

The mood and resolve to vigorously curb corruption was struck by the government as early as in 1960 when Parliament declared that it: "(was) determined to take all possible steps to see that all necessary legislative and administrative measures are taken to reduce the opportunities of corruption, to make its detection easier and to deter and punish severely those who are susceptible to it and who engage in it shamelessly."

The strong anti-corruption refrain was heard again and again, including this statement, made in 1979 by then PM Lee Kuan Yew, which best explains the need for a corruption-free Singapore: "The moment key leaders are less than incorruptible, less than stern in demanding high standards, from that moment the structure of administrative integrity will weaken, and eventually crumble. Singapore can survive only if Ministers and senior officers are incorruptible and efficient … Only when we uphold the integrity of the administration can the economy work in a way which enables Singaporeans to clearly see the nexus between hard work and high rewards."

And again by the then PM Mr Goh Chok Tong in Parliament in 1993 "I have every intention to make sure that Singapore remains corruption free. I will not let standards drop. And everyone should know that corruption in any form will not be tolerated. I expect all Ministers, all MPs and all public officers to set good examples for others to follow…."

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II. POLITICAL WILL

These sentiments reflect the determination and the intense political will in the fight against corruption. Political will, undoubtedly, is a key ingredient in the transformation effort from Singapore's corruption-infested past as it forms that all important sub-structure, upon which all the super-structures of anti-corruption work rest. It provides the soil and the nutrient which allows the seeds of anti-corruption work to germinate and grow; first into a strong sapling, then into a sturdy tree.

But for it to work, genuine political will is not just rhetoric or empty sloganeering. Deeds must match Words. The government mobilized the public, the entire civil service and all apparatus of the state to fight corruption. . .

The year 1975 marked a major turning point in the fight against corruption. The Minister of State Wee Toon Boon, then still a serving Minister in the Government of the ruling party, was convicted of corruption. Such results demonstrated to the public the resolve of the government to keeping Singapore clean. This garnered essential public support in the ongoing fight against corruption. With the efforts put in and with public support over the years, corruption was thus brought under control.

III. FRAMEWORK FOR CORRUPTION CONTROL

We have approached corruption control through a framework of action which we call the 4 Pillars of Corruption Control consisting of 4As -: "Effective Anti-Corruption **A**gency", "Effective **A**cts" (or laws), "Effective **A**djudication" and "Effective **A**dministration".

A. Effective Laws

Effective laws provide the basis for the fight against corruption. The law must define what are corruption offences and their punishments and the powers of enforcement against it. As society and the environment changes all the time, it is necessary to have the law re-visited every now and then to ensure that it is up to date. The powers of enforcement must be well provisioned so that it will have bite.

In Singapore, the principal law is the Prevention of Corruption Act (PCA). This governs the primary offences of corruption and the powers of the enforcement agency, which is CPIB. The PCA was enacted in 1960 to replace the previous Prevention of Corruption Ordinance. Since then, the Act has undergone numerous amendments to increase the powers of investigation of the Corrupt Practices Investigation Officers, enhance punishments for corruption and to plug loopholes to prevent exploitation by criminals.

The law must support law enforcement with a cutting edge. This is vital as corruption offences are particularly difficult offences to deal with. Unlike general crime where there is a victim who tells us everything that happened, in corruption offences, both the giver and the receiver are guilty parties who have the motivation to hide and not tell the truth. This makes investigation and evidence gathering more challenging. To be successful, the law must provide sufficient teeth for law enforcement.

Some of the distinctive features of our law give us that much needed cutting edge. These are:

(i) a presumption that any gratification received by a public officer from a person who has or seeks to have dealings with him or her or the department, is deemed to have been received corruptly, shifting the burden of proving otherwise to the defence;

(ii) an acceptor of a gratification can be guilty even if he or she does not have the power, right or opportunity to return the favour;

(iii) the "accomplice-rule" which views the evidence of an accomplice as unworthy of credit unless corroborated, does not apply for corruption cases;

(iv) wealth disproportionate to income is admitted as corroborative evidence of corruption in a trial;

(v) the Public Prosecutor can order any public officer or persons who can assist in the investigation of a public officer, to furnish sworn statements, specifying property belonging to him or her, his or her spouse and children, including money and property transferred out of Singapore;

(vi) every person under investigation is legally obliged to give information;

(vii) extra territorial jurisdiction can be exercised against Singapore citizens committing corruption offences outside Singapore;

(viii) punishment is sufficiently deterrent. A single charge attracts a maximum fine of $100,000 or an imprisonment term not exceeding 5 years or both. For offences involving Government contracts or those involving bribery of a Member of Parliament, the maximum jail term is extended to 7 years, although the maximum fine remains at $100,000.

In 1989, the Parliament enacted The Corruption (Confiscation of Benefits) Act. In 1999, this Act was replaced by the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation and Benefits) Act, Chapter 65A. This Act provides the court with powers to confiscate the pecuniary resources and property which a person convicted of a corruption offence cannot satisfactorily account for or when the properties are found to be benefits of corruption offences. The objective is to ensure that the perpetrators will not benefit from corruption.

The Parliament has also enacted the Parliament (Privileges, Immunities and Powers) Act to ensure that Members of Parliament will not benefit from the debate in the House in which they have a pecuniary interest. It has also enacted The Political Donation Act to ensure candidates standing for political election declare donations they received.

Other statutes regulating Government bodies have also incorporated provisions which deter corruption. One such provision is in the Customs Act which specifically provides for a penalty for receiving bribes, and presumes any monies in the possession of a Customs Officer which cannot be accounted for to be corruptly obtained.

B. Effective Enforcement

Having tough laws is no guarantee that there is effective enforcement. If there are tough laws but lax enforcement, corruption will still flourish because the corrupt escape detection and investigation. The situation will be like having a good battle plan but poor troops. It is therefore crucial to devote priority and attention to setting up an effective enforcement agency.

The CPIB is the sole agency in Singapore empowered to investigate corruption offences. It was formed more than 50 years ago. In fact it was under the British that it was first formed in 1952. With self governance in 1959 and then independence in 1965, CPIB has been transformed and developed to its current state.

CPIB has independence of action. We can investigate any person or corporation in government or the private sector, however high in the hierarchy they may be. CPIB reports directly to the Prime Minister so as to block any undue interference from any quarters and to ensure that CPIB favours no one particular individual, department or agency but operates without fear or favour, regardless of colour, creed or social status. In fact, by 1992, CPIB's independence of action was guaranteed by the Constitution, with provision for the elected President of Singapore to open the doors for investigation to proceed should the government of the day block CPIB.

Our Bureau logo "Swift and Sure" is the message to all corrupt offenders that there will be swift action, certainty of results and justice will take its course. CPIB has always endeavoured to be a crack investigative agency, purpose-driven and committed fully to our mission of "combat(ting) corruption through swift and sure action". Swift action suggests promptness of action, speed and timeliness while sure action suggests certainty of action, resoluteness and result orientedness.

Having a strong capability is easier said than done. Our current success does not guarantee future success. In a way, it is a race against the corrupt and the criminal minded as they resort to use of technology and more sophisticated modus operandi to commit corruption. There are more and more ways to hide corrupt proceeds. It is incumbent on the enforcement agency to build enough capability to deal with them. For example, in terms of computer forensic capability – ability to extract evidence from computers, financial investigation capability to follow the money trail and uncover hidden corrupt proceeds.

Sufficient time and resources are needed to ensure that capabilities are built and training is given to the officers of the enforcement agency. A proper career scheme is also necessary with a training and learning programme to build professional expertise.

C. Effective Adjudication

Sure detection and strict enforcement of laws, no matter how effective, must however, be complemented by effective adjudication. Detection, prosecution and subsequent court conviction have specific deterrence on offenders. This also has a general deterrence on the like-minded. It is about prevention through sure detection and conviction in a court of law. Aided by the tough laws, the Courts have created a regime of punishment that is deterrent enough to hammer home, loud and clear, the message that corruption does not pay.

There is transparency in the justice process as all court proceedings are open, public hearings. Decisions are documented and subject to public scrutiny. Both the prosecution and the defence can appeal against any decision made by the Courts.

Judgments from the court provide benchmarks as to the severity of offences and their corresponding sentences. For instance, in a recent Appeal case involving a private banker convicted of corruption involving bribes of $150,000 (*Wong Teck Long vs PP*), when the accused appealed against his conviction and sentence, the prosecution cross appealed on the sentence, and the High Court not only dismissed the accused appeal but enhanced his original sentence from four months to 15 months' imprisonment. In passing this judgment, the CJ said: "To safeguard the overall public confidence in the integrity of our banking and financial industry as well as Singapore's reputation as a regional and financial hub, punishment for deplorable and corrupt acts, such as that of the appellant, must be swift and harsh so that a strong message will be sent out to the offender at hand and would-be offenders that Singapore does not, and will not, without exception, condone corruption."

In another corruption case involving short supply of marine bunker (*PP vs Lim Teck Chye*), a private sector business case which would tend to attract fines rather than imprisonment, the court had this judgment: "It could not be said that only corruption offences involving public servants…. harmed the public interest concern for the preservation of the integrity of the public service and the administration of justice. Corruption offences committed in the private sector may do so as well, as private corporations provided public service functions….. The corrupt actions of the appellant … had the potential to adversely affect public confidence in the independence of the marine surveyors and Singapore's bunkering industry. It was therefore untenable to draw a strict line between corruption offences committed in the private sector and those committed in the public arena (for the purposes of sentencing), and a custodial sentence was warranted in this case…".

With the court's sentencing, the clear message is sent to the corrupted and to would be offenders to think twice before committing corrupt acts.

As part of sentencing, the court will also impose a financial penalty on the offender equal to the amount of bribes the offender took. If the offender had taken $1 million in bribe money, on conviction, the court will order him to repay $1 million to the State and if he fails to do so, he will be imprisoned by default. So this again sends the clear message that the offender is not allowed to enjoy any of his ill gotten gains.

On top of this, in cases involving government procurement or contracts, administrative actions are taken to cancel the contract and/or to debar suppliers who were convicted of corruption offences from future government contracts for up to five years.

Apart from criminal sanctions, the Prevention of Corruption Act also provides for recourse to civil suit for recovery of bribe monies in addition to criminal prosecution. The CPIB had prosecuted a facilities manager in a large private company for corruption. He took bribes of almost $300,000 in return for awarding contracts. He was convicted and sentenced to ten months' jail and ordered to pay to the State a penalty of about $300,000, equal to the amount of bribes he had pocketed. After the prosecution was over, his company brought a civil suit against him to recover the amount of bribes he had accepted whilst employed by them. The accused appealed to the court against this, stating that since he had been ordered to pay back the penalty, he cannot be asked to pay twice, and on this second occasion through the civil suit. The Court of

Appeal dismissed his appeal stating that the law expressly provided for two distinct provisions – a criminal proceeding to disgorge benefits and civil proceedings to recover the bribe monies and therefore it is possible that there can be a double disgorgement and it can act as a further deterrence against corruption. This sends the message very clearly to corrupt offenders that they will be made to pay heavily for their corrupt activities.

IV. EFFECTIVE ADMINISTRATION AND GOOD GOVERNANCE

A. Preventive and Administrative Measures in the Public Sector

Alongside the statutory measures dealing with corrupt offenders, a proactive approach to curb corruption was adopted by the Government. With the full support of Parliament and the heads of Government departments, strict rules and regulations have been formulated to govern the conduct of public officers. A high standard of discipline is demanded of these officers such as:

(i) a public officer cannot borrow money from any person who has official dealings with him;
(ii) a public officer's unsecured debts and liabilities cannot at any time be more than three times his monthly salary;
(iii) a public officer cannot use any official information to further his private interest;
(iv) a public officer is required to declare his assets at his first appointment and also annually;
(v) a public officer cannot engage in trade or business or undertake any part-time employment without approval;
(vi) a public officer cannot receive entertainment or presents in any form from members of the public.

The commitment of Ministers and heads of Government had similarly resulted in the establishment of administrative measures to reduce the chances of public officers getting involved in corruption and wrongdoings. These measures include:

(i) identifying and removing opportunity for corruption in Government work procedures;
(ii) streamlining cumbersome administrative procedures and slashing red tape to provide an efficient and transparent civil service so that no one needs to recourse to corrupt civil servants to get things done;
(iii) reviewing public officers' salary regularly to ensure that they are paid adequately and comparable to that of the private sector;
(iv) reminding Government contractors at the time when contracts are signed that bribing public officers administering the contract may render their contracts terminated. A clause to this effect forms part of the standard contract conditions.

B. Efficient Administration

Effective administration is also a key to reducing corruption. The civil service in Singapore initiated major reforms in May 1995 under the "Public Service in the 21st Century" (PS21) to attain sound administrative governance, organizational excellence and service orientedness. Such improvements in efficiency and effectiveness in public service delivery can act against corruption and reduce its opportunities. This is because service excellence and the need to maintain high standards, in compliance with standard operating procedures, are incompatible with corrupt practices. A service delivered promptly and with no hassle leaves no room for corruption, compared to a service which takes a long time and involves tedious processing stages.

Under PS21, there were several major initiatives to reduce bureaucracy and cut red tape, such as:

(i) Pro-Enterprise Panel Movement which consists of the Pro-Enterprise Panel (PEP) The PEP receives and vets suggestions from the public to help ensure that government rules and regulations are supportive of a pro-business environment in Singapore. The panel is headed by Head of Civil Service and comprises members from the private sector, e.g. CEOs of companies. The public and companies can provide suggestions through the internet (www.pep.gov.sg) and suggestions accepted may result in rule changes;

(ii) Zero-In-Process (ZIP) which aims to reduce inefficiencies in services whereby the public has to visit several agencies for related reasons. In the past, issues which cut across agencies were tossed around from one agency to another. In some instances, cases were lost in the bureaucratic maze. The ZIP makes sure that such cases do not slip between the cracks by identifying lead agencies and forming ZIP teams to zero-in on difficult cross-agency issues and propose solutions within a 30 to 60

days timeframe; and

(iii) POWER (Public Officers Working to Eliminate Red-tape) which aims to reduce bureaucracy by eliminating obsolete public sector rules. The goal of this initiative is to give public officers greater flexibility at operational issues and raise awareness that we should enforce the spirit and intent of the regulations rather than complying with it mindlessly. It allows public officers to cut red tape whenever they can. A POWER website has been set up to receive suggestions from public officers and to channel them to respective regulators;

(iv) There is a Cut Waste website where the public can submit their observations/suggestions on areas where government can cut any wasteful expenditure. The government Ministry concerned will have to respond to the public's query and have their reply posted in the website for all to see. This helps to keep government on its toes and help to minimize wastage of government spending, if any.

The Singapore Government's main aim of undertaking the PS 21 initiative is to improve efficiency and effectiveness in the provision of its public services. Nonetheless, they have an important side benefit of corruption prevention. Firstly, by empowering and engaging officers for continuous improvement, we hope that the Public Servant becomes more engaged. An engaged officer takes pride in his/her work and is less likely to succumb to corruption. Secondly, by cutting red tape, making services easier and more accessible, it provides less opportunity for public officers to exact bribes to grease a transaction. By seeking feedback from the public and being transparent in its policies and service standards, it leaves little room for public officers to solicit for bribes.

A parallel move to upgrade the civil service and to position Singapore as a leading government to better serve the nation in the digital age was also embarked upon through the e-Government Action Plans. The first such plan was from 2000 to 2003, the second from 2003 to 2006 and we are now in the third plan, known as iGov2010, running from 2006 to 2010. iGov aims at delivering excellent public services as well as connecting the citizens to the government. Electronic services already in place or to be implemented target higher levels of convenience, efficiency and effectiveness for the public. E-governance measures serve to engage citizens more widely through use of infocomm technology.

One of the many e-services initiatives is the introduction of e-Citizen portal where citizens can access government services from the comfort of their homes, for example, to lodge a police report or to renew their passports. They can also use it to lodge a corruption report with CPIB. The service standards of various departments are also published in the portal so that the public can know what to expect. Another e-government initiative is the business.gov.sg portal. This portal provides the public with information and assistance in planning their businesses and starting companies. One of the services provided by this portal is the OBLS (online business licensing service) built in 2002. With OBLS, someone starting a new business can apply and get the relevant permits and licenses from the comfort of his or her home or office without having to physically go to the various government departments. Some 69 licences from 19 government agencies are on OBLS. The turnaround time to obtain all the licences was cut from 21 days to just eight days. The service was very well received and in 2005 won the prestigious UN Public Service Award.

Another service is the Gebiz – the government procurement portal on the internet. Today most of the Government procurement is done through the Internet and it is open to all, including international businesses, who wish to take part. In Gebiz, the posting of the tender requirements is online, the submission of the bids are online, the deadline is controlled by the computer and the results at the end of tender are automatically published for all to see. This leaves little room for corruption or abuse compared to the manual system.

Although the primary driver behind our e-government action plans was not corruption control, it does have such an important side benefit. It reduces visits to government service counters, service turnaround time and cost of delivery. If we think about it, if a government service can now be obtained from the comfort of our homes, at the click of mouse, what chance is there for someone to interfere in between to exact a bribe for the purpose of greasing the transaction?

This inter-relationship between efficiency and corruption control is succinctly summed up in an old article on corruption control in Singapore by Bob Crew of the South China Morning Post when he said:

"The theory is that the administration is so tight, so efficiently run and controlled, that there is no room for corruption, which thrives much better in an inefficient administration in which there are plenty of loopholes for it to flourish unnoticed and unchecked, where there is scope for hoodwinking and beating the system."

This was an article from way back in 1970s but it is equally relevant today.

V. REGIONAL AND INTERNATIONAL EFFORTS

A. Study Visits

As the sole anti-corruption agency in Singapore, CPIB has been the destination for various study visits and attachments for public officials and counterpart agencies, including countries in the Asia Pacific Region. The visitors are attracted to Singapore mainly because of its international reputation for being effective in controlling corruption. In the spirit of regional co-operation and networking, CPIB hosted official visits and attachments by Government officials from various countries. In recent years, officials visited from countries such as China, Bangladesh, Brunei, Indonesia, India, Nepal, Bhutan, Cambodia, Thailand, Vietnam, Macau, Hong Kong, Australia, Kenya, Ghana, Zimbabwe, Kuwait, Jordan, Solomon Islands, Qatar, Russian Federation, Pakistan, etc.

To be knowledgeable of the latest international developments in anti-corruption matters which could impact on Singapore, CPIB has increased its participation in various corruption-related overseas conferences and seminars.

CPIB has actively established good working relationships with its counterparts in the region and beyond. Assistance is also provided to foreign counterparts in the area of law enforcement, where appropriate, with the understanding of reciprocal assistance from them in the future.

B. Specialized Workshops

CPIB regularly organize an international workshop, known as Anti-Corruption Expertise (ACE) Workshop, with regional participation. We have conducted three runs so far with the following themes – "Excellence in Investigations", from 2 to 4 August 2006; "Excellence in Computer Forensics" on 10 September 2007; and "Excellence in Management of Anti Corruption Agencies, held from 14 to 16 October 2008. Speakers at the workshop came from Singapore, Malaysia, Hong Kong, Korea, United States, United Kingdom, Australia and France. The workshop was conceived as a means for CPIB, Singapore to share its expertise and to bring professionals together for cross-learning. The conduct of the workshop is also in line with our commitment through the MOU with ASEAN counterparts (re: para 24), and is consistent with our readiness to meet requests for learning visits from foreign agencies. Future ACE workshops will continue to be organized by CPIB to benefit officials from the region.

We also conduct a customized Anti Corruption Management and Investigation Course – a five-day programme done for regional counterparts at cost recovery basis. Officials from Bhutan's Anti Corruption Commission and from Cambodia's Anti Corruption Unit have attended.

C. International Fora

The CPIB is actively engaged in international fora and meetings that discuss corruption matters. It is a pioneer member of the ADB-OECD Anti Corruption Initiative. This Initiative meets twice a year. In 2008, Singapore played host to the 12th meeting as well as hosted the 6th Regional Anti Corruption Conference, in which more than 120 participants took part. CPIB has joined the IAACA (International Association of Anti Corruption Authorities). It is a member of APEC Anti Corruption Task Force (ACT) and, in 2009, we are chairing the discussions of the ACT. Within the ASEAN region, there is a MOU on Preventing and Combating Corruption amongst anti-corruption agencies of the ASEAN region in which CPIB is involved. CPIB is one of the first four agencies which signed the MOU in December 2004 in Jakarta, along with the agencies of Malaysia, Indonesia and Brunei. The objective of the MOU was to enhance mutual sharing, institutional and capacity building and to strengthen collaborative efforts in anti corruption matters.

VI. LESSONS LEARNT

There are four main points to highlight when we reflect on what has been done.

Firstly, mere systems, structures and processes do not necessarily provide the template for success. The magic is in the sincerity of purpose; genuine efforts – not less than honest labour – and the overall operating climate. CPIB has the structures, systems and processes that are allowed to work, given the right operating environment created by a strong political will. Unless the will to succeed is forged, much of any anti-corruption programme will remain a passive idle declaration. Clearly, it is as much a question of fixing hearts and minds as it is a question of fixing the system.

Secondly, it is strategic to focus on the three related areas of enforcement, legislation (or law) and adjudication, as a package. Any weaknesses in any one link in this three-link chain can be fatal. Strong and effective legislation that will make detection and conviction of offenders easier is tactical as this provides the cutting edge for more effective enforcement and ultimately, more effective adjudication. All three areas are essential in anti-corruption work.

Thirdly, we adopted, from the onset, a simple, no-frills and largely enforcement-oriented approach, in the belief that deterrence through sure detection, prosecution and ultimately conviction in a court of law is the most tactically tenable and strategically sound plan of action. By single-mindedly taking strong action against the offenders, we avoided being side-tracked unnecessarily by the bark when we should be directing efforts on the bite. The maxim is: "Keep it simple, do it well". Early success was thus possible through focused action and unity of purpose. Success, eventually, begets success; almost inevitably. This generates a momentum of its own, creating a virtuous spiral.

Fourthly, public support, so vital in any anti-corruption programme, is best won through successful action against the corrupt, regardless of colour, creed or station in life and executed without fear or favour, firmly and fairly. Such clear, demonstrable success is the surest way of winning public assent.

VII. CONCLUSION

Today, Singapore has curbed corruption. However, we are mindful that our past success is no guarantee for the future and we do not for a moment think that corruption will never take root in Singapore. We know complacency will lead to a downfall. Therefore, the fight against corruption is still a necessary job for all of us. I quote from Mr Lee Kuan Yew when he addressed the Forum on World Ethics and Integrity held in Kuala Lumpur in April 2005: "Singapore has to keep fighting corruption wherever it exists and however difficult it may be politically. The system works because everyone knows the Singapore Government is prepared to act against the most powerful in the land."

I hope my sharing has been useful to you. The experience of Singapore may not be replicated in other countries as every country has its own characteristics and peculiarities. However, as corruption is a human behaviour which is exhibited across national boundaries with varying degrees of similarities, the systems and mechanisms we put place may bear some similarity and allow us to learn from each other.

INVESTIGATION AND PROSECUTION OF CORRUPTION OFFENCES

*Soh Kee Hean**

I. INTRODUCTION

In the first paper, I explained the system of corruption control that has been put in place in Singapore. Within this scheme, right from the beginning, enforcement and investigation of corruption offences is a function which had been accorded great emphasis. Through persistent enforcement efforts against corruption, we are able to keep corruption levels low. The corrupt offender must feel that this is a high risk business and must feel that they will be caught and dealt with for their crimes. The law and the enforcement agency must combine to give bite to the anti-corruption efforts.

II. PURPOSE

We know that different anti-corruption agencies around the world adopt different approaches and strategies in the way they manage enforcement and investigation work. My presentation will touch on how we do it in CPIB. The purpose of my paper is two-fold:

1. To share our experiences so that we can have a means for mutual learning. We can also learn from others and refine our system and likewise, what we have experienced may provide pointers for others to reflect upon; and
2. Secondly, an understanding of the investigation approaches and strategies can further enhance the basis for mutual co-operation and assistance. By understanding one another in investigation matters, we can facilitate support for one another.

III. A TOTAL APPROACH TO ENFORCEMENT AND INVESTIGATION

CPIB is under the Prime Minister's Office. We report to the Prime Minister and not to any other Minister or government authority. This gives us functional independence so that no government body can question us or influence us in our enforcement and investigation efforts.

Our approach in investigation is a total approach. This ensures we have a good control over the situation and we can contain corruption cases as far as possible. What do we mean by total approach, some of you may be wondering? It simply means:

Firstly, no case is too small to investigate. For example, a motorist is stopped for drunk driving and he tries to bribe the traffic police officer to let him off. He will be charged in court. If a foreign visitor is at our immigration control point at our border and he did not meet the entry requirements but tries to bribe the immigration officer, he will be charged in court. In short, we don't tolerate corruption and the message is clear to all that any case will be investigated and dealt with seriously.

Secondly, we deal with cases regardless of rank and status. Even serving Ministers had been charged and Chief Executive Officers of major companies have been dealt with too. There is no exemption for the 'big fish' or for anyone in high places. The same processes and procedures apply to all.

We are prepared to deal with both givers and receivers of bribes. Under our law, they are equally culpable. Of course, sometimes we may not charge the giver if he was under duress when he gave the bribe or there were some other reasons which led to the offence.

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We fight corruption in all sectors. CPIB's mandate is to investigate corruption in both the public and private sectors. This will include the civil service, the military, the Courts, Parliament etc, as well as all the industries and businesses. The same law applies to all sectors. This may be different from some countries, where the anti-corruption agency may focus only on public sector. In the public sector, CPIB helps ensure there is good governance and delivery of government services. In other words, CPIB helps to keep government clean. For the private sector, it ensures healthy economic activities

We don't leave it to various government authorities to deal with the problem. For example, if there is an issue involving Immigration Department, we don't just leave it to them. We will take over corruption investigation and if necessary, the immigration investigation as well. In other cases, we may jointly investigate with them so that a complete resolution of the corruption and immigration offences can be achieved. We may also help government departments review their systems to remove or change those procedures which may be vulnerable to corruption.

We are prepared to investigate based on anonymous complaints. Of course, we need to be very careful so that we are not "used" by someone who is malicious and wants to cause harm to others. We will process the information and there is a weekly session where the Directorate members (comprising Director and Heads of Operation Units) will meet to decide if investigation should be conducted on any complaint received. We will consider factors such as:

- details of information provided, for example specific persons, organizations, transactions etc;
- whether there is any public interest dimension, for example security and safety concerns; and
- any lead which we can work on or use to verify the information provided.

The CPIB is also empowered to investigate other offences apart from corruption. This is crucial as corruption offences may not exist in isolation and may be mixed with other offences such as cheating, commercial crimes, property crimes and so on. It will be a serious impediment if CPIB officers have to stop short when interviewing suspects who are not obliged to respond to questions touching on other areas. Therefore the powers to investigate other crimes uncovered during corruption investigations are provided for in the Prevention of Corruption Act.

We make it easy for anyone to report corruption offences. The CPIB is very accessible. The public can report by making phone calls to our hotline which is operated round the clock, or they can visit our office at any time. They can also send us letters by post or fax. They can also report from their homes via the CPIB internet website (www.cpib.gov.sg) or sending us an email. By opening up all possible venues for reporting, we hope that those who have come across or are aware of corruption cases will have less difficulty and unwillingness to report.

IV. WHY DEAL WITH PRIVATE SECTOR CORRUPTION?

As mentioned, CPIB can investigate cases in the private sector. Let me explain the reasons why CPIB has to deal with corruption in the private sector as follows, namely:

1. Corruption in the private sector affects public interest. Some used to erroneously think that private sector corruption is a private affair between the giver and the taker. But consider the following. When a supermarket purchaser take bribes from a supplier, the supplier will inevitably mark up its cost to cover the bribes. In so doing, the supermarket which purchased the goods at a higher price will sell it an even higher price. It is the public that suffers in the end.

2. Singapore is a small nation without natural resources. It has to depend on trade and foreign investment. To attract investment, we have to ensure that business cost is low and corruption whether, in the private or public sector, increases business cost.

3. The private sector is a key pillar of the Singapore's economy. It drives national economic growth. We need to have a level playing field for all and the private sector must be clean in order for foreign businesses to want to work with us and to invest in Singapore.

4. The private and public sectors are also intertwined, which is another reason why it matters that CPIB watches over the private sector as well. As more and more government functions become outsourced to the private sector, many private companies are now performing functions once used to be performed by the government. Corruption in private sectors which are involved in strategic functions can also impact the key areas of government and the society at large.

5. A lot of the private sector enterprises have huge public shareholdings as well. If the enterprise is not well run and commits crimes, then its share price may be affected and this in turn affects the interests of the public.

V. TYPES OF CASES

Corruption cases can come in various forms – some of the cases we have seen in the public and private sector are:

Cases involving contracts or procurement of services or supplies. The corrupt offender receives kickbacks in return for awarding contracts. An example of a recent case involves senior staff management of a car company for receiving expensive gifts in return for awarding agency contracts.

Cases involving corrupt offenders who supervise contractors or suppliers, for example, not checking on the quality of work or product delivered and overlooking deficiencies. This can result in serious repercussions. An example, in building works, we have dealt with clerk of works who took bribes to overlook certain deficiencies. We have also dealt with inventory or warehouse staff, who were corrupted and accepted imitation or substandard goods delivered by suppliers in return for bribes.

There are those who are corrupt, and have access to sensitive data and divulge to unauthorized persons in return for some rewards. These cases involve people working in areas where there are storehouses of data about customers and they abuse it by passing on to persons such as illegal moneylenders who were looking for their debtors and private investigators tracing whereabouts of persons of interest.

There are those who are in positions of authority such as the CEO or General Manager, who took bribes and granted approval for various matters in favour of the bribe givers.

In some cases, corruption is mixed with other offences. For example, the corrupt may also cook the company's books when they try to hide the corrupt transactions. They may manufacture false invoices to reflect fictitious transactions. Once uncovered, they will be dealt with by CPIB. Our officers are also empowered to investigate other crimes uncovered in the course of corruption investigations.

VI. INVESTIGATION STRATEGIES

So, what is the magical formula to effectively investigate corruption offences? In order to achieve this mission, we approach it through a framework of action which involves four inextricably linked competencies, that is Intelligence, Interview, Forensics and Field Operations. The success of solving corruption cases hinges on the interplay of these competencies.

A. Intelligence

Intelligence work is critical in the current landscape of constant threats and vulnerabilities. It involves the collation and processing of information for specific objectives, so you can say that intelligence work is really a discreet form of investigation. Intelligence work often provides the basis for successful investigation. A proactive approach can enhance the success of major operations and effectiveness of investigations. Our Intelligence Division adopts both a strategic and tactical stance – we have projects which are intelligence-led operations where our Intelligence Division leads efforts in collation, analysis and pointing out the direction and leads for investigation to follow. We also have cases where Intelligence Division plays a supporting role to our Operations Units in their investigations by providing critical information such as establishing identities, relationships and locations etc during the pre-operation and operations phase.

To stay on top of the situation, we need to continue its successful efforts by building on its capabilities and strong expertise; expand on its current resources and established networks and relationships. Outward and internal approaches are both adopted, as it is vital for intelligence to stay relevant and effective. It is also imperative for us to continue its close liaison with our overseas counterparts such as Hong Kong ICAC (Independent Commission Against Corruption), Malaysia ACA (Anti-Corruption Agency), and our local agencies from the Singapore Police Force, Immigration & Checkpoints Authority and Central Narcotics Bureau.

B. Interview

It is often challenging to handle corruption cases where more often than not, the complainant is as likely to be culpable of the corrupt act as the accused person. Lines are blurred, and our officers are hard pressed to find a clear-cut situation, where there is a distinct perpetrator and victim. In corruption cases, our officers are frequently confronted by complainants or witnesses who are not forthcoming, for fear that what they say may implicate them. Hence, it is imperative that our officers are equipped with all aspects of investigative work, particularly their ability to sieve out the truth from the witnesses, as well as to discern the innocent from the guilty. This brings us to the second competency – Interview.

An interview, simply put, involves the questioning of a person regarding his involvement or suspected involvement in a criminal offence. There are scores of reasons why people choose not to give the necessary information, or choose to mislead by giving false information. Hence, it is important for officers to be flexible enough to switch modes to tailor to the varying situations or types of persons being interviewed.

Our Courts are quite stringent these days, increasing the weightage given to other admissible evidence, as opposed to merely just accepting positive statements or confessions given by accused persons. In consequence, we have to emphasize greatly on developing the interview skills of our officers, which can be the determining factor in cracking a highly complex investigations.

In regard to interview, we do utilize the polygraph machine and we find it very useful. However, we do not use the polygraph test result as evidence in court but only as an aid to investigations.

C. Forensics

Another area which we pay much attention to these days is Forensics or, specifically, Computer Forensics, which is becoming indispensable in our investigations.

The sheer complexity of illicit transactions, whether it is at the individual, syndicate or corporate levels, requires an incredible level of expertise and capability from our officers. Criminals' little black books have undergone a major facelift and have progressed to PDAs, smart mobile phones, personal desktops, and the amount of records detailing corrupt transactions electronically is overwhelming.

To overcome this challenge, CPIB has set up a Computer Forensic Unit, field by officers on a part-time basis, trained to handle the collection, preservation, analysis and court presentation of computer-related evidence. As we are new in this area, our officers are in contact with our counterpart from the Criminal Investigation Department's Technology Crime Forensic Branch to share experience and pointers in this area. As some high end capability may be required which the Bureau does not have, we will depend on our partners when necessary.

There are various cases where forensic evidence played a big part in solving cases. I forsee in the near future, with great advances in technological tools, software, and elaborate IT infrastructures, computer forensics will play an even more proactive role, in tandem with intelligence, as opposed to being a mere investigative support and response mechanism.

D. Field Operations

By field operations, I refer to the range of investigative activities carried out in the field, for example search and seizure, field enquiries, raids and arrests. How its done and how much information security is exercised over it will determine the success of any operation. This cannot be overlooked and the capability need to be developed and worked on continously.

E. Interplay of Four Competencies

The synergy from the interplay of these four competencies – Intelligence, Interview, Forensics and Field Operations is critical to the success of cracking of our major cases. Operation Crossover is one of such cases, showcasing the interplay of these elements. In this case, our Intel asset had given us sufficient details on who were the main players of the syndicate from the company styled Citiraya involved in the diversion of the computer chips, who were the staffs from client companies that were bribed and their modus operandi. Our Intel asset also told us the exact container, which was kept in the free trade zone, containing a shipment of computer chips to be enrouted to Hong Kong. With this information, an operation was mounted, resulting in the seizure of that container. Subsequently, through intensive interrogations and interviews, the parties involved had admitted to the corrupt activities. Forensic searches and analysis carried out on Ng Teck Boon, one of the main player's computer notebook had also attributed to the cracking of this case – it revealed records of shipments of computer chips fraudulently obtained through corrupt means and inflation of the company's accounts. This piece of evidence, together with other physical evidence such as uncrushed computer chips seized from Teck Boon's company and warehouse had led to his confession and admissions of other parties involved in the scam.

The 4 competencies interact and by extracting the appropriate value from each one and allow each to leverage off the other for maximum results. At various junctures, any one of these competencies will play a more significant role to provide the breaking point for successful solution of cases. For instances, if crucial evidence was hidden in computers and through computer forensics, investigators are able to unlock the evidence, then this may prove to be the key to solving the case in hand. Similarly, the interview pillar may play the bigger role when skillful interrogation of suspects led to confessions or the gathering of critical evidence which are instrumental in solving the case.

VII. EVIDENCE GATHERING AND PROSECUTION

What we are mindful of is that for us to be successful in getting positive investigation results, we need to emphasize on evidence gathering. This is always a challenge as:

a) corruption offenders will hide and not tell the truth; and
b) there are increasingly sophisticated modus operandi used and methods to transact and hide bribe monies.

When we apply our minds in using the four competencies of intelligence, interview, forensics and field operations, we also focus on collecting and consolidating the evidence. From the evidence, we review the case. Sometimes, we sit together and discuss in case conferences to go through these issues – Do we have the evidence to charge anyone? What evidence is there when we proceed to charge? We make use of an evidence matrix. This matrix has facilitated our case review and decision making process. Evidence of accepting/receiving/obtaining gratifications is inside, where officers document actus reas, inputting details of the corrupt transactions which the subject has admitted to in his statements, e.g. when did the transaction occur, who did he hand the gratification over to, what are the documentary evidence, etc. Juxtaposed on the information, is the detailing of documentary or other evidence of giving/offering/promising of the corrupt transactions. Usually for easier reference, the evidence for giver and receiver involved in the same transaction are placed next to each other, quoting the paragraph of the subject's statements where the information was extracted from. As for the evidence on corrupt intent, it is also recorded in the table, and it includes details such as what are the gratifications meant for.

At the end of the day, we need to address the legal aspects. In the Singapore system, CPIB does not have in-house legal experts. We understand that in some countries, the anti corruption agency have their inhouse legal experts and some agencies also conduct prosecution themselves. CPIB depends on the Attorney-General's Chambers (AGC) for legal advice. Under our law, we cannot charge a person in court for corruption unless the Attorney-General gives his express consent. So there is a division of responsibilities and a check and balance. We in CPIB are the operational experts in investigating corruption offences. We put together the case file and document all the evidence gathered. But we need the legal experts from AGC, so the case file is sent to them. Together, when both operational experts and legal experts agree that there is a case, we can then proceed to charge offender in court. Once prosecution is mounted, CPIB officers will work together with prosecutors to present the evidence in court.

In terms of prosecution, as we are prepared to prosecute both givers and receivers of bribes, we have to stage our prosecution of the accused persons in sequential order. But then if we prosecute all parties, who is going to give evidence for the prosecution. Sometimes the receiver is prosecuted first and the giver is the prosecution witness. After the case is over, the giver is prosecuted and the receiver in turn becomes the witness. This can present some challenge especially when there is not much independent evidence apart from what the giver and receiver say about the crime. Therefore as we adopt this tough stance against both sides of the corruption crime, it is the responsibility of the CPIB as the law enforcement lead to ensure that it gathers strong evidence on the case so as to be able to prosecute all parties involved.

There are instances where the only evidence we have is from the giver and the giver is not willing to testify unless he is given immunity from prosecution. As a rule, the Attorney General's Chambers does not grant immunity easily. It will be under exceptional grounds if immunity is granted.

The conviction rates of above 95% each year bears testimony to the strength of cases brought to court.

There may be cases in the public sector, where after investigation, there is no evidence of corruption but there is evidence that the public official had infringed some government rule or regulation. In such situations, the Bureau will provide the information to the Public Service Commission or to the person's parent Ministry for them to take departmental disciplinary proceedings against the said officer. The information and evidence collected through investigation can then be put to good use.

In some cases, apart from dealing with the culprits, after the case is over, the Bureau may note down vulnerabilities or loopholes in the system of work, work process or procedures of the affected government department and offer some recommendations for them to consider as they work towards plugging any loophole or vulnerability.

VIII. THREE STRATEGIC THRUSTS

To discharge its role as a lead investigation agency, CPIB must be on top of the situation and its capability must be up to mark. To ensure this, CPIB embarks on 3 strategic thrusts, namely Strengthening Operational Capabilities, Forging Networks & Partnerships and Investing in Organizational Excellence.

In "Strengthening Operational Capabilities", CPIB seeks to improve on investigation capabilities such as document examination, computer forensic, financial investigations. We need to hone our skills in the areas required.

In "Forging Networks & Partnerships", CPIB forges partnerships with local and international entities. To ensure good governance and to combat corruption effectively, CPIB recognizes the need to strengthen international and regional cooperation and liaison. As a result, CPIB has actively participated in various anti-corruption initiatives and international fora, such as UNCAC (United Nations Convention Against Convention) – Conference of State Parties, ADB/OECD Anti-Corruption Initiative, ACT Task Force (APEC Anti-Corruption and Transparency Task Force), MOU (Multilateral Memorandum of Understanding on Cooperation for Preventing and Combating Corruption amongst anti corruption agencies of the ASEAN region), and the IAACA (International Association of Anti Corruption Authorities).

In "Investing in Organizational Excellence", CPIB invests heavily in training her people and encourages staff to share knowledge and innovate. We regularly do inhouse learning where we bring all operational staff together for training. We may invite experts from various government Ministries and from private industry to address the officers on issues of topical interest. When there are new areas of work, we will build new capabilities. For instance, next year, Singapore will have Casinos and Casino related corruption cases may occur. Therefore the Bureau is building its capability to tackle such situations. CPIB is also active in outreach programmes to raise public awareness through regular talks, especially for public officers such as enforcement agencies, on the pitfalls of corruption. Selective outreach is done with specific industry sectors.

IX. CONCLUSION

There are various challenges we face in investigating corruption offences. Firstly, the changing nature of corruption. While behaviour and motivation of the corrupted may be similar, the methods used have transformed greatly. There is more sophistication seen in corruption today. More complex methods are used. The corrupt transactions are more complicated, going through various loops and intermediaries. There are more methods used to hide the money trail such as bank transfers, false accounting, phantom workers, camouflage payments of various types. Computers are often used in the commission of the offence such that where we used to seize paper records in the past, today, we seize a lot of computers and electronic media. It is thus important for the enforcement agency to continually upgrade its capability and ensure its personnel are well trained and well skilled.

Secondly, there is internationalization of the issue of corruption. Corruption offences can cross international borders. This brings with it challenges for law enforcement and where necessary, we need to work with foreign counterparts in investigating corruption cases. At the international level, there is also greater interest by governments around the world in dealing with corruption.

Corruption is a dynamic phenomenon and CPIB continue to have an important role to play in keeping Singapore clean, and our efforts to combat corruption and uphold a high standard of transparency would not have been possible without galvanizing the synergy from the roles played by the whole of government. In addition, we also require our fellow law enforcement members, like all of you, to join in and help in the fight against corruption.

PARTICIPANTS' PAPERS

EFFECTIVE LEGAL AND PRACTICAL MEASURES TO COMBAT CORRUPTION IN IRAQ

*Chemen Bajalan**

I. INTRODUCTION

Corruption acts as a major deterrent to growth and development. It is a global and widespread problem which affects development and growth nationally as well as globally. The importance of the problem has been increasingly recognized by the international community and in particular in developing countries. The aim of this paper is to summarize existing conditions in relation to corruption in Iraq. In similarity with many other developing countries and a country in transition, Iraq suffers from increasing trend in corruption with negative effects on its reconstruction and development programmes. Iraq by the constitution is a federal system and the region of Kurdistan is constitutionally recognized as federal region. This paper focuses on the Iraqi legal system for combating corruption. Since the political situation in Kurdistan from 1991 is different from the rest of the country, the paper mansions briefly the legal system in Kurdistan as well.

The rest of the paper is organized as follows. The paper begins with a brief overview of corruption, and then turns to a review of the situation in Iraq. This is followed by a discussion of the corruption related offences in the Iraqi Criminal Law. The discussion above is continued with an overview of the entities that monitor transparency and combat corruption in Iraq. Media and its role have been briefly studied. The paper ends with a summary which includes some of the challenges that face fighting corruption in Iraq and some suggestions that support the effort to retain the transparency in the country.

II. A GENERAL BACKGROUND TO CORRUPTION

According to the United Nations Global Programme against Corruption, currently there is no single, comprehensive and universally accepted definition of corruption. However, listing specific types or acts of corruption can be recognized and clearly identified. Corruption can be defined as the abuse of publicly entrusted power for private ends and it usually involves officials from the public sector. Thought the states are reluctant, corruption in private sector is increasingly recognized recently.

Corruption can be "Grand" or "Petty". The first pervades the highest levels of national government leading to a broad erosion of confident in good governance, the role of law, and the economic stability. In the case of Iraq "Grand" can relate with the oil industry where the looted money reach millions of dollars. The looted money in the oil for food programme is also an example for this type of corruption. The minister of trade has been accused in misusing his authority and getting personal benefits from the programme.

Petty corruption involves the exchange of very small amounts of money, the granting of minor favors by those seeking preferential treatment or the employment of friends and relatives in minor positions. . This type of corruption is been practiced in Iraq on daily basis. Kurdistan region suffers less from corruption in the shape of bribes; however, preferential treatment for political supporters and relatives is a major problem. It is a reason for suspicion of the government among the people.

Also corruption can be "active" which refers to the offering of the bribe or "passive" which refers to the receiving of the bribe. According to the Iraqi criminal law both offering and receiving are in the same legal category. According to the last paragraph of Article 310 "… The person who offers a bribe as well as the intermediary is punishable by the penalty prescribed by law for a person who accepted such bribes".

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Research indicates that corruption exists in all societies, but it is more pervasive in some societies and more common at some times in their process of evolution. They focus on a number of studies where researchers investigate the reasons for corruption to be more widespread in some countries than others. A number determinants of corruption are identified in the literature ranging from political modernization and the speed at which it takes place, lag in adjustment of laws and regulations to adapt to new conditions with the objective to prevent corruption, historical and cultural traditions, levels of economic development, political institutions, government policies, to duration in democracy and ethnicity.

III. AN OVERVIEW OF THE CONDITIONS IN IRAQ

Iraq is a country which has been in a series of wars including wars with its nation of Kurds. In 1991 the central government withdrew its authority from the region. The Kurdish parties established a local government after the election in the area. Since then the Kurdistan Regional Government (KRG) ruled though facing massive challenges including the economic embargo from the Government in Baghdad. After the 2002 and the topple of the dictator regime in Baghdad KRG has been recognized officially and Iraq is considered according to its new constitution a federal country. The serration between Kurdistan Region and the Central Government of Baghdad led to different level of development and slightly different legal system. Though the leading parties in Kurdistan are consisting an important component of the government of Iraq, the relationship between the region and the centre is smooth. There was no relationship since 1991 until 2002. Since 2002 though there is high level of co-operation and political relationship there is no administrative avenue between the institutions in the region and those in Baghdad.

In Iraq most of the types and cases of corruption can be found. Iraq was ruled by a dictator with strong influence from his clan and political party. The handful of people with strong influence and holding the key institutions in the society determined the level of production, flow of resources, its distribution, welfare and priorities of the society. In addition they neglected easily the laws and regulation in the absence of minimum levels of public sector transparency and accountability.

The sources of income for the state have had been limited to few including: revenues from Oil and Gas, tariffs, income from fees charged for automobile registration and housing constructions, and limited revenues from provision of public utilities to the households. Thus, corruption and abuse of power was a result of political institutions and government policy that was strongly rooted in the public institutions with major impacts on every aspect of the life of the citizens.

In the aftermath of the American invasion and the toppling of the dictatorship, the country worsened among the developing and transitional countries as ranked by their levels of corruption. The Transparency International Corruption perception index score that ranges from ten (squeaky clean) to zero (highly corrupt) puts Iraq at the end of its index. According to this index Iraq ranked 1.9 in 2006, the country number 160 among 163 countries. It ranked 1.5 in 2007, the country number 178 among 180 countries. And it ranked 1.3 in 2008, the country number 178 among 180 countries.

According to various professional journalists' and NGOs' reports, corruption in Iraq remains untouchable and it is protected by senior Iraqi government members. On the other hand the anti-corruption entities are affected by the political environment and the Shiite/Sunni division of the government which makes combating corruption in Iraq more difficult. Each side tries to protect its alliance, though they are corrupt, that of course happens through intervention in the work of the anti-corruption entities.

Iraqi society is a society where religion plays a great role in the people's life. However many who practice religion seriously never come across other people's belongings and do not have any conscience when it comes to the public domain. Though a legal and governing system is vital for combating corruption, the way corruption has been judged socially is worthly of study and research. The sense of shared responsibility plays a role in determination of some types of corruption. There is a lack of sense of responsibility in the Iraqi society. People are aware of corruption as serious threat to their lives; however, they rarely contribute to any efforts to fight corruption.

The United Nations Convention against Corruption is the first legally binding international anti-corruption

instrument available. It provides a unique opportunity for mounting a global response to corruption. Iraq has joint membership to the Convention since 17 March 2008.

IV. CORRUPTION OFFENCES IN THE IRAQI PENAL CODE

Corruption offences are set in chapter six of the Iraqi Criminal Code No. 111 of 1969 under the title (offences in breach of the duties of office). This chapter is divided into the following three sections.

A. Section One (Bribery)

Section one starts with Article (307) and ends with Article (314). It is penalizing different acts of bribes. There are different penalties for taking or giving bribe or other roles played in the bribery action. The punishment may reach ten years imprisonment in some cases. According to Article (314) "In addition to the penalties stipulated in this section, an order for the confiscation of the gift received by or offered to the public officials or agents will be issued".

B. Section Two (Embezzlement)

Section two of this chapter is dealing with any action of embezzlement. Articles 315 to 321 of the code, set penalties for different cases of embezzlement. The punishment rang between fine and life imprisonment according to the circumstances of the embezzlement case. Similarly in the cases of embezzlement the offender shall be ordered to make restitution for the funds he has embezzled or appropriated for him or for the value of the benefits or gain which he has obtained of course in addition to the penalties stipulated in this code.

C. Section Three (Officials Who Overstep the Bounds of Their Duty)

The third section includes Articles 322 to 341 is concerning "officials who overstep the bounds of their duty". Any act of public officials includes abuse and misuse of the public authority is punishable according to this chapter. For example arresting people in circumstances stipulated by the law or engaging slave labour in activities unconnected with the legally or constitutionally recognized public interest are punishable. Article 330 deals with well-known "WASTA" problem in the Iraqi society. It sets "Any public officials or agents who unlawfully refrains from executing the duties of his office or wilfully fails to fulfil his duties in response to a request or instruction or to mediation by another or for any unlawful reason is punishable by detention".

Some of the cases of this chapter, like Article 334, sets that there shall be an order to make restitution for the property that has been appropriated or its value if it has no substance in addition to the compensation if necessary of any person who has suffered harm as a result of the offences. Of course there is always the right to ask for compensation in all the criminal cases according to the general principles.

It is obvious that there is a rapid development in the area of corruption and related cross border crimes. In parallel there is an active legal response in the international level and in the national law around the world to deal with corruption. However, Iraqi penal code is the same since 1969. The developed international legal standards related to combating corruption are not reflected in the Iraqi laws satisfactorily.

V. TRANSPARENCY MONITORING RELATED ENTITIES

There is a kind of monitoring according to the administrational hierarchy in all the public offices. So mangers in any public office may and even should use their authorities to monitor the transparency in the office. However there are offices are specialized and deal directly with the mission of fighting corruption. Following is a discussion about these entities.

A. Board of Supreme Audit (BSA)

The Iraqi Board of Supreme Audit has been established according to Law No. (17) 1927. Since then it witnessed various development phases to fill the existing gaps that has been emerged through application of the law or in response to the dramatically political changes in the country. Since 1990 the Audit is regulated by the Board of Supreme Audit law. According to Article 6 of the law the Board's primary tasks are to set the roles, specify duties, and specialties of the Board of Supreme Audit and enhancing its role to participate in improving the performance of the state's institutes. The law sets the role to enable this board to secure

the auditing requirement and its needs of resources, human capital, and information whether to express an opinion about the truth of the financial situations and the activities or to evaluate the structures that go along with the phases of the development of the national economy. Finally the law gives sufficient flexibility to the Board in planning and assigning duties and specialties.

The way the board functions aims to secure the required central supervision. That helps to direct controlling tasks and development bases principles, means and ways of implementation and assessment the results are required. In addition in order to enable the law one needs to enable the board to cover all the services and institutions of the state in the governorate with auditing and supervision with the highest level of competence and efficiency.

The Board of Supreme Audit works as part of the ministry of finance and it has no independent legal personality. It plays a role in combating corruption and following the performance of various levels of government but it has no such broad authorities as the Integrity Commission have as we will see next.

In should be noted that the Iraqi Board of Supreme Audit has no control over the Kurdistan Region which has it is own Board of Supreme Audit and it follow similar techniques and roles in order to enhance the performance of the Kurdistan Regional Government.

B. Inspector General Office (IGO)

This office is another new experience to Iraq. It is established according to order No. 57 in 2004. The major task of this office is to evaluate the performance of public service within by the officer with the ministries. In performing its mission the office has access to any documents in the ministry. It also supervises and reports the conduct of civil servant. It might conduct investigations and it has the authority to refer the result of such investigation to the Commission of Public Integrity. Again the Inspector General Office has no control over Kurdistan Region and there is no such experience for monitoring the conduct of civil servant in the administrational institutions.

C. The Commission of Public Integrity (CPI)

Iraqi Commission of Public Integrity is one of the institutional mechanisms specialized in combating corruption in the country. It is an independent, public, integrity and combating corruption entity. It was set up in Iraq under the name of the Office of Public Integrity. The Commission was established under the formal law of the Iraqi Governing Council and in accordance with the authorization granted by the Coalition Provisional Authority dissolved matter (55 of 2004). The Commission was established in accordance with the Articles (6) and (36) of the United Nations Convention against Corruption in 2003.

According to the Iraqi constitution of 2005, the Integrity Commission is one of the independent bodies. It is subject to the control by the House of Representatives. Article (102) of the Constitution sets "High Commission for Human Rights, the Independent High Electoral Commission, and the Integrity Commission are independent bodies which operate under the control of the parliament, and its actions organise according to a law".

The independence of the Commission and that it does not follow any branch of the executive gives the Commission crucial importance. This makes the Commission different from the Board of Audit. The Commission has the legal power to and the freedom to watch, investigate, compel any official no matter how high ranked they were. However, in practice the political atmosphere might affect the work of the Commission.

As mentioned previously, the Integrity Commission aims to prevent and to combat corruption and it has the legal means to achieve such goal. To perform its goal the commission activities are divided into two areas:

The first area is legal and is implemented through four mechanisms:

1. The investigation of corruption cases by the investigator under the supervision of specialized criminal investigation judges. The specialty here is according to the area where the crime occurs.

2. Preparing legislation proposals in the field of combating corruption and development of a culture of probity, integrity, transparency, accountability and acceptance of interrogation, equality and justice.
3. Compel Iraqi leaders to disclose their assets and financial interests.
4. Issuing a code of conduct in the field of public sector employment. Such code sets the standards of the ethical conduct in the field of public service.

The second area – education and media, operates through:

1. Curriculum development to promote ethical conduct in the public services in cooperation with the Ministry of Education and Ministry of Higher Education.
2. Preparation of studies and research.
3. Training.
4. Media campaigns and outreach activity through media.
5. Organization of seminars.
6. Any action in the field of raising awareness and training of public sector employees and the public to strengthen the calls for transparent and accountable government and public institutions subject to interrogation.

The law gives the commission a great power. In relation to the Commission's authority Section (3) of the Act attached to the Law No. (55) of 2004 "For achieving its goals the commission is allowed to take any necessary actions". The term is flexible and gives the Commission a wide scope of authority. It has no determination in action in order to achieve its goals.

Accordingly the commission acts through six offices or directorates to carry out the goals mentioned in the law:

1. Investigation office.
2. Legal affairs office.
3. Prevention office.
4. Education and public service office.
5. Relations with non-governmental organization office.
6. Administrative office.

The Commission is headed by an official in the rank of minister being appointed by the prime minister. Only the House of Representatives has the authority to remove the chief of the Commission. The procedure is the same as the procedure followed in the case of dismissal of ministers.

CPI's mission is reinforced by the Bored of Supreme Audit (BSA) and the Inspector General Office (IGO) within each Ministry. The BSA serves as Iraq's oversight auditing institution; Whilst IGOs conduct fact-findings investigations, audits and performance reviews within the minister and report cases of suspected criminal conduct involving corruption to CPI for review and appropriate action.

The Integrity Commission has no control over the Kurdistan Regional Government. There is no such commission in the region. Recently there are many calls in the media for the establishment of a similar commission in the region where the corruption is publicly being discussed in public and private places but with no effective practical measures or official will for combating it.

D. The Public Prosecution office

According to the Iraqi Public Prosecution Law No. (159) of 1979, the prosecutor's office plays a vital role in protecting public property. For that purpose it has a wide range of authorities. The public prosecutor office can ask for the initiative of investigation of public rights. Also it can play according to the law an active role in monitoring investigations, collection of evidence and monitor all the decisions made by the investigative judge and the decisions made in all stages of investigation and trail procedures. The investigation judge has the authority to conduct investigation in cases referred to by the police as well as to initiate investigation by

themselves. The public prosecutor may refer a case to the investigation judge. In all cases the decision is made by the judge. The public prosecutor has to be informed about each single decision in the case and s/he has the authority to appeal any of these decisions.

The legal authority given to the public prosecutor is not applicable or it is not applied in practice easily. There is a limited role played by the public prosecutor office in raising corruption related cases by itself. That has to do mostly with the inactive role of the office. Undoubtedly, the case that been brought to the office has to be followed and the office usually plays a role in taking the needed legal measures according to the law to deal with them. However, it is not popular that the public prosecutor office watches the performance of public service to monitor the public prosperity which has been mentioned in the public prosecutor law.

According to the public prosecutor law the public prosecutor plays a vital role in detection, investigation, prosecution, adjudication punishment of offence. The same role is true for the corruption offences. Nevertheless, the role of public prosecution office is a negative role according to the law. In practice the personality of the public prosecutor him or herself plays a great role in activating such vague code.

In general the public prosecutor does not play a proactive role in combating corruption. In practice the investigation is been lead by the judge. The public prosecutor has to be informed by about the judge's decisions. If the public prosecutor found any of these decisions in disagreement with the law he or she can appeal the decision. So the public prosecutor is aware of the procedures of the legal cases and can follow and ask the judge for taking any needed decision according.

So the public prosecution office is not a special corruption fighting entity but it can play a role in fighting corruption. Its role in a corruption case is not any different than its role in any other crime. A bribe is the same as a murder in relation to the role of public prosecution office. The judge leads the investigation and takes decision at the end of it. The public prosecution office monitors the process and has the right to appeal in any stage of decision making.

E. The Judiciary Supervision Commission

The judiciary Supervision is not one of the agencies that specialized in fight against corruption; however it plays a vital role in this area. Judges and public prosecutors in fulfilment of their duty have to be under special kind of supervision. The Commission is consist of experienced judges and public prosecutors to monitor the conduct of judges and public prosecutor and their fulfilment of the duty.

The Judiciary supervision works through its irregular visits to the courts and public prosecutor offices. In these visits the judges or the public prosecutor from the commission follow the daily work in the court and public prosecutor office. The reports written as a result of these visits, whether positive or negative are important and reliable for promotion or delay of promotion of the judge or public prosecutor according to the case

VI. THE ROLE OF THE MEDIA

The media can play a great role in combating corruption. The space of freedom expression has been used in Iraq recently in accusation of high ranks official and other levels of officials in Iraq and Kurdistan region involvement in corruption. It is not always the case that reports concerning corruption and accusing of officials are true or based on evident. Often such accusations are related to political disagreement or for the purpose of gaining personal interests by certain politicians or their political parties. That strongest effect which an independent media can play is in enhancing public awareness and serving as a monitoring measure. However, some cases have been brought to the court by a journalist report.

Public sector in its capacity as the main employer and provider of services is a main source of corruption through financing and implementation of public projects. The combination of public-private-politics is the root of the problem. Public finances and provision of services is decided by politics who own business. Unless these three-party alliances are separated it will be hard to fight against corruption in an effective way. In a recent case of abusing public property a case law brought to my court and accordingly the investigation started. The case is

an important case related to a preservation of a historical site and its alleged embezzlement.

Media can also play a role in building trust in the Judiciary and other entities that specialized in fighting against corruption. Raising awareness about how these entities conduct its mission. It is also crucial for greater role to these entities to simplify and publicised how people can contact and inform these entities about corruption cases. In addition it is very important to inform the public of the successful corruption cases which establish for confident in the government.

VII. SUMMARY AND CONCLUSIONS

Iraq is a country suffering seriously from the vast negative impact of wide spread corruption on the country's ability to reconstruction and development. There is a crucial need for a comprehensive approach to development. Implementation and evaluation of an anti-corruption approach covering all sectors of the society from the central government to the individual being involved at every stage is necessary. It implies inclusion of international community, international aid agencies and local NGOs, individuals, media, governments, public and private institutions.

Because of the dictatorship and decades of war, destruction and sanctions, the country is experiencing massive psychological, social, political and economical complexities and irregularities. It makes combating corruption much more difficult. Organization of the World Transparency indexed Iraq as one of the most corrupt countries. This makes the task of combating corruption in a critical stage of reconciliation, reorganization, reconstruction and development rather tough work.

The new era after the fall of the dictatorship heralded dramatic changes in the country. It led to the fall of the whole system and all kinds of difficulties, in particular ethnic conflict and internal security difficulties rise at different levels in the society. On the other hand a kind of democratic experiences accrued. The freedom of media was a new experience and plays a role in public awareness about corruption. However the negative side of such freedom is that it is practiced with no responsibility. In many cases the media accuse officials without having any evidence against them and that might be for political purpose. That led to injustice when such reports cause damages for innocent people.

The second newly established organization in the country is the Integrity Commission. The Commission is publicly well known though it has been working since few years ago. It is a new experience to the Iraqi society. It is particularly new in that the Iraqi leaders and high rank officials have to disclose their financial assets. That is a positive tool that helps the Commission to implement its goals in fighting corruption. It also has other important benefits for the officials themselves when it will prevent accusing them by other political parties or civil society.

The role which possibly can be played by the public prosecutor office is not effective in its application. The public prosecution law gives wide authority to the public prosecutor office in protecting public prosperity and in combating corruption as part of such task. Nevertheless the law is vague. In addition in practice the role is not that active. The other challenge that faces the criminal justice is the slow procedure which hinders a powerful investigation and evidence collections.

A. The Challenges

Some of the Challenges that face the fight against corruption are related to the nature of corruption in general, and others related to Iraq and its political, social and legal situation. Below are some of these challenges and accordingly some suggestions to enhance the general situation in the country as a whole:

1. Security;
2. Lack of data and systematic research to shed lights on problem and possible solutions;
3. The need to update the existing laws to reflect general development in and outside the society;
4. The gap between the existed laws which are sometimes sufficient and their actual application which is done often by neglecting the laws need to be diminished. In another word the absence of the basic principle of role of law is a major challenge;
5. The mass of public servants in the different government organs that help the corrupt people to slip easily;

6. Lack of specialized people in all the governmental organs that secure transparency in the country;
7. Article 136 (b) of the criminal procedure law which gives the ministry the authority to block any case. Although the law contemplated the application after the investigation judge finishing investigation, the Article has been used by the current regime to stop investigation prior to the decision made by the investigation judge;
8. The negative role of the public prosecutor office;
9. The absence of effective banking system allow economics of crime to blooming and the judiciary system is unable to trace illegalities in the banking system;
10. Lack of skill in the public prosecutor office and judiciary system is another manpower problem facing the system;
11. Delay in investigation is a common cause of incapacity to handle the situation effectively. Some cases stay in the court for years and the general public and the administration lose incentive and interest;
12. Lack of funding and resources is another problem to build up capacity to face the problem;
13. The usual challenge is associated with fighting against corruption related to its hidden nature and high rank people involvement;
14. People are cynical about the government and there is a belief that bribery and all sorts of corruption are inevitable. This undermines the rule of law and its legitimacy. As a result there is no effort in the downstream level to combat corruption.

B. Suggestions

The issue of corruption has been discussed sporadically in the media. Its extent is however widespread and both general public and non-governmental organizations feel unable to impact the public sector which is the main nest of it to be willing to tackle it in an effective way. Despite the lack of interest, means and effective channels there has to be both a long term and a short term plans to fight corruption such as:

1. Supporting the independence of judiciary as the most active anti corruption mean in the society;
2. Specialized anti-corruption research centres should be established;
3. Data to be collected systematically and used in research analyzing economics of crime;
4. Training and skill building of manpower at the national and regional level be conducted;
5. Strengthening the independency of transparency monitoring entities to enhance our knowledge about the actual conditions in the public sector;
6. Legal reform, for example Article 136 (b) regarding ministerial consent for a case to be adjudicating exclusion;
7. Giving the public prosecutor's office a more proactive role in exercising their duties and working with individuals case without unauthorized interventions;
8. Benefit from international experiences;
9. Engaging individuals and civil society in the fight against corruption to build a transparent culture in the society at the grass root level;
10. Guaranteeing that media have the freedom to receive and publish information on corruption cases and their follow ups;
11. Introduction of laws reducing intervention of political parties in governance, and separation or private businesses and public decisions.

MONTENEGRIN RESPONSE TO CORRUPTION – INSTITUTIONAL AND POLICY REFORM –

*Marija Novkovic**

I. INTRODUCTORY REMARKS

This paper will elaborate on the approach that Montenegro has employed in fighting corruption, with a particular emphasis on the legislative efforts regarding incriminations, in line with the leading international anti-corruption instruments, institutional setup for prevention, detection, investigation and adjudication of corruption offences, as well as the more recent proactive initiatives in the area of criminal justice. The focus will be on measures to detect corruption, such as special investigative means, procedures for reporting corruption and whistleblower protection, and the regime for confiscation of the proceeds of crime, to be introduced by the upcoming adoption of the new Criminal Procedure Code (CPC). Throughout the paper, reference will be made to the United Nations Convention against Corruption (UNCAC) and the mutual evaluation conducted by the Group of States against Corruption (GRECO).

II. INCRIMINATION OF CORRUPTION OFFENCES

The inception of anti-corruption efforts in Montenegro can be traced back to 2001, when the Government of Montenegro established the Directorate for Anti-corruption Initiative (DACI). The DACI is inherently a preventive body; therefore, it facilitated the adoption of a number of anti-corruption lex specialis, e.g. in the areas of money laundering and conflict of interests. The forthcoming period has been marked with the rounding up of the legislative framework and institutionalisation of the fight against corruption.

Following a public referendum, which resulted in the demise of previous federal structures, and a subsequent Parliamentary declaration of independence in June 2006, Montenegro has reconfirmed its dedication to the goals and purposes of the UN. Montenegro deposited a notification of accession to the United Nations Convention against Corruption (UNCAC), the first truly global anti-corruption treaty, in October 2006. Efforts to implement the Convention effectively through the domestic legislation have been undertaken in the previous years. The Directorate for Anti-corruption Initiative, joining efforts with the UNDP, conducted an assessment of compliance of the criminal legislation with the provisions and requirements of the Convention. It was concluded that high level of compliance had been achieved inasmuch the offences of corruption had been codified in the Criminal Code, with the exception of trading in influence (Article 18), illicit enrichment (Article 20) and obstruction of justice (Article 25). This is not to say that these Convention offences are not considered illegal behaviour in Montenegro; rather these are sanctioned through complementary measures of the criminal justice system, e.g. through incriminating the abuse of official duty, through procedures for deprivation of illegally acquired property and through provisions of criminal procedure.

When it comes to the perpetrator of the mentioned criminal offences, the Criminal Code gives broad effect to the incriminations, as the Article 142(3) offers the definition of what is to be considered 'a public office holder': a person who performs official duties with state authorities; elected, appointed or designated person in a state authority, a local self-government body or a person who performs on a permanent or temporary basis official duties or official functions in these bodies; a person in an institution, company or other organization to whom the performance of public powers is assigned, who decides on rights, obligations or interests of natural and legal persons or public interests. Additionally, these offences are not limited to a particular setting, and may be committed in either public or private sector.

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III. THE INSTITUTIONAL SETUP FOR PREVENTING AND SUPPRESSING CORRUPTION

The criminal justice system of Montenegro is largely inquisitorial in nature, with some recent reform processes which introduce a flavour of the adversarial system, which will be elaborated in the next section. The police are tasked with detection of criminal offences; the investigation is entrusted to the investigative judge who must co-operate closely with the police. The criminal charges in the form of an indictment will be brought forward by the State Prosecutors and courts will have the final say in the procedural cycle.

A. Detection of Corruption Offences

Police tasks and affairs are defined by Article 2 of the Law on Police ("Official Gazette", No. 28/05) comprising:

(i) protection of citizens' security and freedoms and rights guaranteed by the Constitution;
(ii) protection of property;
(iii) prevention and detection of criminal offences and misdemeanours;
(iv) identifying and capturing offenders;
(v) maintaining order and peace;
(vi) surveillance and protection of the state border and performing border control;
(vii) control of movement and stay of foreigners.

Substantial efforts have been deployed to specialize various segments of the criminal justice system for effective suppression of corruption. The Department for Suppression of Organised Crime and Corruption operates within the Criminal Police Sector of the Police Directorate.

B. Detection of Money Laundering and Terrorism Financing

The Directorate for the Prevention of Money Laundering and Terrorism Financing was established in December 2003 as an autonomous public administration body, in order to enforce the Law on the Prevention of Money Laundering and Terrorism Financing ("Official Gazette", no. 14/07, 4/08).

Specific competences derived from the Law caused the Directorate to be established as an administrative financial intelligence unit. Apart from detection of money laundering and terrorism financing, the Directorate is also in charge of initiating and conducting first instance misdemeanour proceedings, in the cases of breaches of the Law. It collects and analyses data needed for the detection of money laundering and terrorism financing and creates the list of indicators of suspicious transactions which is shared with the reporting entities. The scope of the law is wide inasmuch as the list of reporting entities includes all relevant actors in the financial and business operations, i.e. banks, insurance companies, stock exchanges, broker companies, etc. The Directorate for Prevention of Money Laundering and Terrorism Financing co-operates closely with the Police Directorate and State Prosecution; however, there have only been a handful of money laundering cases which resulted in a final judgement of the court.

C. Prosecution and Adjudication of Corruption Offences

Specialized departments have been established in the judiciary so as to take concerted action against corruption. The Law on State Prosecutor ("Official Gazette", no. 69/03, 40/08), adopted in 2003 and amended in 2008, provided for the establishment of the Special Department for Suppression of Organised Crime, Corruption, Terrorism and War Crimes. Corresponding chambers have been formed in two High Courts in Montenegro so as to achieve concentration of competences, higher levels of specialization and, eventually, more effective adjudication of these offences.

According to the Criminal Procedure Code ("Official Gazette", No. 71/03, 07/04, 47/06), the state prosecutor is, regarding the criminal offences that are prosecuted ex officio, competent to:

(i) conduct pre-trial proceedings;
(ii) request that an investigation be carried out and direct the course of preliminary proceedings,
(iii) issue and represent an indictment or indicting proposal before the competent Court, i.e. in the case of organized crime before the Special Chamber of the High Court;
(iv) file appeals against Court decisions that are not final and to seek extraordinary legal remedies against the final Court decisions;

(v) undertake other actions determined by the Code.

The Special prosecutor is competent to prosecute criminal offences committed throughout the territory of Montenegro.

D. Prevention of Corruption

The DACI is tasked with prevention of corruption. The DACI is not entrusted with detection and investigation of corruption related offences. Its operations relate predominantly to preventive activities such as:

(i) Awareness raising, including researching the phenomenon of corruption, the form it takes, its causes, etc;

(ii) Co-operation with relevant state bodies aimed at drafting and implementing of the legislative and programmatic documents in the area of anti-corruption;

(iii) Co-operation with non-government organizations and private sector towards combating corruption;

(iv) Co-operation with state authorities related to the corruption reports that Directorate receives from the citizens and other subjects;

(v) Proposing to Government the adoption and implementation of European and other anti-corruption international standards and instruments;

(vi) Monitoring the implementation of recommendations of GRECO (Group of States of the Council of Europe against corruption);

(vii) The co-ordination of activities that arise from the applying of UN Convention against corruption.

However, in the past period and, particularly, in the research of integrity and capacity of the judiciary in Montenegro,[1] it transpired that the citizens report corruption reluctantly. The DACI operates an anti-corruption hotline where citizens may report suspicions of a criminal offence having taken place. Thus, the DACI acts as a mediator between the citizenry and the law-enforcement authorities.

IV. FROM REACTION TO PRO-ACTION: THE MOST RECENT CRIMINAL JUSTICE INITIATIVES

A. Special Investigative Means

Montenegrin law-enforcement and judicial authorities have often stated that the lack of convictions in corruption related offences was directly caused by the fact that corruption is a clandestine activity and that the police were hampered by legislative constraints from using special investigative means to detect and investigate corruption. Special investigative means were introduced in 2003 by the Criminal Procedure Code (CPC);[2] however, they can be brought into play in relation to offences committed within a criminal organisation, as well as offences sanctioned by imprisonment of at least ten years or a more severe penalty. These measures, *inter alia*, include:

(i) secret surveillance and sound recording of telephone conversations;
(ii) secret photographing and video recording in private premises;
(iii) simulated purchase of objects and persons and simulated giving and taking of bribe;
(iv) supervision of the transportation and delivery of instrumentalities of criminal offence;
(v) use of an undercover investigator and witness.

This legislative arrangement has been addressed by the GRECO in the Joint First and Second Evaluation Rounds, recommending for the scope of the provisions to be extended to cover all corruption-related offences.[3] Consequently, the Proposal CPC[4] proposes the use of the special investigative techniques in the pre-trial proceedings, as well as in the investigation stage. An amendment to the previous regime is introduced and the list of criminal offences in relation to which the techniques may be employed is provided

[1] Research was commissioned by the DACI. It was finalized and published in October 2008.

[2] Criminal Procedure Code, Articles 237-242.

[3] The Report on Joint 1st and 2nd Evaluation Rounds was adopted by GRECO, at its 30th Plenary Session. Strasbourg, France, 9-13 October 2006. The Report is available at:
www.coe.int/t/dg1/greco/evaluations/index_en.asp.

[4] Adopted by the Government of Montenegro; currently awaiting parliamentary debate and adoption.

for. The list specifically mentions the following corruption related offences:

(i) money laundering;
(ii) violation of equality in the conduct of business activities;
(iii) abuse of monopolistic position;
(iv) causing false bankruptcy;
(v) abuse of assessment;
(vi) disclosing a business secret;
(vii) disclosing and abusing a stock-exchange secret;
(viii) active bribery;
(ix) passive bribery;
(x) disclosure of official secrets;
(xi) illegal mediation;
(xii) abuse of authority in business activities;
(xiii) abuse of official status; and
(xiv) fraud in service.

The expected adoption of the Proposal CPC will thus extend the scope of these penetrating investigating techniques and provide leverage to the law-enforcement bodies. At this point, it would be useful to offer an example of the procedure for the use of special investigative means. The case revolves around activities of a financial inspector who attempted to induce a bribe. The owner of a private commercial company turned to the Police Directorate, stating that a financial inspector has not discharges his duties in a lawful manner, since he requested a payment for which he offered to be more lenient in his control. The police officers swiftly informed the competent state prosecutor who issued specific guidelines as regards the course of action. It was agreed that the owner of the company would simulate active bribery, with a set of bills which have been marked. Preparatory actions were taken and the owner of the company called the financial inspector to come at a specific time, so as to give the bribe in exchange for a lenient treatment of his company. The owner simulated giving of bribe and the financial inspector walked away with marked bills. He was then apprehended by the police; he was searched and marked bills were found. A crime report for passive bribery was submitted to the state prosecutor and the person was turned to the investigative judge who ordered one month of detention, on account of charges for passive bribery.

B. Confiscation and Reversed Burden of Proof

Criminal offences of corruption are inherently profit-driven offences. Therefore, taking the ill-gotten assets away from the offenders is one of the main pillars of the UNCAC. The proviso of Article 31 is formulated to that effect and contains a number of obligations for the Parties. The underlying obligation is to enable confiscation of proceeds acquired by a criminal offence established by the UNCAC, including its equivalent value; as well as instrumentalities used or planned to be used in a Convention offence. Furthermore, States Parties are required to introduce measures directed at identification, tracing, freezing or seizure of all objects and property that would be subject to confiscation. States Parties are expected to consider shifting the burden of proof to the offender in relation to origin of property which is liable for confiscation.

Confiscation of the proceeds of crime, including but not specific to corruption, is regulated by Chapter VII of the Criminal Code,[5] as well as by Section 2 of Chapter XXXI of the Criminal Procedure Code.[6] Confiscation of proceeds acquired by a criminal offence may be ordered in the framework of a sentencing act (a conviction; a warrant pronouncing a sentence issued without the trial; a ruling on a judicial admonition; or a ruling imposing a security or corrective measure).[7] Therefore, confiscation of material gain is inextricably linked to a conviction of the perpetrator. During the course of the criminal proceedings, it is the duty of the court to determine the extent to which the defendant has increased his property and possessions.

With regard to the confiscation of criminal proceeds, GRECO addressed a recommendation, calling for guidelines to be issued addressing effective methodology for financial investigations that would enable seizure and confiscation in corruption cases. Moreover, it was highlighted that law enforcement and

[5] Criminal Code, Articles 112-114.
[6] CPC, Articles 538 – 545 (Proceedings for confiscation of property gain).
[7] *Ibid*, Article 542.

prosecutorial services must benefit from training programmes, tailored to enable, promote and encourage better use of the means available for identifying, tracing and seizing the proceeds of crime, including corruption.[8] It was further recommended to encourage seizing of the proceeds of corruption offences in the earliest stages of the preliminary investigation, in order to secure possible confiscations.[9] Clearly, a proactive approach is called for; one that would look ahead and secure the property for the more advanced stages of the proceedings that could eventually result in a confiscation order.

The timely and efficient disposal of criminal proceedings has been one of the most highly regarded goals in the reform process of the criminal justice system in Montenegro. This objective is to be realized by, inter alia, consolidating the role of the prosecution in the initiation and conduct of the investigation. The Proposal CPC stipulates that an investigation is instituted by an order of the State Prosecutor. The order is final and is not subject to appeal. The course of the criminal justice reform in Montenegro is that of combining the features of both adversarial and inquisitorial systems. A useful case in point could well be the reversal of the burden of proof in the section 283 of Chapter VII which deals with evidence. Articles 85 to 89 regulate provisional measures, i.e. seizure of objects that are likely to be confiscated or could be used as evidence in the court proceedings. However, Article 90 deals specifically with seizure of objects or property suspected to originate from a criminal offence.

In order to set in motion seizure of ill-gotten property, the prosecution must apply to the court, providing a summary of the criminal offence; the specifics of the objects, property or profits; the personal data of the suspect; as well as the grounds of suspicion that have been acquired by a criminal act. More importantly, the prosecution must submit compelling evidence pointing to the fact that, by the end of the trial, the seizure/confiscation of the ill-acquired profits will be significantly more difficult or even impossible. The provision may be invoked in the early stages of the proceedings and the person affected by the order of seizure may challenge the decision of the court. The court will be obliged to annul the order only in the event that the defendant manages to demonstrate, by means of documentary evidence or in any other manner, that property comes from a legitimate source.[10]

Thus, the departure from the traditional rules of evidence, when the prosecution bore the onus of proving beyond reasonable doubt all elements of a criminal offence, is signalled by the shift of the burden of proof in relation to seizure. However, certain concerns remain as to the compatibility of the proposed regime with the exigencies of the European Convention on Human Rights, particularly Article 6 on the right to a fair trial. It could be argued that the proposed reversal of the burden of proof in the pre-trial proceedings runs counter to the presumption of innocence (Article 6(2)). Presumption of innocence is a building block of the right to a fair trial, and as such safeguarded in the Constitution of Montenegro and the Criminal Procedure Code. Moreover, the jurisprudence of the European Court of Human Rights is prolific when it comes to Article 6. The right to a fair trial is of paramount importance; therefore, any activity with potential impact on the fair and impartial administration of justice must be vigorously scrutinized. "It was held in Kostovski v. Netherlands that 'the right to a fair administration of justice holds so prominent a place in a democratic society that it cannot be sacrificed to expediency'".[11]

The Strasbourg Court has already dealt with the reversed onus of proof in relation to the confiscation orders. However, in *Phillips v. The United Kingdom*[12] confiscation procedure was preceded by a conviction for involvement in the importation of a large amount of drugs. During the confiscation procedure, the burden of proof was placed on the offender, and the standard was on the balance of probabilities. The Court took a holistic stance in ascertaining the nature of the confiscation proceedings under the relevant UK legislation. The Court pointed out that confiscation orders follow through the conviction of the defendant and do not entail bringing new charges against the convicted offender. Thus, the confiscation proceedings were equated with the sentencing process inherent to criminal proceedings resulting in a conviction. It is due to this conclusion that the Court found the presumption of innocence does not apply to the confiscation proceedings

[8] See n3 above, 17.
[9] *Ibid*, 18.
[10] Proposal CPC, Article 93(3).
[11] S. Greer, The European Convention on Human Rights: Achievements, Problems and Prospects, Cambridge University Press New York 2006, 252.
[12] *Phillips v. The United Kingdom*, 41087/98, 5 July 2001, 11 B.H.R.C. 280.

instituted against Mr. Phillips.[13] The House of Lords reached much the same conclusion in two later cases on confiscation of proceeds from drug offences.[14]

These cases bring to the fore features of the UK's criminal confiscation – it is dependent upon the conviction, triggering the process of deprivation of the ill-gotten assets. And in the ensuing phase of the procedure, the one aimed at ascertaining the property which shall he confiscated, there is an express reversal of the onus of proof, calling for the defendant to rebut the assumptions that it originates from an offence. Thus, it would follow from the reasoning of the European Court of Human Rights and the House of Lords that the presumption of innocence is not violated in confiscation proceedings, provided that there is a valid conviction to set in motion the determination of the amount to be confiscated. It is established that the statutory assumptions on the origin of property do not amount to a fresh criminal charge, which effectively renders Article 6(2) inapplicable. It is for the prosecution to initiate the confiscation proceedings. In any event, the court is obliged to reverse its assumption if the defendant discharges a persuasive burden of proof; in much the same vein, the court must refrain from any action that would create serious injustice for the defendant.

C. Whistleblower Protection

The most recent initiative in the anti-corruption area has been the protection of whistleblowers. This was achieved through the amendments of the Law on Civil Servants and State Employees. Article 54 prescribes that the employment of civil servant and state employee, who report criminal offence of corruption to the head of a state authority or an authorized person, cannot be terminated on this basis. These persons are guaranteed that their identity will not be disclosed to unauthorized personnel, as well as the protection from abuse, denial or limitation of rights, set forth in the Law. Should there be reasonable fear that life, health, physical integrity, freedom or properties of a civil servant and state employee are endangered; whistleblowers are protected pursuant to the special provisions on witness protection.

In order to effectively implement provisions of the law and to encourage citizens to report cases of corruption, the Director of the Police Directorate adopted the Professional Directive on procedures for reporting corruption offences and protection of persons who report these crimes to the Police Directorate in October 2008. This Directive stipulates in detail the procedures for reporting corruption offences to the Police Directorate, the actions of authorized police officers upon corruption reports, the protection of citizens reporting corruption, as well as the means and methods of promoting the procedures and guaranteed protection. Designated police officer is obliged:

(i) to protect the identity of the person reporting corruption, as well as the contents of the report;
(ii) to undertake all necessary measures for protection of this person;
(iii) to undertake immediate security assessment of threats made to the person;
(iv) to protect the person reporting corruption or disclosing such information from abuse and humiliating treatment; and
(v) to undertake measures for protection of this person in accordance with the law, and should the threats prove to be reasonable, to undertake measures of protection in accordance with the Law on Witness Protection.

The DACI and the Police Directorate are currently conducting a promotional campaign aiming to inform the citizens that, in case when reporting corruption, they will be granted adequate protection. Since the adoption of the Professional Directive (October 2008 to February 2009), the Police Directorate received 20 criminal charges related to corruption, 18 of which are now in the investigation phase while two have already been forwarded to the State Prosecutor. Despite these efforts, the European Commission has stated that the protection of whistleblowers remains insufficient in practice.[15]

[13] Ibid, paragraph 36.
[14] *R v Benjafield, R v Rezvi*, House of Lords, 24 January 2002, [2002] UKHL 2, [2002] UKHL 1, [2003] 1 A.C. 1099
[15] Montenegro 2008 Progress Report, available at: http://ec.europa.eu/enlargement/pdf/press_corner/key-documents/reports_nov_2008/montenegro_progress_report_en.pdf.

V. CONCLUDING REMARKS

An examination of the more recent steps undertaken in the process of the criminal justice reform indicates that Montenegrin legislators are determined to design a system for effective seizure and confiscation of criminal proceeds. However, much will depend on investing in human capital. Montenegrin law-enforcement and judicial authorities are in dire need of capacity-building and training programmes. The complexities that go hand-in-hand with corruption cases, i.e. its clandestine nature, the lack of a victim to report a crime, the subsequent laundering of criminal proceeds, might act as a deterrent and actually reduce the number of initiated proceedings. Specialization of investigators and prosecutors for corruption related offences should be considered as a way forward, as it enhances the likelihood of a positive outcome in the struggle against corruption.

The advancements in the criminal reform will be tested come implementation time. Notwithstanding the positive feedback of international actors on the Proposal Criminal Procedure Code, significant efforts will need to be effectuated so as to enable its effective enforcement. The revised concept of investigation will require an increase in human resources, particularly within the State Prosecution, who will be in charge of conduction the pre-trial and investigation proceedings. The provisions on reversed burden of proof might be tested against the backdrop of the exigencies of the European Convention on Human Rights. The protection of whistleblowers, introduced through legislative amendments, is yet to contribute to the increase in the number of reported and adjudicated cases of corruption. The use of special investigative means will aim to provide a level-playing field for the law-enforcement authorities, however further training needs be provided in order to boost financial investigations. Finally, these repressive measures need to be assessed in terms of their proportionality, as the need for a more effective criminal justice system should not override the framework for protection of the fundamental rights and freedoms.

CRIMINAL JUSTICE RESPONSE TO CORRUPTION IN NEPAL

*Surya Prasad Parajuli**

I. INTRODUCTION

Nepal is considered a country where status of good governance is not satisfactory. In 2008, Transparency International placed Nepal in 121st place with 2.7 Corruption Perception Index (CPI).[1] Corruption is not only the reason for, but also a result of, the poverty in Nepal.

The criminal justice system has lots of flaws and it is not sufficient enough to deter crime in the country. Many corrupt activities are out of the purview of the judicial system.[2] The success rate of the corruption cases is quit low and 60 percent of the corrupt activities are out of the scope of the law and among the cases registered in the courts, around 60 percent are result in conviction. Further, the criminal justice system is heavily affected by delay. Although Nepal has attempted to improve law and practice regarding corruption control for long time, results are not satisfactory. So, a search for improvement in law and practices to combat corruption is still going on in Nepal.

II. ANTI-CORRUPTION LAW IN NEPAL: HISTORICAL PERSPECTIVE

The statement of King Prithvi made 250 years ago – "a person who gives or takes a bribe is the enemy of the nation and he deserves the death penalty"– shows the stringent attitude towards corruption in Nepal. The policy still continues as the government has passed a policy of "Zero Tolerance" to corruption. However, the problem persists in Nepalese society. Numerous attempts have been made to tackle this problem through improvement of the legal framework.

The Civil Code 1854 was the first Act which criminalized corrupt activities of public officials in Nepal. After a century, in 1954, a special law regarding corruption came in to force. Afterwards, in 1957, 1961 and 2002 new corruption control Acts were passed; and each Act, one after another, repealed the earlier ones.

Corruption Control Act 2002 (CCA) is now in force. CCA is main substantive law which defines different types of corrupt activities. There are also some legal norms which establish institutions and procedure for investigation, prosecution and adjudication on corruption. Commission for Investigation of Abuse of Authority (CIAA) is the main investigating and prosecuting body established by Constitution of Nepal, 1991; and continued by the present Interim Constitution of Nepal, 2007.

The power and functions of CIAA are stipulated in CIAA Act, 1991. This act has been amended twice with objective of providing more power to the CIAA. Before 1991, there was similar type of constitutional body which had power not only to investigate but also to prosecute and adjudicate.

In 2005, the then King Gyanendra established a Royal Commission on Corruption Control (RCCC) with authority to investigate, prosecute and adjudicate on corruption charges, however it was declared unconstitutional by the Supreme Court in 2006.

Nepal's signature of the United Nations Convention against Corruption (UNCAC) in 2003 is a notable step towards reform and international networking in this area. Ratification of the same could herald a new

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[1] Transparency International, Corruption Perception Index, 2008

[2] CIAA Souvenir, 2007, p.31.

era in the legal regime on corruption control in Nepal.

III. EXISTING ANTI-CORRUPTION LEGAL REGIME

Under the constitutional framework different laws and institutions have been developed to combat corruption in Nepal. Besides, the Interim Constitution, 2007, CIAA Act, 1991 (CIAA Act), CCA, 2002, Impeachment Act, 2002 (IA), Military Act, 2003 (MA), Judicial Council Act, 1991 (JCA), Money Laundering Control Act, 2007 (MLCA) are the main laws which deal with the investigation, adjudication and enforcement of the corruption cases.

A. Constitutional Framework to Deal with Corruption

Since 1977 an anti-corruption institution has been given constitutional status in Nepal to maintain its independency and impartiality and to enforce anti-corruption law in effective and efficient manner. This is continued in the Interim Constitution 2007. Now, constitutionally, it is obligation of the State to maintain good governance and to end corruption and impunity in the country.[3] This obligation can be obtained by effective legal and practical measures.

CIAA is the principal organ which is responsible for investigation and prosecution in corruption cases. It is composed of one Chief Commissioner and other commissioners as may be required. They are appointed by the President on the recommendation of Constitutional Council headed by the Prime Minister. Commissioners are appointed for six years or until they reach 65 years old, whichever is earlier. Their conditions of service are provided by law and it cannot be altered to their disadvantage.

The commission has jurisdiction for investigating and prosecuting the corruption cases against public officials as stated in law. But the CIAA cannot investigate the Constitutional Officials, who can be removed by passing the motion of impeachment, who are in the post of Judge, and the person who are liable to action under the Military Act, 2007 during the time they are in job. However, CIAA shall prosecute them after their removal from the post.

B. Substantive Anti-Corruption Laws

CCA, 2002 is main law related to corruption, which enumerates the activities that amounts to crime of corruption. The main criminal activities stipulated in the Act are:

- Giving or receiving bribe to or by the public official or other person (art. 3);
- Accepting goods or service free of cost or at lower price by the public official (art. 4);
- Unlawfully receiving gift by the public official (art. 5);
- Getting commission in public purchase by the public official (art. 6);
- Cause loss in revenue by the public official (art. 7);
- Getting illegal benefit or causing illegal loss by the public official (art. 8);
- Preparing false document by the public official (art. 9);
- False translation of documents (art. 10);
- Tampering with government documents (art. 11);
- Causing damage to Government or public documents (art. 12);
- Disclosing secrecy or question papers of examination (art. 13);
- Engagement in illegal trade or business by public official (art. 14);
- Claiming false designation (art. 15);
- Submitting false information about oneself for getting or staying in a public post (art. 16);
- Damaging public property (art. 17);
- Pressure to commit crimes (art. 18);
- Providing a false report (art. 19);

[3] Art. 33, Interim Constitution of Nepal, 2007.

- Attempt and accomplishment of a crime (art. 20&21);
- The Act provides for additional punishment if the public official is in a senior post. (art. 24)

As stated in Article 15 of the UNCAC, in crime of bribery, undue advantage is exchanged with the action or inaction of the public official. Intentional offering, promising, giving or accepting or soliciting the undue advantage is crime of bribery. There is demand side and also supply side of corruption in this crime. The undue supplier also gets benefit from the crime. But here, necessary thing is intention of committing crime. So, the crimes stated above in Articles 3,4,5 and 6 are the crimes of bribery of the national public officials in Nepal.

C. Procedure and Institutions for Enforcing Anti-corruption Laws

Generally, in corruption cases, CIAA is responsible for investigation and prosecution. The Special Court in Kathmandu adjudicates all the cases. Appeal over the decision of Special Court lies in the Supreme Court of Nepal. Government Attorneys, who work under the Attorney General of Nepal, represent the CIAA during whole adjudication process during trial and appeal as well. As in all other cases, District Courts enforce the decision of corruption cases, except where judgement stipulates otherwise.

1. CIAA Act, 1991

Except provided in other laws, all corruption cases are dealt under CIAA Act. The CIAA is the apex constitutional agency which investigates and prosecutes the corruption cases. This law mainly provides for the powers and functions of the CIAA which are as below:

- CIAA has jurisdiction only over the corruption where public officials are involved. Public official also include the officials of public institution where the government has either full or partial control or ownership;
- CIAA has no jurisdiction over parliamentary activities, policy related or collective decision of Cabinet of Ministers, and judicial activities of judges;
- It has power to investigate on the basis of complaint of a particular person or information from any source;
- It may take statement of the suspect or any person seems necessary;
- It has also power to search and seizure where it is necessary;
- The commission may suspend the suspect from his post of public responsibility, if there is sufficient ground;
- It may arrest and detain suspect for maximum of six months with the competent court's consent, if there is reasonable ground that accused may cause adverse influence in investigation;
- The commission may ask for guarantee with the suspect if there is proof of loss of property;
- Some important features are added in CIAA Act in 2002. CIAA is given access to the bank accounts and other financial transaction. It is empowered to withhold the transaction in accounts, or the property of suspect. Similarly, it may seize the passport of the suspect and also order for area restriction against suspect;
- CIAA may order for punishment to those people who do not comply with its official order during the investigation;
- CIAA, after investigation takes decision on whether to prosecute the suspect or not. If it decides to prosecute registers a case in the Special Court by filing a charge-sheet;
- If a suspect co-operates CIAA during the investigation, it may produce him or her as witness in the court and may lessen or waive the charge against him or her;
- The commission may ask to the government for necessary manpower or hire them in contract.

Table 1
Complaints registered at CIAA and cases registered by it.

	2007/8	2006/7	2005/6	2004/5	2003/4	Total
No. of complaints	2732	3564	4324	4759	3732	19111
Cases registered in court	65	113	114	115	70	477
Percentage	3.5	3.1	2.6	2.4	1.8	2.4

Source: CIAA Souvenir, 2008.

2. Special Court Act, 2002

Objective of SCA is to deliver speedy and effective justice in special types of cases. Government of Nepal, in recommendation of Judicial Council,[4] appoints members of the Special Court. Currently, Special Court has three members and exercises jurisdiction over the cases related to Corruption, Money Laundering and Treason against the State. Corruption cases are filed in the Special Court by the CIAA. By law, the court shall deliver its verdict within six months from the date of registration.

Table 2
Major Corruption Cases Filed in Special Court by CIAA

	Cases filed in Special Court					
Cases	**2007/8**	**2006/7**	**2005/6**	**2004/5**	**2003/4**	**Total**
Bribery	2	2	3	0	3	**10**
Illicit enrichment	0	0	9	8	17	**34**
Forged certificate	56	92	60	80	42	**330**
Decision related	8	20	43	20	43	**134**

Source: Special Court Reports

The court exercises its authority as a trial court. Some special power that the court exercises are: taking statements with the accused or with other persons as required; keeping accused in remand or asking for guarantee; withholding the suspect's passport or restricting issuance of passport to the suspect.

After registration of case the special court takes the statement of the accused if he or she is produced in the court by the prosecutor, and after hearing from both sides takes a decision on whether the accused should be kept in custody during adjudication or not. The court may ask for a guarantee if it decides not to keep the suspect in judicial custody.

The court issues summons of 15 days, expect for the period of journey, to the accused who is not produced in the court by prosecutor or who could not be contacted during the investigation. If the court cannot contact the accused by any reason, the court publishes a notice in a national newspaper to be present in the court within 30 days.

When all the parties are notified about the case against them or they are present in the court, the court fixes a date for examination of witness and submission of other proofs.

During the date of the final hearing all the parties of the case plead in the court. Then the court takes decision on whether the accused is guilty or not.

There are three members in the court. A single-judge bench can issue an order in procedural matters, but cannot deliner final verdict. A two-judge bench can issue orders in procedural matters as well as deliver final verdicts. For final verdicts a unanimous vote is necessary. A three-judge bench can issue a final verdict with unanimous or majority vote.

[4] The Judicial Council is headed by the Chief Justice and other members are the senior most judge of the Supreme Court, the Law Minister, a lawyer nominated by the Nepal Bar Association and a legal expert appointed by the Prime Minister.

Table 3
Number of Cases Decided by Special Court in five years

Year	Cases decided	Conviction	Acquittal	Amount recovered (=USD)
2003/4	129	109	20	**4,802,184**
2004/5	106	97	9	**21,351,518**
2005/6	109	89	20	**7,563,338**
2006/7	171	140	31	**306,424**
2007/8	71	43	28	**293,924**
Total	586	478	108	**34,317,388**
Percentage	100	81	19	

Source: Souvenir 2008 of the CIAA.

Appeal against the decision of the Special Court lies in the Supreme Court. The Supreme Court shall decide the case within three months of its registration.

Table 4
Corruption Cases Pending in the Supreme Court

Life of cases in SC (in year)	Number of cases in SC	Percentage
0 to 2	85	13.8
2 to 4	307	49.9
4 to 7	184	29.9
7 to 12	40	6.4
Total	616	100

Source: Supreme Court of Nepal, (as of 7 May 2009)

Decisions on the corruption cases, except otherwise ordered by the courts, are enforced by the relevant district court.

3. Sectoral Laws for Controlling Corruption

There are some other laws which are not administered by CIAA. By constitution and other laws some officials are dealt differently than how CIAA deals. The laws are as outlined below.

(i) Impeachment Act, 2002

By constitution, there are some public officials holding the constitutional posts whose removal on corruption charge is possible only through impeachment. During the impeachment process parliament constitutes an investigation committee. The committee may ask CIAA to investigate on the issue and prepare report. On the basis of the committee's report the parliament takes decision on impeachment proposal. Hence, CIAA does not have jurisdiction over their misconduct or corruption while these officials are in job. However, according to IA, CIAA shall prosecute against them in the charge of corruption, on the basis of the investigation committee's report, if they are removed through impeachment.

(ii) Military Act, 2007

MA provides that any crime of corruption committed by army staff is investigated and prosecuted by a three-member committee headed by the Deputy Attorney General.[5] Other members of the committee include an officer working at the Defense Ministry and member of legal department of Nepal Army. Such cases are adjudicated in a three-member Special Military Court which is headed by an Appellate Court Judge who is appointed by the government in recommendation of Judicial Council.[6] Other members of the court are Secretary of the Defense Ministry and head of the legal department of Nepal Army.

[5] Aticle 62(2), Military Act, 2007.
[6] Article 119, Military Act, 2007.

Appeal against the decision of the Military Special Court lies in the Supreme Court of Nepal.

(iii) Judicial Council Act, 1991

Judicial Council, an independent constitutional body headed by the Chief Justice, is responsible for recommendation and appointment of all the judges except Chief Justice, has also power to investigate and prosecute the judges of District Courts and Appellate Courts, in the charge of corruption. Such cases are adjudicated by the Appellate Courts. Appeal against decision of the Appeal Courts lies in the Supreme Court of Nepal.

Council also monitors the observance of the Code of Conduct of Judges which is recently passed by a conference of all the judges of Nepal.

IV. PREPARATION FOR RATIFICATION OF UNCAC

Realizing the fact that corruption is being globalized, and its control is only possible through the collective effort by all the nations, Nepal has already signed the UNCAC in 2003. Parliament has also directed government to ratify it.

Now Nepal is preparing for ratification of the UNCAC. Its ratification could be a major step towards fulfilling its commitment of corruption control. This would open the opportunity to internalize modern and effective legal basis; be a member of strong network against corruption; and participate in the international co-operation. Lacunas in law, which are main causes of impunity in corruption cases, could be corrected.

Numbers of Acts – such as Money Laundering Act, Electronic Transaction Act, Good Governance Act, Special Court Act, Public Procurement Act, and Right to Information Act - have been passed for developing basis for ratification. A task force has submitted a draft of Corruption Control Act to the Prime Minister's office.

V. ARE ANTI-CORRUPTION MEASURES EFFECTIVE?

Legal and institutional measures are developed to curve the corruption. Many positive norms compatible with the modern principles are also inserted in the system. Still, there are some flaws in the system. Three types of main weaknesses can be identified in the judicial administration of corruption.

1 Delay in disposal of cases;
2 Low conviction rate;
3 Weaknesses in the overall system.

A. Delay in Disposal of Cases

In the Special Court, cases are delayed by up to seven years and in the Supreme Court by up to 12 years. There are some reasons behind the delay:

(i) No preferential track: Supreme Court is crowded with the complex cases. There is no priority for hearing corruption cases. Neither there is special rule for fast track procedure on disposing these cases.

(ii) Time required by law: Court cannot dispose a case before certain procedure is fulfilled. Time is required to fulfill the procedure, e.g. time for giving notice to defendants, time for calling witnesses and their examination etc.

(iii) Ambiguity in law: Ambiguity in law or lack of clear precedent is also hampering quick disposal of cases. In 2002, CCA criminalized the illicit enrichment. The CIAA accused against some public official on this charge over the property earned by them even before the Act came into force. The Special Court acquitted them and CIAA appealed in the Supreme Court. But Supreme Court raised some legal questions regarding the principle of retrospective law and referred the case in larger bench. On the other hand the Special Court postponed the hearing of other similar cases waiting for the decision of Supreme Court in these issues.

(iv) Reluctant judges: Sometimes judges seem reluctant on deciding corruption cases in which political persons are involved.

(v) *Non co-operation by foreign institutions:* Mainly in cases of forged documents, the validity of the document should be verified from Indian universities. Getting reply from the universities is very difficult.

(vi) *Bench shopping:* In exceptional situations, lawyers may request for postponing the hearing of case, but they are using this rule for bench-shopping (choosing the judge of their favour).

(vii) *Long presentation:* Lawyers take long time for presenting the case.

B. Low Conviction Rate

Conviction rate in corruption cases in trial and appellate level is about 60% while most of the conviction is in the cases related to forged certificate. Or 125 cases pending in the Special Court, 82 are related to forged certificate. These cases are not of significantly important in comparison to other cases of big embezzlement of public property, because there is not loss of public property in case of forged documents. After 2002, CIAA massively investigated and prosecuted against senior public officials in charge of illicit enrichments. Although, the burden of proof is in defendant in such cases, the Special Court acquitted almost all the accused. Some of the reasons of low conviction rate are:

(i) *Ambiguity in Law:* In 2002 CCA criminalized the illicit enrichment. The CIAA started to investigate and prosecute public official using this rule, but could not get success in the court because the law did not state about whether this crime is applicable to the property acquired before this rule come into force. Similarly, legal provision about limitation on corruption is ambiguous.

(ii) *Failure to Address Vulnerability of Victim and Obtain Co-operation:* Sometimes persons do not offer undue advantage to public officials intentionally, instead they are compelled. But in CCA art 4.1, there is no mention about intention. Even the bribe supplier come into the investigation and is charged. This causes failure of cases because such supplier, after arrest, denies the offering of bribe. Instead of that such person should be produced in the court as witness.

(iii) *Common Flaws in the Administration of Justice:* Experts have identified some problems regarding criminal justice system including in corruption related ones. Some of them can be enumerated as:[7] Lack of qualified and specialized manpower, lack of quality logistics and resources, lack of security of witness, lack of co-operation and co-ordination among concerned agencies, centralized agencies, lack of integrity of manpower, delay in investigation and scrutiny of cases, inadequate preparation by the prosecutor, delay in trial, hostile witness, lack of victim support, difficulties in obtaining forensic evidence, inadequate court structure, unnecessary adjournment of cases, political pressure, lack of international co-operation, etc.

(iv) *Political Influence:* As it is a white-collar crime, in most cases big personalities, including politicians, are involved. They manipulate the judicial process.

(v) *No Victim:* If some person pays bribe for her or his benefit, there will be no apparent victim. There is no person who has really concern for punishing the accused. Enforcing agencies also think leniently in favor of the accused and they indirectly favour the acquittal.

C. Weaknesses in Overall System

Besides specific problems regarding the administration of justice, there are some common problems pertaining to the overall legal system of corruption control, such as:

(i) *Lack of Laws on par with International Norms:* Though there is intense pressure to ratify the UNCAC, Nepal has not yet ratified it. Most of the weaknesses of corruption related laws could be corrected, if UNCAC is ratified and laws are passed in line with it.

(ii) *Narrow Coverage of Person:* The Act only deals with the corruption in the government or in public institution where government involves through ownership, grant, guarantee, share etc. Since CIAA has no jurisdiction over the bribery in private institution, a huge sector of corruption is excluded. Also, problems occur when public bribery is mingled with private bribery.

[7] Dr. Meen Bahadur Poudyal Chhetri, Principles of Conviction Rate, CIAA Souvenir, 2008, p 241.

(iii) No Coverage of NGOs and INGOs: Nepal does not have law in order to control, or punish for, the corruption happening in international organizations or non-government organizations.

(iv) Policy Level Corruption: CCA does not deal with corruption at the policy level. Nepal has also experienced political appointments where taking undue advantage is rampant. The CCA is silent about it.

(v) Appointment of CIAA Members: Constitutional Council is headed by the Prime Minister. Chief Justice of the Supreme Court, Speaker of the Parliament, other three members nominated by the Prime Minister in order that different political parties shall represent it, and leader of the opposition party in the parliament, are other members of the Council. It seems that all the major parties shall have their share in the Council. Consequently, neutrality of the CIAA member has been questionable. On the other hand, for more than two years CIAA does not have Chief Commissioner, and there are only two commissioners working where there were five in previous years. It seems that the Executive does not want that the CIAA work actively.

(vi) Problem of Human Resources in the CIAA: CIAA does not have its own staff. It brings staff from government agencies. Consequently, they are more accountable to their boss. This hinders professional and neutral investigation.

(vii) Integrity and Impartiality of the CIAA: Sometimes CIAA's activities have been criticized as politically motivated actions. It is said that the officials in CIAA themselves involve in the corruption.

VI. POSSIBLE REMEDIES

Proper utilization of judicial administration in combating corruption it requires certain reforms. The possible reforms should address: procedural delay, low conviction rate and weakness in the overall system.

A. Addressing Procedural Delay

Procedural delay may be addressed by the following means:

- In every case a time-frame should be fixed and work accordingly. Judges should be made responsible for not deciding cases within the time line;
- Time should be fixed for lawyers by the bench for pleading;
- Supreme Court should apply continuous hearing in important cases involving serious legal issues and decide them in time;
- Cases should be heard by a panel of specially trained and capable judge so that they don't hesitate to decide serious cases also;
- Especially in the Supreme Court, corruption cases should be treated under fast track rule and given priority over other cases;
- Court should discourage bench shopping.

B. Addressing Low Conviction Rate

The conviction rate may be increased in the following ways.

- Ambiguities in law especially about the illicit enrichment and the limitation should immediately be addressed;
- The cases which are pending in the Supreme Court and have impact in other cases pending in the Special Court should be decided immediately;
- A system of plea bargaining should be applied so that criminals can be punished with the help of other suspects;
- Effective system of protecting witnesses should be developed, so that they don't become hostile;
- All the people who involve in investigation, prosecution and adjudication of corruption cases should be provided quality training;
- CIAA should be well equipped with modern technology of crime investigation;

- The supreme Court should compose a special panel of judges to take decision of corruption cases.

C. Addressing Weaknesses in the System

Other problems which need a long-term strategy to establish permanent and effective mechanisms for curbing corruption may be addressed via the following measures:

- Ratify the UNCAC and make the laws and system compatible with it;
- Draff laws in line with the UNCAC so that all components of crime are addressed and made punishable by the law;
- Immediately fulfill the posts of commissioners in the CIAA;
- Make the CIAA more powerful and free from political influence, and equip it with specialized manpower and technology;
- Divisions of the CIAA should be established at the regional level also;
- Special laws should be passed to disclose the financial documents of the political parties, NGOs and INGOs;
- Persons involved in corruption should be barred from political appointment and political candidature;
- Preventive measure should be made effective through standard surveillance, skilled intelligence, effective process of disclosure of property, regulated banking transaction etc.

VII. CHALLENGES AGAINST REFORM

There are many things to do; but agendas are not free from challenges. Nepal is facing the following challenges in reform of the corruption control system.

- The nation is in transition and the whole political and financial force is centralized in constitution making. Hence, priority is not reform and good governance;
- Parliament is not properly functioning because of political conflict, while reform requires active parliament to make laws;
- UNCAC expects a sophisticated system of laws and network, while Nepal is in financial crisis;
- As criminal-political nexus prevails in Nepal, political leaders are reluctant to institute reform;
- It is too difficult for CIAA staff to maintain neutrality, because the most of the suspects are from the bureaucracy and they have direct or indirect connection to the investigating officer;
- As the nation is heading towards federalism, we need expert manpower to establish a compatible system for that;
- Policy-level corruption is main problem, but politicians are not ready to create a system and comply with its rules.

VIII. CONCLUSIONS

Nepal has a long history of anti-corruption movements. However, visible results are still far away. Numbers of attempts were made to cope with the challenges of corruption through making norms and establishing institutions and developing awareness. However corruption and impunity is rampant in the country. Existing laws and jurisdiction of institutions does not cover all the types of corruption.

Globalization, modern business and development activities have opened new horizons to corrupt people. The international community is also committed to the fight against corruption. One of the examples of it is the UNCAC – a strong international legal instrument which is open for ratification. Nepal should ratify it as soon as possible.

An effective criminal justice system is an important tool for corruption control. Nepal requires many legal and institutional reforms to make its criminal justice mechanism reliable. The reform of the system should be born of political commitment.

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EFFECTIVE LEGAL AND PRACTICAL MEASURES FOR COMBATING CORRUPTION

*Vorayanee Vudthithornnatirak**

I. INTRODUCTION

For a period of time, corruption has been considered a main problem of many nations as it has become widespread, and poses a serious threat to economic and social development, political stability and the rule of law. In response to this serious threat, an effective international legal instrument is necessary. As a result, in 2003, the General Assembly adopted the United Nations Convention against Corruption (hereinafter "the UNCAC") which entered into force on 14 December 2005. At present, 136 United Nations Member States have become parties to this Convention. The UNCAC aims to provide global framework for combating corruption. Its new approaches highlight the significant aspects of preventive measures, criminalization, international co-operation through mutual legal assistance and extradition; and asset recovery.

To illustrate the serious harm of corruption, I would like to emphasize the statement of Mr. Kofi Annan, a former UN Secretary General at the adoption of the General Assembly of the UNCAC that "Corruption is found in all countries – big and small, rich and poor but it is in the Developing Countries world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a government's ability to provide basic services, feeding inequality and injustice, and discouraging foreign investment and aid. Corruption is a key factor in economic underperformance and a major obstacle to poverty alleviation and development."[2]

Thailand is fully aware of the harms of corruption as it has caused considerable damage to the national economy, jeopardizing national security and undermining the rule of law. Since Thailand became a signatory to the UNCAC in December 2003, many steps pertaining to the UNCAC ratification process have been undertaken and realized. However, a number of domestic legislations still need to be amended to be in conformity with the UNCAC, particularly on the issue of asset recovery, the statute of limitations and international co-operation. In order to successfully eradicate corruption, the effectiveness of legal frameworks, mechanisms and the role of involved agencies in the criminal justice system are essential. For this purpose, Thailand has made utmost efforts to improve and develop its domestic legal regime so as to be in line with the Convention. As soon as the Thai legal regime is in compliance with the new benchmark set by the UNCAC, Thailand will make the ratification of the UNCAC its first priority. This achievement would assure the international community as well as prospective foreign investors of Thailand's transparency, accountability and fair treatment.

This paper focuses not only on the current situation of corruption in the public sector in Thailand but also on how the Thai criminal justice system responds to corruption. Particular attention is given to the legal framework and measures in combating corruption. This paper also emphasizes the recent improvement of the Thai legal framework, its mechanisms and measures to effectively combat corruption as well as its negative effects and obstacles. Finally, this paper gives concrete recommendations on ways to improve the Thai legal framework and system to more effectively respond to corruption.

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[2] www.unodc.org. Corruption Control in Public Procurement, Report of the Second Regional Seminar on Good Governance for Southeast Asian Countries, 23-25 July, Bangkok, Thailand Resource Material, UNAFEI, p.25

II. CURRENT SITUATION OF CORRUPTION IN THAILAND

Thailand is among the countries long affected by corruption in both the public and private sectors. According to the Corruption Perception Index 2008 (CPI), in the Asia Pacific Region, a survey done by Transparency International, Thailand ranked 13 out of 32 countries with a score of 3.5 and ranked 80 out of 180 countries worldwide.[2] However, from 2002 to 2008 CPI shows that Thailand improved its score, though 3.5 remains troublingly low and indicates a serious corruption problem in the public sector. Nevertheless, Thailand's corruption situation seems to be slightly above the average in comparison with those of other ASEAN countries, e.g. Myanmar, Cambodia, Lao PDR, Philippines, and Indonesia, with their CPI 2008 scores ranging from 1.3 to 2.6. Even though Thailand has fought corruption for many decades in which various legislative and social strategies and measures, either preventive or suppressive, have been imposed to solve this problem, corruption in Thailand still persists and has become more sophisticated and difficult to address.

A. Definition and Concept of Corruption in Thailand

In General, "Corruption" or "*Thujarit*" in Thai means "breaking or violating laws and ethics which include refraining from carrying out lawful duty."[3] However, a more generally accepted definition is "illegal exercise of duty and authority of state officials for personal gain". This reflects a recognized concept that corruption occurs when an official exercises his or her official power or authority for personal interest. However, corruption is not limited to monetary gain, it rather includes other forms of monetary benefit such as giving stocks or shares or getting special discounts when buying goods or services, etc. According to academics' statements regarding the concept of corruption in Thailand, "Corruption problem is the "national disease" of Thailand for decades. This disease has existed in Thailand for a very long period of time. There is still no kind of medicine to prevent and eliminate the growth and development of this disease."[4]

Corruption in the public sector appears to be a highly systematic and sophisticated practice involving people in both public and private sectors. Characteristics of corruption in the public sector can be briefly characterized as follows:

1. Corruption involving Finance and Accounting

It is observed that government officials at all levels seek opportunities to undertake misconduct on the government budget by misappropriate taking money or siphoning public funds for their own interest and falsifying accounts or financial reports.

2. Corruption in Public Procurement

This type of corruption involves taking advantage of laws, rules and regulations as tools for gaining personal profits to be shared between officials and vendors. This could be considered corruption on a grand scale involving politicians, government officials and the private sector in which they all conspire to siphon money off the government budget. Also, it can be seen as a link to the abuse of power by high-ranking officials. There are various practices, such as in procurement, which impose strict pre-qualification criteria appearing to favour some bidding companies and discriminating against others. Another example is in case of collusion among potential qualified bidders ("*Hua*" in Chinese), when prospective bidders agree upon who shall be the lowest bidder to win the bidding while the other bidders submit higher bids.

1. Corruption involving interests vested in providing public services, conducting inspection, taking control of specific affairs or carrying out duties to ensure justice.

This practice involves government officials entrusted with the tasks of providing public services performing their tasks with unlawful intent by demanding certain payment in return for the service rendered.

2. Corruption involving bribes to be granted a monopoly business.

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[2] Transparency International. Corruption Perception Index 2008 (www.transparency.org)

[3] Sawang Boonchalerm – Viphas, *Enforcement of law for the purpose of Suppressing Corruption and Malpractice in Thailand*, Thammasart University, B.E. 2544 (2001), p. 3.

[4] Suvitcha Piarat, editor, *10 Nation Crisis* B.E. 2550, Baan Pra Arhit (2007), p.67-69.

For certain types of projects, government agencies may grant a monopoly in which they shall screen a number of qualified private entities and decide which entity is the most qualified entity to run a government enterprise as concession. Therefore, the granting of monopoly gives rise to tremendous incentives for private entities to pay bribes to influential responsible officials and politicians. In sum, corruption in the public sector tends to become more carefully planned, more prudently executed and involves corrupted individuals, ranging from politicians and government officials at local and national levels. Those involved in the the scheme choose to work systematically in teams with a clear division of their roles and responsibilities to cover the tracks and hide the wrongdoing with the unlawful intent of illegally gaining money from the government budget. Once the monetary gains have been amassed, they are transferred to many people involved at many stages and then go through a money laundering process for safe keeping.

III. LEGAL FRAMEWORK GOVERNING CORRUPTION UNDER THE THAI LEGAL REGIME

Even though Thailand became a signatory to the UNCAC in 2003, it has not yet ratified the Convention. However, Thailand is in the process of reviewing and harmonizing its domestic legislation to ensure its compatibility with the UNCAC instruments. At present, three draft pieces of legislation on asset recovery, mutual legal assistance in criminal matters and the statute of limitations are under the consideration of the Council of State. Once these three proposed laws are approved by the Parliament, Thailand will be able to ratify the UNCAC. Moreover, Thailand has enacted a number of anti-corruption laws, particularly in relation to the criminalization of corruption, which are fully in consistent with the UNCAC. Nevertheless, some issues remain to be discussed, as follows. below

A. Criminalization of Corruption and Relevant Acts

The issue of criminalization of corruption and relevant acts provided in the UNCAC, Articles 15 to 25, including offences such as bribery of national public officials, embezzlement, misappropriation or other diversion of property by a public official, embezzlement of property in the private sector, trading in influence, abuse of function, are also stipulated as offences under the Penal Code Sections 143, 144, 148, 149, 150 – 154, 167, 169, 201; the Organic Act on Counter Corruption B.E. 2542 (1999); the 2007 Constitution of Thailand; the Act Governing Liability for Wrongful Acts of Competent Officers B.E. 2539 (1996); or the Regulations of the Office of the Prime Minister on Procurement B.E.2535 (1992), and so on. Therefore, Thai legislation is mostly consistent with the criminalization provided under the UNCAC. However, some offences carried out in support of corruption, including obstruction of justice, concealment or laundering the proceeds of corruption and the limited scope of predicate offences under the Anti-Money Laundering Law, which may not cover some kinds of corruption, remain necessary issues to be explored.

The 1997 Constitution, or the so-called the "People's Constitution", was promulgated as a successful achievement which gives practitioners the necessary teeth to penalize corruption and effectively control corruption in Thailand. Moreover, this People's Constitution also established the National Counter Corruption Commission (NCCC), an independent agency, whose mandate, according to the Organic Act on Counter Corruption B.E. 2542 (1999), is to conduct investigations and take legal action against politicians and government officials regarding alleged corruption. It is clear that the measures provided under this Organic Act include, but are not limited to, the mandatory declaration of assets and liabilities, an unusual wealth inquiry, imposition of the provision prohibiting transactions relating to the conflict of interest of state officials, and prohibition on acceptance of property or any other benefit. The Supreme Court's Criminal Division for Persons Holding Political Positions, established in September 1999 by the provision of the 1997 Constitution, and the Organic Act on Criminal Procedure for Persons Holding Political Positions B.E. 2542 (1999) are other legislative highlights of the fight against corruption in Thailand. The structure, authority and responsibility of the NCCC, as well as those of the Supreme Court's Criminal Division for Persons Holding Political Positions, together with its special procedure, role, duty and authority are explored later in this paper.

B. Safeguarding and enforcing Integrity

The former 1997 Constitution imposed various preventive and suppression measures, checks and balances and other mechanisms to secure the accountability of politicians and bureaucrats to the public. It empowers the public to remove high-profile politicians and high-ranking government officials in case of the suspicion of corruption. It is provided under this law that at least 50,000 citizens can sign a petition to the

Senate President, who would send it to the National Counter Corruption Commission for investigation. If there is sufficient evidence, the accused could be removed from the position. It is the first time that citizens can be directly involved in scrutinizing state performance. Later, under the new Constitution enacted in 2007, Article 271 ensures the same direct public involvement as the 1997 Constitution. However, it is even easier to remove high-ranking officials and politicians from their position as it requires only at least 20,000 citizens to sign the petition to the Senate for further removal procedure.[5]

Apart from the laws mentioned above, there are some other pieces of legislation that played an important role in combating corruption, such as the Act Governing Liability for Wrongful Acts of Competent Officers B.E. 2539 (1996); the Civil Service Act B.E. 2535 (1992); the Organic Act on the Election of Members of the House of Representatives and Senators B.E. 2541 (1999) as amended to No. 3 B.E. 2543 (2000). The Regulations of the Office of the Prime Minister on Procurement as amended to No.5 B.E. 2542 (1999) is further legislation promulgated to prevent corruption in public procurement. It has been revised to be in line with the model law on public procurement of the UN Commission on International Trade Law (UNCITRAL). This law guarantees the basic principles of proper procedures to ensure fairness, prudence, transparency and accountability through the bidding process in public procurement.

C. Freezing, Seizure and Forfeiture of the Proceeds of Corruption

Besides the aforementioned legislation involving corruption issues in Thailand, another piece of legislation which is in line with the UNCAC principles with regard to the laundering proceeds of crimes is the Anti-Money Laundering Act B.E. 2542 (1999), as amended in 2003 and 2008. It is stipulated under this law that the offence relating to malfeasance in office is one of the predicate offences for the purpose of prosecuting the offence of money laundering. This Act established the Anti-Money Laundering Office (AMLO), which is an independent agency under supervision of the Minister of Justice. The AMLO serves as the Financial Intelligence Unit (FIU) which is responsible for analysing suspicious transactions and conducting investigations leading to the seizure and forfeiture of assets acquired with proceeds from the commission of predicate offences, including corruption. This Act also set up the Transaction Committee, under the AMLO, in order to audit the suspicious transactions referred by financial institutions or assets involved in the commission of offences. According to Section 48, in the case of examining reports and data on financial transactions, if there is probable cause to believe that there may be a transfer, distribution, placement, layering or concealment of any assets related to the offence, the Transaction Committee or the Secretary General of the AMLO shall have the power to temporarily restrain, seize or freeze that asset for a period not exceeding ninety days and then shall report to the Board for further process. Once the AMLO completes its evidence gathering process, where there is sufficient evidence to believe that an asset is related to commission of the predicate offence, the Secretary General shall forward the case to the Office of the Attorney General for the prosecutor's consideration to file a petition seeking the Civil Court's order to forfeit those assets for the benefit of the State.

In short, this asset forfeiture is so called the civil asset forfeiture system, for confiscating assets identified as having been acquired with the proceeds of specific predicate criminal offences without requiring an indictment or prior conviction against the accused as to the criminal confiscation system in criminal cases.

D. International Co-operation in conformity with the UNCAC

As the world becomes increasingly globalized, corruption has become widespread and more sophisticated. Corruption in one country may affect another country and poses a threat to the global economy and security. To successfully combat corruption, international co-operation, particularly mutual legal assistance in criminal matters and extradition, are the key tools required under the UNCAC.

According to the UNCAC, Member States are bound to assist other State Parties in gathering and transferring evidence through mutual legal assistance. More specifically, Article 43 of the UNCAC obliges States Parties to extend the widest possible co-operation to other states in the investigation and prosecution of offences defined in the Convention. Prior to the existence of the UNCAC, Thailand promulgated the Act on Mutual Assistant in Criminal Matters B.E. 2535 (1992) which is in line with the UN Model Law on Mutual Legal Assistance in Criminal Matters and compatible to international standards. This Act provides wide ranges of assistance such as investigation, inquiry, prosecution, forfeiture of property and other

[5] Constitution of the Kingdom of Thailand B.E. 2550 (2007), Section 271.

proceedings relating to criminal matters on a bilateral treaty basis or reciprocity rule in case there is no treaty between the Requesting and Requested States, consistent to the principles provided under Article 46 of the Convention. Among the topics to be amended so as to comply with the UNCAC is the provision regarding asset recovery. The amendment is now pending for the Thai Parliament's approval. Moreover, Thailand has signed a Mutual Legal Assistance Treaty among liked-minded countries in ASEAN in 2006 and is currently in the process of reviewing its domestic legislation to fully comply with this ASEAN region instrument.

Extradition is another issue of international co-operation emphasized under the UNCAC. Recently, the new Extradition Act B.E. 2551 (2008), providing that the Attorney General is the Central Authority, was enacted in August 2008. This new law was designed to be more modernized and consistent with the present context of international co-operation as well as to meet international standards, eg. the rule of "prosecute or extradite". It also corresponds to the principles in Article 44 of the Convention. For example, the offence of corruption under the domestic regime is considered an extraditable offence. Moreover, this Act accepts the rule of dual criminality on the action-based basis rather than the offence-based basis which is in consistent with Article 43 of the UNCAC. Like mutual legal assistance, if there is no treaty between Thailand and the Requesting State, Thailand would be able to render co-operation on the reciprocity basis. However, in most common law countries, the reciprocity basis would not justify an extradition request if there is no treaty between the Requested State and the Requesting State, or any other applicable multilateral treaty such as the UNCAC as a ground for an extradition request. Therefore, when ratified, this convention would enable Thailand to broaden its capacity to request extradition of those common law countries. In addition, Thailand has also engaged in bilateral treaties with 13 countries regarding mutual legal assistance and ten countries on extradition and is under negotiations for a treaty on extradition and mutual legal assistance in criminal matters with countries in the Asia Pacific region.

E. Statute of Limitations

In accordance with Article 29 of the UNCAC, Member States are urged to impose the provision stipulating a long period of the statute of limitations for offences of corruption and related offences, or the suspension of the statute of limitations where the alleged offender evades the administration of justice under their domestic legal regime. Hence, it is questionable whether the period of statute of limitations set by the current law is long enough to bring corrupted officials or politicians to justice. Some academics and practitioners called for the abolishment of the statute of limitations for the prosecution of corruption. However, Thailand is now amending the Penal Code to extend the time limit for prosecution of corruption to thirty years and provide the option for the suspension of the statute of limitation where the alleged offender flees to other countries. At present, the draft law is pending for consideration in the Council of State. It would be passed to the Thai Parliament for further approval if approved by the Council of State.

IV. CURRENT MEASURES AND MECHANISMS IN PREVENTING AND COMBATING CORRUPTION

A. Competent Agencies mandated to Prevent and Suppress Corruption in Public Sector

The 1997 Constitution gave birth to number of mandated organizations and agencies. These bodies are authorized to prevent and suppress corruption in the public sector by closely monitoring and efficiently controlling the performance of government officials. They are intended to ensure transparency, accountability and fairness, and to guarantee the basic civil and political rights and well-being of Thai citizens. In 2007, there were a number of agencies established by the Council for Democratic Reform to investigate a number of corruption charges by the former Prime Minister Thaksin Shinnawattra's government. At present, the legally mandated organizations and agencies dealing with corruption in the public sector include: the National Anti-Corruption Commission (NACC); the Ombudsman; the Anti Money Laundering Office (AMLO); the Royal Thai Police; the Department of Special Investigation; the Office of the Attorney General; the Supreme Court's Criminal Division for Person Holding Political Positions; Office of the Auditor General and the Office of Public Sector Anti-Corruption Commission. This paper will underline some of these organizations' roles, power and functions.

1. The National Anti-Corruption Commission (NACC)

The National Counter Corruption "NCCC" is an independent agency established by the 1997 Constitution and the Organic Act on Counter Corruption B.E. 2542 (1999) ("the Organic Act") as a constitutional body

separate from the executive body which reports directly to the National Assembly. In 2008, the National Counter Corruption Commission changed its official name to the National Anti-Corruption Commission (NACC).[6] NACC consists of four branches which are the Operational Branch, comprising Ethics & Integrity Promotion and the Corruption Prevention Group, the Asset Inspection Group and the Corruption Suppression Group; the Administrative Branch; the Technical Branch; and the Unit attached to Secretary-General. The NACC has been charged with three functions, including the declaration and inspection of assets and liabilities, prevention of corruption and suppression of corruption. Moreover, the NACC has been authorized to conduct investigations of complaints against persons holding political position or government officials who are accused of being unusually wealthy, abuse of power and authority as stipulated in the Penal Code or committing offences against their own duties. In other words, the NACC has broad inquisitorial powers in public sector corruption cases; the authority to overrule the Attorney General in certain specific instances; independence in initiating investigation and prosecution (exception); and the right to examine the assets of politicians and state officials when there is suspicion of unusual wealth.[7]

Furthermore, according to the Constitution of the Kingdom of Thailand B.E. 2550 (2007), Section 250, the NACC is authorized to conduct the inspection on assets and liabilities of persons holding political positions, or any government officials, for the purpose of removal of those politicians and state officials, to carry out investigation and to take legal action against officials or employees on the charge of corruption. As the NACC has very broad duties and power in inquiring into all kinds of corruption offences committed by government officials at all levels, the NACC has a severe caseload problem. In 2007, there were 11,591 complaints carried over to the NACC together with 2,723 newly submitted complaints, totalling 14,314 complaints, of which 9,148 complaints were completely investigated (including the cases forwarded to other agencies and the cases which lacked evidence) by the end of 2007.[8] However, in 2008, the NACC handled 8,604 complaints, of which 2,955 complaints were new cases and thus established offences for 61 cases and 2,285 cases were forwarded to other agencies for further consideration. Hence, the Office of Public Sector Anti-Corruption Commission (PCCA), a new investigative authority responsible for investigation of lower-ranking government officials was established in 2008 to help the NACC handle corruption cases committed by low-ranking government officials.

2. The Office of the Attorney General

According to the 1997 Constitution and the 1999 Organic Act on Counter Corruption, the Office of the Attorney General (OAG) plays a vital role as a significant organ in the criminal justice system in combating corruption in the public sector. According to the 2007 Constitution, the OAG is newly established as a constitutional independent body. After completion of investigation, the NACC shall refer the corruption case with adequate legal grounds (*prima facie*) to the Attorney General for prosecution in the case of a criminal offence allegedly committed by an accused who is a person holding a political position or any state official.[9] It is provided under the law that only the Attorney General is authorized to prosecute the accused by filing the criminal charges to the Supreme Court's Criminal Division for Persons Holding Political Positions in case the accused is a politician, or to any other Competent Court in case the accused is a state official, if there is adequate ground for prosecution on the charge of corruption. If the Attorney General is of the opinion that the inquiry file has insufficient evidence for the prosecution, he will send the inquiry file back to the NACC for further inquiry. In such case, the NACC and the OAG shall set up a "working committee" for the purpose of collecting further evidence necessary for the Attorney General in making a prosecution order and bringing the case to the Court. In cases where such a working committee fails to reach an agreement regarding the next legal proceedings, the NACC has the power to proceed the case to the competent court by itself or hire a lawyer to do so. According to Section 80, the Organic Act on Counter Corruption 1999, if the NACC has conducted its fact finding and passed a resolution that the alleged has become unusually wealthy, it shall refer the case to the Attorney General for his further consideration by filing a motion to the Supreme Court of Justice's Criminal Division of Persons Holding Political Positions in case the alleged criminal is a person holding a political position, or to any Court having jurisdiction over in case of a state official, to seek a court order to forfeit assets to the State domain. If the inquiry file is not completed, the

[6] National Counter Corruption Commission, Resolution 40/2551 dated 15 July B.E. 2551 (2008) (http://www.nccc.thaigov.net)
[7] Executive summary, 1st JFCCT/NACC Anti-Corruption Forum, 27 May 2009, Bangkok, Thailand.
[8] NACC Annual Report, 2007.
[9] Organic Act on Counter Corruption B.E. 2542(1999), Section 56.

working committee shared by both agencies will be set up to process the case similar to the proceeding of criminal prosecution clarified above.

3. The Supreme Court's Criminal Division for Persons Holding Political Positions

To be consistent with the establishment of the NCCC, the Supreme Court's Criminal Division for Persons Holding Political Positions was established in September 1999 by the provision of the 1997 Constitution and the Organic Act on Criminal Procedure for Persons Holding Political Position B.E. 2542 (1999) as the special division under the Court of Justice, rather than the Specialized Court, to better handle corruption cases involving political position holders. The "political position holders" means the Prime Minister, members of the House of Representatives, members of the Senate and other political office holders. However, the jurisdiction of this Court is limited to cases in which political position holders are accused of being usually wealthy, committing an offence against his or her own duty as stipulated under the Penal Code and the Organic Act on Counter Corruption, abusing his or her power, committing corruption against his or her duties or being the key offender, instigators, or the one issuing instruction or order to accomplice or support in such criminal offences.

Regarding the special procedure under the Supreme Court's Criminal Division for Persons Holding Political Positions, the Rules on Criminal Procedure for Persons Holding Political Positions B.E. 2543 (2000) stipulates various special proceedings which are different from normal criminal proceeding. For instance, the data recorded in or processed by computer (electronic file) is admissible as evidence under Rule 13. Furthermore, under Rule 20, the Court may permit the hearing of witness being outside the court conducted by mean of video conference. Moreover, the trial is founded upon an inquisitorial system (semi-inquisitorial system), rather than an accusatorial one, by which the court shall mainly rely on the NCCC's inquiry file or evidences produced by the public prosecutor. However, the quorum of judges may conduct an investigation in order to obtain additional facts or evidences as it thinks proper.

4. The Office of Public Sector Anti-Corruption Commission

According to Section 250 of the current 2007 Constitution, the NACC has duty to investigate only corruption offences conducted by persons holding political positions and state officials with high-ranking executives or government officials holding position of director or its equivalent and upwards. The newest investigative authority responsible for investigation of lower ranking government official is the Office of Public Sector Anti-Corruption Commission ("PCCA") established in 2008 which belongs to the Ministry of Justice pursuant to the provision of the Act on Public Administrative Measure in Counter Corruption B.E. 2551 (2008) entered into force on 25 January 2008. However, PCCA has not yet performed its full function as the regulation and legislation provided under the Act is still in drafting process. In the meantime, the investigation of suspected corruption offence conducted by lower government official is temporarily handled by NACC. After completion of inquiry, if the disciplinary offence is found, NACC shall refer the case to the government agency for which the accused works to start the disciplinary action against the accused. On the contrary, if the corruption offence is found, it would refer the case to Office of the Attorney General for prosecution.

V. LEGAL MEASURES FOR PREVENTION AND SUPPRESSION OF CORRUPTION IN THE PUBLIC SECTOR

Since the 1997 Constitution, its Organic laws and the new 2007 Constitution entered into forced, Thailand has introduced new, modernized and effective measures to cope and combat the growing corruption practices in the Thai Public Sector.

A. Mandatory Declaration of Asset and Liabilities

This measure, under Section 32, 39 of the Organic Act in Counter Corruption 1999, mandates persons holding political position and government officials, specifically for those at managerial and executive level, to declare assets and liabilities including those of their families. The objective of this measure is to ensure transparency and accountability. Regarding the asset scrutiny, 20,000 citizens may request for the securitization of the assets and liabilities of the state officials (high ranking/low ranking official). The failure to comply with this legal obligation will result in the accused being criminally charged and banned from being a political or public official for five years.

1. Unusual Wealth Inquiry

In accordance with Section 75, the 1999 Organic Act on Counter Corruption, if any state officials, either holding political position or being a government official is accused of being unusually wealthy, the NCCC shall conduct an inquiry with regards to the alleged unusual wealth. If the NCCC found such unusual wealth to be suspicious of corruption, the NCCC shall refer the case to the Office of the Attorney General in order that the public prosecutor may file a petition seeking the Court order to forfeit such assets to the public domain. In case that the accused is a person holding political position, the Attorney General shall bring the case to the Supreme Court's Criminal Division for Person Holding Political Positions. In case the accused is a state official, the public prosecutor may bring the case to any competent Court similar to the procedure of criminal prosecution mentioned above.

2. Provisions and Measures to bar Conflicts of Interest

The 2007 Constitution and the 1999 Organic Act on Counter Corruption have imposed provisions that bar state officials from engaging in personal or private business that may have conflicts of interest with the public interest the said accused posseses.

"According to section 100 of OACC, this provision bars the state officials from carry out a transaction or business by

(1) being a party to or having interest in a contract made with a Government agency where such State official performs duties in the capacity as State official who has the power to conduct supervision, control, inspection or legal proceedings;

(2) being a partner or shareholder in a partnership or company which is a party to a contract made with a Government agency where such State official performs duties in the capacity as a State official who has the power to conduct supervision, control, inspection or legal proceedings;

(3) being a concessionaire or continuing to hold a concession from the State, State agency, State enterprise or local administration or being a party to a contract of a directly or indirectly monopolistic nature made with the State, a Government agency, State agency, State enterprise or local administration, or being a partner or shareholder in a partnership or company which is a concessionaire or a contractual party in such manner;

(4) being interested in the capacity as a director, counsel, representative, official or employee in a private business which is under supervision, control or audit of the State agency to which such State official is attached or where such State official performs duties in the capacity as State official, provided that the nature of the interest of the private business may be contrary to or inconsistent with public interest or the interest of the Government service or may affect the autonomy in the performance of duties of such State official.

The provisions of paragraph one shall apply to spouses of the State officials under paragraph 2. For this purpose, the activities carried out by the spouse shall be deemed as the activities carried out by the State official".

Regarding the scandal involving the former Prime Minister of Thailand who has been alleged to have committed an offence under Section 100 cited above, there has been a controversial debate among academics and practitioners whether the wrongdoing under this provision should be categorized as a criminal offence or moral misconduct. Many scholars argued that the said wrongdoing is more likely a policy corruption rather than apparent corruption. To illustrate this case, the first defendant, a high-ranking state official, was alleged to have committed the offence based on the action of his spouse, the second defendant, stipulated under the 1999 Organic Act on Counter Corruption, Section 100 Paragraph 2. Section 100 of the said Act can be viewed as an absolute prohibition provision for a state official to engage in the activities as prescribed in Section 100 (1) to (4) and, by virtue of Paragraph 2, the act of the spouse is deemed to be the act of the state official. Some academics and practitioners view this section as a sample of "vicarious liability" to punish one person base on the guilt or action of another person. However, the Supreme Court's Criminal Division for Person Holding Political Positions convicted the first defendant pursuant to the Section 100 to two years' imprisonment and acquitted the second defendant on the charge under Section 100 since

Section 122 which prescribes punishments for violation of Section 100 mentions the state official only but not the spouse. It can be seen that the deeming provision in Paragraph 2 of Section 100 is only intended to ensure effective enforcement of the prohibition without leaving any gap for the state official to use as excuse; it is not designed for the purpose of punishing the spouse of the state official.

3. Prohibition on Acceptance of Property

The 1999 Organic Act on Counter Corruption states that state officials at all levels are strictly prohibited from accepting property or any other benefits from any person except for the property or benefit legally acquired in accordance with the rule and regulations issued by virtue of law.

B. Control of Procurement by Government Agencies

The key criteria for proper procurement is prescribed in the Regulation of the Office Minister relating to Parcel 1992 to ensure equal opportunity regarding state biddings and to guarantee maximum efficiency of government budget spending.

VI. RECOMMENDATIONS AND CONCLUSION

It is generally known that corruption has long been one of the major problems that hinders the development of Thailand and that there is no single clear solution to fight against corruption. Effective corruption control requires not only comprehensive legal regime, effective preventive and suppression measures but also the serious co-operation among involved agencies in criminal justice system, private sector and the public to participate more in tackling this serious problem.

Thailand has made utmost efforts to combat and control corruption particularly corruption in public sectors. It has been amending domestic legislation as well as developing and improving its current legal regime and measures to effectively fight against corruption. These preventive and suppression measures include mandatory declaration of assets and liabilities, unusual wealth inquiry, legal provision prohibiting the engagement in transaction that impose the conflict of interest in nature and prohibiting the state officials from accepting gift, assets, property or any other benefits. Moreover, the Thai legal framework imposes strict and transparent public procurement procedures; the freezing, seizure and forfeiture of assets and proceeds of corruption crime to the State; and takes harsh criminal action against corrupt politicians and state officials.

However, these measures are not yet sufficient to significantly alleviate the corruption problem in Thai society. In order to deal with this issue more effectively, the amendment of legislation and other measures should be taken into account as follows:

1. Improvement of Legislation regarding Corruption in the Private Sector

Many academic and criminal justice authorities found massive corruption in the public sector arising from corruption in the private sector. There is a theory that a business tycoon who seeks monopoly business from the government would mostly use money or other kinds of benefits to bribe politicians and high-ranking officials in order to win the bidding. Thus, to prevent this massive corruption, not only the appropriate legislation pertaining corruption in the private sector should be enacted but severe penalties as a punishment of the offence at the same level as those of corruption in public sector should be imposed.

2. More Effective Measures of Witness Protection

Although Thailand promulgated the Act of Witness Protection B.E. 2546 (2003), this law does not provide a total solution to the problem since the agencies involved cannot provide adequate protection to the witness. Moreover, the witnesses or persons possessing the information seem to be reluctant to report the suspicion of corruption or co-operate with the agencies involved. Therefore, the government agencies should raise the public's awareness through a government campaign. The government should also put in place measures and mechanisms to encourage people to supply the information to and co-operate with investigative and prosecutorial authorities as well as to report the suspicion of corruption while, in the same time, provide adequate protection and benefit to the witness in return. According to Section 62, the current 2007 Constitution, it was the first time to provide a the Whistle Blower Protection provision under the Thai legal regime. It is provided that the person who bona fide provides to an agency responsible for the scrutiny of

the exercise of state powers or to State Agency information in connection with performance of duties of person holding political positions, State agencies or State officials shall be protected. Moreover, a Whistle Blower Protection Act is currently being drafted under initiative of the NACC. This law will mandate the protection and possibility of promotion for informants when it comes into effect.

3. Speed Up Thailand's Ratification of the UNCAC

Since Thailand singed the UNCAC Convention in 2003, Thailand has not yet ratified the Convention as it is still in the process of reviewing and harmonizing domestic legislation to ensure its compatibility with the Convention. Therefore, it is the country's urgent task to speed up the process of legislative amendment to comply with the UNCAC requirements and ratify the Convention so as to acquire more international co-operation as well as to meet international standards. Furthermore, Thailand should expand its co-operation with other developed and developing countries in negotiating extradition and mutual legal assistance treaties to foster greater co-operation in combating and fighting against corruption.

In conclusion, I strongly believe that to successfully and effectively combat corruption one must have a basis of realization of merit and moral satisfaction in mind, with particular attention paid to the promotion of a merit management system, such as "good governance". Furthermore, innovative and comprehensive measures are among those vital tools for effective long-term corruption prevention. Besides, in order to control and eradicate corruption, transparency, accountability and checks and balances principles need to be in place. While the world today seems to pay very much attention on economic recovery, it should be noted that the growth of the corruption crime rate has a direct correlation with economic recession and one problem should not be neglected in favour of the other. Therefore, it is the duty of involved criminal justice agencies to work harder, to make greater efforts and to foster strong co-operation both at domestic and international levels in fighting against corruption in all its forms.

REPORTS OF THE COURSE

GROUP 1

IDENTIFYING AND PUNISHING CORRUPT OFFENDERS

Chairperson	Mr. Joel Noble Done	(Papua New Guinea)
Co-Chairperson	Mr. Masayuki Miyazaki	(Japan)
Rapporteur	Ms. Marija Novkovic	(Montenegro)
Co-Rapporteur	Ms. K. H. Subashini Siriwardena	(Sri Lanka)
Members	Mr. Wa'el Mahmoud Mohammad	(Palestine)
	Mr. Camillo Afele	(Samoa)
	Mr. Man Bahadur Aryal	(Nepal)
	Ms. Vorayanee Vudthithornnatirak	(Thailand)
	Mr. Tien Thanh Le	(Vietnam)
	Mr. Tareq Ahmed Abdo Al-Gumaei	(Yemen)
	Mr. Yukio Matsui	(Japan)
	Mr. Haider Akram Al-Zaidi	(Iraq)
	Mr. Makoto Wada	(Japan)
Advisers	Deputy Director Takeshi Seto	(UNAFEI)
	Professor Naoyuki Harada	(UNAFEI)

I. INTRODUCTION

Group 1 started its discussion on 25 July 2009. The Group elected by consensus Mr. Done as Chairperson, Mr. Miyazaki as Co-chairperson, Ms. Novkovic as Rapporteur and Ms. Siriwardena as Co-rapporteur. The group, which is assigned to discuss "Identifying and punishing corrupt offenders", agreed to conduct its discussion in accordance with the following agenda:

1. Identifying corrupt offenders;
2. Proactive approach to collecting information and/or evidence;
3. Identifying and tracing crime proceeds;
4. Seizure, freezing and confiscation;
5. International co-operation.

II. SUMMARY OF DISCUSSIONS

A. Identifying Corrupt Offenders

The Group chose not to define corruption, rather to focus its discussion on detecting perpetrators of these offences. The first topic on the agenda was the method for identifying corrupt offenders. Following a lengthy debate, the Group concluded that, due to the clandestine nature of offences of corruption, competent authorities need to employ an array of measures so as to collect clues of corruption.

Firstly, the Group discussed the issue of protection of persons who disclose information on criminal offences of corruption to the competent authorities. There was an agreement across the table that it is necessary to encourage persons with knowledge of criminal activity to co-operate with law-enforcement authorities. Therefore, these persons should be awarded suitable protection so as to limit any undue consequences. In most countries, civil servants are protected from undue consequences, e.g. termination of employment. However, the protection should be more substantial and should include protection of identity, confidentiality in processing the report at all stages of the proceedings and, ultimately, protection of physical integrity and/or relocation.

When adopted, these measures need to be communicated to the citizenry in a form of a continuous information campaign, in order to encourage them to co-operate with the competent authorities. However, it was rightly pointed out by the Group that protection of whistleblowers might present substantial challenges in small countries.

Award or other types of incentive for people who have information on corruption offences was ardently

discussed. This approach has both positive and negative consequences and it should be carefully considered. For this reason, the Group could not reach a consensus on this matter.

The Group went on to inspect the issue of granting immunity to corrupt offenders, in order to allow for a successful prosecution in those cases where collection of evidence is significantly difficult or impossible. In some jurisdictions, e.g. Palestine, the prosecution is empowered to do so. However, plea bargaining is not allowed in Japan.

Moreover, the group discussed whether it would be beneficial to consider mitigation of punishment for those offenders who co-operate with the authorities. It was highlighted that such an approach would contribute to more successful prosecutions. However, it was also mentioned that, for judges, the statements of accomplices may lack credibility. In such cases, other independent evidence is necessary to corroborate the constituent elements of the offence.

The issue of the independence of institutions in charge of investigation was addressed as a prior requirement for a successful investigation. The independence of the institutions and their ability to follow up on the reports of the citizens will influence public trust, and could cast away any reluctance of the citizens to co-operate with the investigative authorities.

Summary of recommendations:

1. In countries where needed, existing laws should be amended so as to incorporate measures which guarantee protection to persons who disclose information on criminal offences of corruption to the competent authorities;
2. Protection of witnesses and victims should be implemented, pursuant to the requirements of Article 32 of the UNCAC;
3. The protection which is guaranteed in respect of public sector employees should also be afforded to those employed in the private sector;
4. Granting immunity or mitigating punishment to those offenders whose testimony or co-operation is vital for the prosecution should be considered;
5. Independence of institutions should be secured, so as to enable effective investigations of corruption offences, without any undue influence. These institutions should be given broad access to files, documents, databases, etc.

B. Proactive Approach to Collect Information and/or Evidence

The Group discussed possible ways to initiate an investigation. An avenue of formal complaint by citizens or organizations was mentioned as a typical commencement of the investigation, as well as independent initiation of the proceedings by the national anti-corruption authorities. Secondly, the Group elaborated on the use of information communicated in the media. The Group recollected the experience of Singapore's anti-corruption authority which is empowered to follow up on a media report or other sources where there are allegations of corruption. In countries like Thailand, Yemen, Japan, Samoa and Nepal, the situation is similar to that of Singapore. The institutions can initiate investigations based on suspicions of corruption independently, without a formal complaint. However, in countries like Papua New Guinea and Sri Lanka, this is rather scarce, or there needs to be a formal complaint to start investigations.

Though media reports and other sources of information, e.g. the World Wide Web, can be highly valuable in gathering clues of corruption, it was mentioned that extreme caution is needed when handling these sources. The ownership of the media is one of the elements which need to be taken into account as it is not uncommon for the media to be owned by the political parties and/or interest groups. Therefore, media reports on corruption offences could be misleading or defamatory and require utmost vigilance.

The Group proceeded to discuss the handling of anonymous complaints of corruption. Anonymous reports should not be disregarded though the proper handling of anonymous reports is rather complex and requires a great deal of attention. Prior to the initiation of the investigation of an anonymous report, the background of the accused person should be verified in terms of e.g. previous convictions and/or suspicious behaviour. The information provided in this manner could be well-founded, thus enabling the investigative authority to

uncover offences. However, in treating these types of reports, greater attention should be paid to safeguarding the human rights of all involved.

Investigation of related offences was also singled out as a useful approach in obtaining initial intelligence which can be used as a basis for an investigation into corruption offences. During investigation of other offences corruption might be unveiled. It was agreed that this is a very effective method for finding clues of corruption.

There is now a general understanding that corruption, due to its clandestine nature, cannot be detected using conventional investigative techniques. In some countries, the investigative authorities may use special investigative techniques such as electronic surveillance, simulated active and passive bribery, controlled delivery, undercover operations, etc. However, in some countries there are limitations as to the use of these measures. For example, in Sri Lanka, wire-tapping is not used in investigation of corruption offences as the lack of technical equipment and financial resources presents an obstacle. In Montenegro, these measures may be used for offences of organized crime and offences sanctioned with imprisonment of more than ten years; there are legislative efforts to enable the use of these measures in investigation of corruption. It was recalled by the Group that introduction of these investigative techniques is one of the requirements of the UNCAC.

Summary of recommendations:

1. A proactive approach is recommended. National anti-corruption authorities should be empowered to verify the accuracy of allegations of corruption communicated by the media or other sources, e.g. the Internet. However, following up on a media report requires utmost vigilance.
2. Anonymous complaints of corruption should not be ignored; however, there should be a developed methodology which provides clear guidelines on the course of action as regards anonymous reports.
3. There should be an opportunity for authorities to initiate investigations independently and without a prior formal complaint.
4. Relevant legislation should provide for the use of special investigative means in investigation of corruption cases. Where necessary, training on the use of these sophisticated techniques should be provided to the law enforcement agencies and the prosecution offices. Specific techniques to be considered are:
    (a) Wire tapping and/or electronic surveillance;
    (b) Controlled delivery and/or simulated active/passive bribery;
    (c) Undercover operations.

C. Identifying and Tracing Crime Proceeds

As offences of corruption are predominantly driven by the desire to accumulate wealth illegally, identifying proceeds of crimes becomes a primary issue. Therefore, the Group discussed bank secrecy and its implications for investigation of corruption offences.

It was mentioned that in some countries a search warrant is needed to access bank records and account statements, whereas in Thailand the police are authorized to access bank accounts of suspects without a court order. However, the real issue lies in the fact that the offenders deposit their proceeds in foreign banks. Therefore, there is dire need for international co-operation.

The Group proceeded to discuss access to information which is compiled by various government agencies. It was stated that in all countries public officials are obliged to disclose their income and property on a regular basis. This data should be used to gather clues of corruption, particularly if there are evident discrepancies between the registered income and the person's affluent lifestyle. However, the issue of administrative capacity to verify these declarations was raised. For example, in Sri Lanka there is no designated authority to perform this task. In Japan, it is the executive officers who supervise the declarations of their staff and in case of suspicion, they may refer the case to the internal or external inspection authority.

Apart from the obligation to disclose income and property, it was mentioned that investigative authorities may request information to be provided by a government agency. This is commonly done in Japan, and the

relevant authorities have been co-operative to date.

Ensuring the secrecy of investigation was also singled out as a matter of concern. It was mentioned that gathering evidence of corruption is significantly difficult, and this task is made even more tedious in an event where information leaks, giving the offender enough time to hide or destroy evidence. Therefore, the Group agreed that the secrecy of investigation needs to be safeguarded at all costs. This could be achieved by involving as few investigators as possible, who should be selected from amongst senior staff. It goes without saying that during the course of investigations information should not be disclosed or publicized.

On the issue of information collated by the financial intelligence units (FIUs), it was pointed out that the reports on suspicious transactions may be indispensable in corruption investigations. It was noted that there is a need for strengthened inter-agency co-operation, as well as for a proper analysis of information provided by the FIUs. In Palestine and Japan, information coming from FIUs is regularly checked in order to detect corruption related offences. For example, in Japan the special investigative departments established in Tokyo, Nagoya and Osaka District Public Prosecutors Offices have designated units which analyse the reports provided by the FIUs.

However, attention needs to be paid to the operations of bank staff that are not necessarily mindful of the need to detect suspicious transactions and to identify customers. Therefore, FIUs should play a significant role in the training of bank officers on due diligence. To that end, guidelines on detecting and reporting suspicious transactions should be produced by the FIUs and regularly updated. There needs to be a suitable and swift communication channel between the banks and the FIUs, as well as interaction between the FIUs and investigative authorities. With respect to the information collected by the FIUs, it could be beneficial to apply a risk-based approach in analysing these data. For those entities that choose not to comply with anti-money laundering provisions, administrative and/or monetary sanctions should be imposed.

Summary of recommendations:

1. Bank secrecy must not be used to conceal the identity of customers who are suspected to have committed an offence of corruption;
2. With respect to disclosure of officials' assets and other wealth, it was proposed:
    (a) to empower the institutions tasked with collecting declarations of income and property and to provide adequate human resources and technical capacities;
    (b) to scrutinize these data in cases of suspicions of corruption;
    (c) to conduct random checks of the accuracy of information provided by high ranking officials; and
    (d) to conduct risk-based checks of declarations of income and property;
3. At the early stages of the investigation, the number of officers should be limited and there should be a strict confidentiality policy. Information leaks need to be resolved immediately with appropriate measures;
4. The reports on suspicious transactions provided by the FIUs should be carefully analysed so as to gather clues of corruption and/or collect evidence. It would be beneficial to set up departments or units within investigative authorities which would be tasked with regular checks of the information provided by the FIUs. A risk-based approach is recommended.

D. Seizure, Freezing and Confiscation

Having in mind that corruption offences are inherently profit-driven, there was consensus across the table that it is vital to identify the proceeds of corruption. That is where measures such as seizure, freezing and confiscation come into play. However, it is contested whether investigative authorities and prosecution services pay significant attention to detecting proceeds of crime. It is agreed that financial investigations require advanced skills in, for example, forensic accounting, and that due to electronic money transfers it is painstakingly difficult to follow the money trail.

The Group discussed both the possibility of criminal confiscation as well as the avenue of civil forfeiture. It was concluded that both procedures present different challenges. The traditional rules of evidence imply that, in criminal proceedings, the prosecution bears the onus of proof and the standard is beyond a

reasonable doubt. The rules of evidence vary if the procedure is that of civil forfeiture.

In most countries, confiscation is allowed only following a conviction in a court of law (Sri Lanka, Palestine, Japan and Montenegro). As such, it is considered a part of the sentencing procedure. The onus of proof lies with the prosecution and the standard is beyond a reasonable doubt. In Sri Lanka and Nepal the burden of proof is shifted to the offender, but only with regard to the property suspected to have been acquired illegally.

However, it was indicated that in Thailand and Papua New Guinea civil forfeiture is introduced, and that it is being used to forfeit to the state the property suspected to originate from a criminal offence. In such instances, the standard of proof is on the balance of probabilities which basically means that the state must make it probable that the property comes from an illegal source and it is up to the defendant to rebut these assumptions by means of documentary evidence.

Summary of recommendations:

1. The competent authorities in respective countries should be empowered by law to seize, freeze and confiscate illegal proceeds;
2. Introduction of civil forfeiture should be considered as a way forward for those jurisdictions which still rely on criminal confiscation;
3. Training programmes for investigators and prosecutors should be conducted, so as to promote a wider use of financial investigations and change their mindsets, generally inclined to conducting traditional investigations;
4. Forensic accounting needs to be utilized as a method of following the money trail;
5. It is worth considering shifting the burden of proof from the prosecution to the offender, in respect of the property which is suspected to originate from illegal sources;
6. Finally, inter-agency co-operation should be strengthened.

E. International Co-operation

Bearing in mind the transnational nature of corruption, all members of the Group agreed that international co-operation is of paramount importance. In most countries, the types of assistance provided under Article 46 of the UNCAC are already in place. Direct communication among law-enforcement agencies and INTERPOL in exchanging information and requesting assistance is often utilized. However, it was pointed out by several participants that, in order to secure admissible evidence, authorities need to rely on formal avenues of providing assistance through mutual legal assistance. It was emphasized that the procedure is lengthy and complex; and that in some instances informal communication might take place before the formal procedure is initiated. This approach is recommended so as to facilitate the preparation of the request and prevent delays in requesting mutual legal assistance; it is all the more necessary in those cases where the requested state must pay high attention to the request or act in an urgent manner.

The Group noted that preparation of a formal request for mutual legal assistance can be rather complicated, particularly as regards the format of the request and incorporating documents needed to substantiate the request. Moreover, central authorities responsible for mutual legal assistance need to be easily accessible.

Specific issues relating to the provision of mutual legal assistance were discussed at length. The summary of recommendations is as follows:

1. Ratification and implementation of the UNCAC should be ardently promoted, as the Convention provides for a broad platform for international co-operation in combating corruption. Additionally, national legislation should allow provision of mutual legal assistance and extradition;
2. Apart from international co-operation through mutual legal assistance and extradition provided in the UNCAC and respective national legislation, fostering direct communication between international counterparts should be considered through, for example, establishing a network of anticorruption practitioners;
3. The UNCAC should be ratified so as to prevent the situation in which the requirement of dual criminality obstructs the provision of mutual legal assistance and extradition;

4. The use of the writer tool designed by the UNODC should be encouraged as it facilitates the preparation of the formal request for mutual legal assistance;
5. Freezing, as an interim measure taken to secure future confiscation, needs to be facilitated by means of swift international co-operation. Asset recovery, as provided by the UNCAC, needs to be enforced so as to enable repatriation of assets;
6. Communication and co-operation through INTERPOL and national law-enforcement agencies should be enhanced, while at the same time mutual trust needs to be built so as to provide for more fruitful co-operation.

GROUP 2

STRENGTHENING THE CAPACITY AND ABILITY OF CRIMINAL JUSTICE AUTHORITIES AND THEIR PERSONNEL AND PREVENTIVE MEASURES AGAINST CORRUPTION

Chairperson	Mr. Surya Prasad Parajuli	(Nepal)
Co-Chairperson	Mr. Hiroki Ito	(Japan)
Rapporteur	Ms. Chemen Saeed Jafar Bajalan	(Iraq)
Co-Rapporteur	Ms. Denada Koçiaj	(Albania)
Members	Mr. Mohammed Sharif Rahpo	(Afghanistan)
	Mr. Ruffin Ikie-Ituya	(DR Congo)
	Mr. Tsend- Ayush Dorjgotov	(Mongolia)
	Ms. Tai Thi Ta	(Vietnam)
	Mr. Shintaro Uchida	(Japan)
	Ms. Yoko Watanabe	(Japan)
Advisers	Prof. Jun Oshino	(UNAFEI)
	Prof. Fumiko Akahane	(UNAFEI)

I. INTRODUCTION

This group has started its discussion on 24 July 2009. The group elected, by consensus, Mr. Parajuli as its Chairperson, Mr. Ito as its Co-chairperson, Ms. Bajalan as its Rapporteur and Ms. Koçiaj as its Co-rapporteur. The group, which is assigned to discuss strengthening the Capacity and Ability of Criminal Justice Authorities and their Personal and Preventive Measures against Corruption, agreed to conduct its discussion in accordance with the following agenda:

1. Independence of the criminal justice authority;
2. Integrity of the criminal justice authority (Code of Conduct);
3. Impartiality, transparency and accountability in the relevant decisions in the criminal proceedings;
4. Strengthening the capacity of judiciary in dealing with corruption;
5. Preventive measures against corruption.

II. SUMMARY OF THE DISCUSSIONS

A. Independence of the Criminal Justice Authorities

1. Judges

The participants agreed that the independence of the criminal justice authorities can be analysed in two directions:

(a) Structural independence; and
(b) Functional independence.

The participants introduced their countries' experiences and problems regarding this theme.

In Afghanistan the separation of powers is not practically implemented and the appointment of judges is not exercised independently. In Albania the problem is the transparency of appointment of judges. There is no legal provision which provides for the transparency of the appointment procedures. In Mongolia the Council of the Judiciary decides on the judiciary. The judicial system is independent but the judges are not individually independent. In Vietnam the judiciary is independent (including structural independence and functional independence). The appointment of judges is held by the president judge of the Supreme Court.

In Japan, before the appointment of judges, the professors of the judicial academy observe the character of the candidate in addition to the exam results. The process is very strict. There is a third party which reviews the selection or engages in any other reviewing methods. No contradictions between the independence of the judiciary in the Japan law were made evident by the Japanese participants.

There is agreement that there are problems in the procedure of appointment of judges. That affects the independence of the judiciary.

The problems are varied according to the countries:

1. Judicial independence is not always secured;
2. The judicial appointment process is subject to political influence;
3. The appointment process is secret and the media has no role;
4. Salary is insufficient;
5. Promotion is not systematic;
6. Insufficient budget.

2. Public Prosecutors

All the participants agreed that when analysing the independence of public prosecutors these factors are to be considered:

1. Independence of the prosecutorial organization;
2. The authority given to the public prosecutor;
3. The appointment of public prosecutors.

In Afghanistan public prosecutors are independent according to the law; however, they are not independent in practice. In Iraq the public prosecutor is independent; however, the public prosecutor law handicaps the position and does not allow for an active role. The judge, not the public prosecutor, is responsible for investigation. In Mongolia, immunity for parliament members is one of the difficulties facing investigators. The same problem is present in Albania. There appointment is affected by the political view. The president appoints the general prosecutor. In Nepal, parliamentarians can be interrogated and arrested by the investigator but the speaker of the parliament should be informed.

Each participant agreed corruption should be considered in the following terms:

1. The organization of the investigation authority;
2. What kinds of interference occur and the function of the office;
3. The exercise of power and the need for any kind of permission;
4. No risk of dismissal after exercise of power;
5. A sufficient salary and promotion system.

B. Integrity of the Criminal Justice Authority (Code of Conduct)

Nepal has a code of conduct for the behavior of judges and the general prosecutor and other officials. In Mongolia there are different codes of conduct for judges, public prosecutors and other public servants. The code sets restrictions on the behavior of judges and public prosecutors. In Iraq there is supervision but it is not very active. It has a role in applying the code of conduct. In Afghanistan there is a code of conduct but it is inapplicable because of the prevailing complexities in the country. For example there are judges who are members of political parties while according to the law having no right to that. In Nepal the lawyers uses the NGOs and their activities to affect indirectly judges who are involved in these NGOs. Working conditions in Albania are not bad. There is an inspection office under the Ministry of Justice. In Vietnam there is no code of conduct for judges or prosecutors, but there is the Public Official Law and there are some regulations (under law) for the behaviour of public prosecutors and judges.

In Japan there is a national public service ethics law which is also applicable to public prosecutors. The national code is not applicable directly to judges because of the independence of the judiciary. They have to set their own rules without interference from the Diet. Every three or four years judges and public prosecutors are transferred to avoid any possible collusive relationship. There are some exceptions for reasons like taking care of family members; such reasons are given consideration but have not always been accepted.

To conclude, the absence of a code of conduct in some countries and insufficient content of the code are some of the problematic issues.

C. Impartiality, Transparency and Accountability in the relevant Decisions in the Criminal Proceedings

In Nepal there has to be a reason for a decision. The trial is public. There is a restriction on investigation due to the authority of some officials to refuse to give information. The media has the right to inform the public of the court work. In relation to the prosecution, the attorney general has the power to prosecute. For corruption, the CIAA has the power to decide whether to prosecute or not. The decision of the CIAA cannot be appealed. The court has no right to interfere in this decision.

In Afghanistan, corruption cases are overseen by the High Office of Oversight and Anti-corruption in the investigation and trial stage. In Albania, there is transparency in court, and media presence. There is no such transparency and publicity in relation to the investigation stage. There is an inspection office in the Ministry of Justice to oversee the work of judges and public prosecutors. In Mongolia all the information about corruption is available by the IAAC. There is a twice yearly media conference on the work of the IAAC. There is a need for permission from the public prosecutor in relation to detailed information about criminal cases, but all the other information is accessible by the public.

In Japan, there are two types of procedure for the prosecution of public prosecutors.

1. Prosecution Review Commission

The Commission is located in each District Court. It consists of eleven members drawn from lists of voting citizens. It reviews whether the non-prosecution decision is appropriate. After reviewing, it can make three types of decisions as follows:

(i) Non-prosecution is appropriate;
(ii) Non-prosecution is improper;
(iii) This case should be prosecuted.

Generally, these decisions are not legally binding, but recently, the system was partly amended. If the commission twice makes a type (iii) decision and the public prosecutor doesn't prosecute, lawyers appointed by the court should prosecute the case and maintain the prosecution.

2. Request for Trial

In some cases, including those involving the abuse of power of public officials, the complainants or the accusers have the right to request the District Court for trial if the public prosecutor doesn't prosecute the cases. And if the court decides that the cases should be committed to the court for trial, the lawyers appointed by the court should maintain the prosecution.

To summarize, important issues are:

1. There is a need for a checking mechanism on the authority of the public prosecutor;
2. The role of media in overseeing transparency is important.

D. Strengthening the Capacity of the Judiciary in dealing with Corruption

Important issues are:

1. Manpower;
2. Equipment;
3. Budget;
4. A separate anti-corruption body;
5. Co-operation between governmental institutions.

In Afghanistan the role of the international community is very important in fighting corruption, both financially and technically. Other agencies are involved in fighting corruption but they are not co-ordinated. In Iraq there is a special Anti-corruption Commission in Baghdad but it has no power over the Kurdistan area. In Albania there is an Anti-corruption Task Force led by the prime minister and an Anti-corruption Department in the cabinet. It has the power to inspect the public administration and if it finds any irregularities it sends the data to the public prosecutor. The existence of an independent body might be a good solution. In Mongolia there is a separate independent body named IAAC but it is not a constitutional body. IAAC has its own budget

and its own equipment. Its annual budget must be at least maintained; it is not allowed to decrease. There are no IAAC branches outside the capital because of the lack of resources. There is a need for expertise in the financial area. In case of the need for expertise in any area the IAAC might ask other public offices to send specialists. There is no special training for officials in the corruption commission. The chief is appointed by the parliament. In Nepal there is a constitutional body for investigation of corruption. The appointment of the commissioner of the CIAA is made by the Constitutional Council. Only the CIAA deals with corruption so the attorney general has no role. There is a special court for trial of corruption cases. There is a totally specialized body for investigation and trial of corruption cases. In the military there is another different body for investigation. The separate body is a good solution for avoiding any difficulties which arise from the prosecutors being appointed by the Council of Ministers. In Vietnam there is no separate organization for corruption. In corruption cases the public prosecutor and police conduct investigation.

In Afghanistan there is a monthly meeting to review the anti-corruption procedure by the committee under the authority of the president. UNDP supports the project finically. In relation to training for anti-corruption there is no special training. There is no computer lab for investigation. There is a very simple investigation. Questionnaires are sent to the related ministry to get the answers and documents. That is been used as evidence in court. It is very hard for the prosecutor to win a case. Theoretically there is a time limitation to decide a case but in practice that does not work. In Albania there is no specialized equipment for corruption. NGOs provide training sessions for the officials of corruption cases. Prosecutors deal with corruption cases and they as judges enter the judicial academy after taking an exam. There are special prosecutors for financial and economical cases. There is a specialized lab for criminal investigation.

In Nepal the CIAA can ask for assistance from public offices and can hire people on contract if necessary. There are two forensic labs, one under the police and another under the science academy. There is no special training institution under the CIAA but it can ask other entities like the judicial academy to conduct training. For dealing with the problem of delays there is a special penal division in the Supreme Court to deal with old cases. In Iraq the major problem is the negative role of public prosecutors. However there is the possibility of bringing expertise from other government offices. In Mongolia there is a legal time limitation for the judge to decide a case.

In Japan there is no separate organization for corruption. Instead, there are special investigation departments in major cities and these departments conduct the corruption investigations. In other areas, the public prosecutor and the police usually conduct joint investigations in corruption cases. In general, the public prosecutors provide the necessary knowledge to investigate corruption cases, but some prosecutors who have the potential are assigned to the Special Investigation Department and get necessary training. There might be some areas of conflict, such as in the area of interpretation of the law or disclosing of information between police and public prosecutors. In such cases the role might be divided between both parties to avoid conflict. In conducting such joint investigation there will be a daily contact for sharing information.

In Japan the prosecutors' assistant officers analyse most of the data. The prosecutors' assistant officers have the opportunity to attend accounting lectures. Specialized prosecutors attend a special tax institute. In relation to computers there is no specific office for analysing data. But computer operating training is provided to some public prosecutors. There is a problem of delay due to unclear collection of evidence. The pre-trial procedure involves a judge, prosecutor, and attorney who meet to decide how the trial will be processed. The defence council and the public prosecutor decide the major point of the trial and what sort of evidence is necessary and present. First, the public prosecutor discloses the evidence and later, at the request of the defence council, the prosecutor makes clear his or her main case. By this stage the evidence has been decided and no more evidence can be brought to trial or the first trial after the pre-trial procedure. The prosecutor has the duty to report the time for bringing down the cases he or she is in charge of. The senior prosecutor according to the reason makes a decision either to take a procedure or to let another prosecutor take charge of the case. There is a time limitation in relation to detention for a maximum of 23 days before deciding to indict.

E. Preventive Measures against Corruption
(Effective methods of selecting and training public officials: UNCAC Article 7.1 b)

In Nepal the Public Official Commission developed a unified standard for interviews. The interviewer should declare if there is any relationship or possibility of favour or disfavour to the interviewee. The Public Service Commission has developed various techniques and processes to maintain neutrality.

In Afghanistan there is widespread nepotism which creates a corruption network in most of the ministries. Of course there is a code of conduct and legislation prohibiting such behaviour but these are not implemented in practice. The challenges and the recommended solutions have been mentioned by the National Anti-corruption Strategy which is overseen by the HOO to reduce corruption. There is a commission for selecting senior officers but the ministry selects other persons. In Albania there is an institution which organizes the competition for public officials. It announces the vacancies, selects the candidates for civil servants, supervises the exam and publishes the result. In Mongolia there is a public service office under the parliament. There has to be an exam after the announcement of the service. The higher grades get the job. The competition is announced every year.

In Japan, to become a national public officer, the applicant must obtain a set score in the unified exam held by National Personnel Authority, which is under the Cabinet but independent from other ministries. After passing the exam, they apply to each ministry to get a job. Each ministry assesses their capability for job through interviews before employment. Until recently, officers of Ministry of Foreign Affairs were recruited separately, but because of some scandals, the same process now applies to them. The recruiting system is fair but it is difficult to evaluate character in brief interview. Compared with this process, the long selection process of judges and prosecutors are more effective.

1. Remuneration of Public Officials
   Sufficient remuneration certainly contributes to preventing corruption.

In Nepal, in comparison with the private sector, public officials receive low salaries. Of course, public office salaries vary according to rank. Generally it is lower than other countries. In Iraq the salary is sufficient but it was very low until 2002; that was the reason for corruption in the public sector, including the criminal justice authority. In Albania the salary is not sufficient and this is one of the most crucial problems leading to corruption.

2. Reporting (Whistle Blowers)
   In Albania there is a law protecting whistle blowers.

In Nepal there is no separate law protecting whistle-blowers but there is a protection paragraph in the CIAA Act. In Afghanistan, there is no protection for reporters. Lately an office for complaints has been established. There are boxes and a website; this is the resource for most of the reports. There is a paragraph in the Anti-corruption Law for protecting whistleblowers but it is very difficult to implement. In Iraq there is no special law for protecting whistleblowers but there is a provision in the Criminal Procedure Code. The Anti-corruption Commission has telephone numbers and websites that contribute to keeping the name of the reporter confidential. In Mongolia there are paragraphs in the Criminal Procedure Law but no separate law.

In Japan, a Whistleblower Protection Law was recently passed. It is related to people reporting from the private sector. The purpose of the law is to be applied to the public officials as well.

There are measures to encourage people to report. Boxes, emails and awareness programmes to encourage people to report are among the methods used for that purpose.

To what organization should people report? To the ministry or office they belong to or to a separate institution? All the types of reporting can be included so people do not hesitate about reporting. It is just about encouraging people to report, it does not matter where to.

In Afghanistan there is a commission in the parliament to receive complaints, and the president's office also has a similar office to receive complaints. The Anti-corruption Office as well has a reporting department but the problem is that people do not trust the system so they do not report. The reports are not dealt with effectively; they are sometimes ignored.

It is very important to take strong measures about reporting to encourage people to report. In addition, the media can play a great role.

In Mongolia there is free hotline for reporting within the Anti-corruption Commission, in addition, the website with of the commission have fax and email. States officials are under obligation to report any corruption in their office. There are awareness activities for the public to inform them about the possible ways for reporting. There are NGOs network in the local areas working for awareness. In Nepal there is a free hotline system which has recording system and email also is available. It is not compulsory to disclose names and identity. There are awareness programs by NGOs that work for good governance activities.

In Japan there is no separate organization so people take different measures for reporting. Even an anonyms report can lead to investigation. There are various measures for encouraging the public to report. The national public service takes charge in preventing corruption, their website contains easy way to report anonymously but it is not clear if it is known by all Japanese. The same webpage contains hotlines numbers and emails for reporting.

3. Reporting Assets by the Officials

In Albania senior officers have to report their assets to the high inspectorate of declaration of assets periodically. In Nepal it is compulsory to report and a system has been produced by 2003. The public officials has to prove the recourses of their property if the anti corruption commission asked for that. In Afghanistan There is obligation to register assists. But there is no punishment if the public service did not report. It is important to have some punishment to implement the obligation of reporting assets. There is no banking system that makes it difficult to follow the money movement. In Mongolia there is an assets declaration department of IAAC. Public officials have to declare their assets. There is s a punishment for lies and exceeding the time limitation of the declaration. There is investigation going on for cases where the declaration was not true. Some declaration been published for the public so there might be complains about them from the public accordingly the investigation starts.

In Japan, the National Public Service Ethics Law regulates the acceptance of gifts by public officials. If a senior public officer receives a gift to attend a party of more than 5,000 yen from the people related to his or her public service he or she has to report it. That works in practice and the reporting requirment deters public officials from taking gifts or any other entertainment. Every three months there has to be a reporting and such reports are accessible by the public. Additionally, high-ranking officials have to report extra income like stocks. Prosecutors are prohibited by internal regulation from holding stocks.

4. Mechanism for deterring Public Officials from Corruption

(i) Disciplinary Actions

In Nepal there is risk of losing job in case of corruption. Mongolia there is the possibility of reducing salary, losing job, restriction on interring a public service for two years. There is a possibility of appealing against these measures. In Afghanistan there are disciplinary actions for public officials.

In Japan according to the national public service law there are disciplinary actions. Violation of any related law to the public service and any misconduct led to a disciplinary action. Dismissal, suspension of the office from a day up to one year, reduction of salary for term of less than a year up to 20% and admonishment are disciplinary action. There is away of appeal or complaint against the decision to the national personnel authority can be made against.

(ii) Training

Training contributes to preventive measures of corruption. In Albania the Department of Public Administration, which supervises the public servants' exam, conducts training.

Afghanistan recently established a management academy for public officials. Six months' study in this academy is required before beginning work and that is an effective way to train staff. In Nepal newly appointed public officials must go through three months' special training, which is important for their awareness of the disciplinary measures in the public service.

In Japan, there are many types of training. For example, court clerks receive training before beginning work and regularly through out their service. Some training is for all court clerks, some for managers, and still others are for the head of the managers. The national public service website has a page to allow public officials to self-check their knowledge.

To conclude, both training and preventive measures are required but money and time are important elements for both. For implementing all the measures we need very strong leaders, then a strong decision can be made. All the measures then can be implemented in a relatively short time. In order to improve a criminal justice system three pillars are important: (i) laws; (ii) a system for operating laws; (iii) human resources to take advantage of the system for implementing laws. Without these three pillars it is very hard to fight corruption. Human resource development is very important but it takes time and money. Creating both laws and a system is very hard. Training is the most important and it is the priority. That has to happen in parallel with legal and system developments.

III. RECOMMENDATIONS

1. Criminal justice organizations and their operations should be independent. Appointment of criminal justice authorities has to be via special mechanisms to maintain their independence and integrity;
2. Political influence in the criminal justice authorities and in the operation of the individuals, judges, public prosecutors, police and other administration officers must be avoided;
3. Political will for an effective criminal justice system is essential. The international community and civil society can play a great role in developing political will in a positive way;
4. Budget, salary and remuneration have to be secured. However it is difficult in countries which suffer from economic difficulties to maintain such security. To allocate a certain percentage of the budget to the judiciary is one possible recommendation;
5. Although to maintain integrity of judges and prosecutors a code of conduct is important, this should not be at the expense of the independence of the judiciary. Transferring judges regularly is one of the measures for maintaining integrity. Integrity testing as it exists in Hong Kong, which is a kind of sting operation against corrupt officers, is another measure;
6. Accountability and checks and balances mechanisms are indispensable. Appeal, supervisions and complaints to the court, as in Japan, are some such mechanisms. A level of secrecy has to be maintained during the investigation stage. However, third party checking in the investigation stage is important. The trial should be open to the public, in principle;
7. Encouraging of reporting through awareness programmes is crucial. Utilizing media and the Internet in the efforts of raising awareness and informing the public could be effective. It is essential to establish a system of protecting informants;
8. Training public officials in general and the criminal justice authority in particular is important to maintain integrity and develop capacity;
9. Simplifying the process of service providing can be considered an anti-corruption measure;
10. International co-operation (capacity building, reporting, awareness programmes, etc.) surely contributes to the fight against corruption.

PART THREE

Work Product of the 143rd International Training Course
"Ethics and Codes of Conduct for Judges, Prosecutors and Law Enforcement Officials"

UNAFEI

VISITING EXPERTS' PAPERS

UNITED NATIONS ACTIVITIES AGAINST CORRUPTION IN THE JUDICIARY, PROSECUTION AND LAW ENFORCEMENT AUTHORITIES

*Sunghoon Park**

I. INTRODUCTION[1]

Corruption is generally defined as 'the abuse of entrusted power for private gain'. This means both financial or material gain and non-material gain, such as the furtherance of political or professional ambitions. Judicial corruption includes any inappropriate influence on the impartiality of the judicial process by any actor within the court system.

The fight against corruption depends upon the judicial system. The expanding arsenal of anti-corruption weapons includes new national and international laws against corruption that rely on fair and impartial judicial systems for enforcement. Where judicial corruption occurs, the damage can be pervasive and extremely difficult to reverse. Judicial corruption undermines citizens' morale, violates their human rights, harms their job prospects and national development and depletes the quality of governance. A government that functions on behalf of all its citizens requires not only the rule of law, but an independent and effective judiciary to enforce it to the satisfaction of all parties.

The professionals that make up the judicial system can use their skills, knowledge and influence to privilege truth and benefit the general public, and the vast majority do. But they can also abuse these qualities, using them to enrich themselves or to improve their careers and influence. For whatever reason and whether petty or gross, corruption in the judiciary ensures that corruption remains beyond the law in every other field of government and economic activity in which it may have taken root. Indeed, without an independent judiciary, graft effectively becomes the new 'rule of law'.

Careful law-making at the national and international level since then has better defined and proscribed corrupt behaviour in many countries. Nevertheless, an enormous challenge for the anti-corruption movement is to ensure that anti-corruption laws are enforced and that legal redress for injustice can be secured through a functioning judicial system. The failure of judges and the broader judiciary to meet these legitimate expectations provides a fertile breeding ground for corruption. In such environments even the best anti-corruption laws become meaningless.

For example, a judge may allow or exclude evidence with the aim of justifying the acquittal of a guilty defendant of high political or social status. Judges or court staff may manipulate court dates to favour one party or another. In countries where there are no verbatim transcripts, judges may inaccurately summarize court proceedings or distort witness testimony before delivering a verdict that has been purchased by one of the parties in the case. Junior court personnel may 'lose' a file – for a price.

Other parts of the justice system may influence judicial corruption. Criminal cases can be corrupted before they reach the courts if police tamper with evidence that supports a criminal indictment, or prosecutors fail to apply uniform cristeria to evidence generated by the police. In countries where the prosecution has a monopoly on bringing prosecutions before the courts, a corrupt prosecutor can effectively block off any avenue for legal redress.

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[1] Transparency International, Global Corruption Report 2007, Executive Summary : Key Judicial Corruption Problems, p.xxi , Cambridge University Press.

Judicial corruption includes the misuse of the scarce public funds that most governments are willing to allocate to justice, which is rarely a high priority in political terms. For example, judges may hire family members to staff their courts or offices, and manipulate contracts for court buildings and equipment. Judicial corruption extends from pre-trial activities through the trial proceedings and settlement to the ultimate enforcement of decisions by court bailiffs.

II. UNITED NATIONS CONVENTION AGAINST CORRUPTION AND UNITED NATIONS STANDARDS AND NORMS

A. United Nations Convention against Corruption[2]

1. History

In its resolution 55/61 of 4 December 2000, the General Assembly recognized that an effective international legal instrument against corruption, independent of the United Nations Convention against Transnational Organized Crime (resolution 55/25, annex I) was desirable and decided to establish an ad hoc committee for the negotiation of such an instrument in Vienna at the headquarters of the United Nations Office on Drugs and Crime. The text of the United Nations Convention against Corruption was negotiated during seven sessions of the Ad Hoc Committee for the Negotiation of the Convention against Corruption, held between 21 January 2002 and 1 October 2003.

The Convention approved by the Ad Hoc Committee was adopted by the General Assembly by resolution 58/4 of 31 October 2003. The General Assembly, in its resolution 57/169 of 18 December 2002, accepted the offer of the Government of Mexico to host a high-level political signing conference in Merida for the purpose of signing the United Nations Convention against Corruption.

The Convention needs 30 ratifications to come into force. In accordance with article 68 (1) of resolution 58/4, the United Nations Convention against Corruption entered into force on 14 December 2005. A Conference of the States Parties is established to review implementation and facilitate activities required by the Convention. Until now, 140 countries signed the Convention. 138 countries have become parties to the Convention.

2. Implementation of the Convention

Corruption is a complex social, political and economic phenomenon that affects all countries. The United Nations Convention against Corruption is the first legally binding international anti-corruption instrument. The Convention provides a unique opportunity for mounting a global response to a global problem.

The UNODC Global Programme against Corruption is a catalyst and a resource to help States effectively implement the provisions of the Convention. It assists States with vulnerable developing or transitional economies by promoting anti-corruption measures in the public and private sector, including in high-level financial and political circles.

The United Nations Convention against Corruption provides an opportunity to develop a global language about corruption and a coherent implementation strategy. Although a multitude of international anti-corruption agreements exist, their implementation has been uneven and only moderately successful. This Convention gives the global community the opportunity to address both of those weaknesses and begin establishing an effective set of benchmarks for effective anti-corruption strategies.

The primary goal of the anti-corruption work done by UNODC is to provide States with practical assistance and build the technical capacity needed to implement the Convention. Efforts will concentrate on supporting Member States in the development of anti-corruption policies and institutions, including preventive anti-corruption frameworks.

3. Convention Highlights

(i) Prevention

Corruption can be prosecuted after the fact, but first and foremost, it requires prevention. An entire

[2] http://www.unodc.org/unodc/en/treaties/CAC/index.html

chapter of the Convention is dedicated to prevention, with measures directed at both the public and private sectors. These include model preventive policies, such as the establishment of anticorruption bodies and enhanced transparency in the financing of election campaigns and political parties. States must endeavour to ensure that their public services are subject to safeguards that promote efficiency, transparency and recruitment based on merit. Once recruited, public servants should be subject to codes of conduct, requirements for financial and other disclosures, and appropriate disciplinary measures. Transparency and accountability in matters of public finance must also be promoted, and specific requirements are established for the prevention of corruption, in the particularly critical areas of the public sector, such as the judiciary and public procurement. Those who use public services must expect a high standard of conduct from their public servants. Preventing public corruption also requires an effort from all members of society at large. For these reasons, the Convention calls on countries to promote actively the involvement of non-governmental and community-based organizations, as well as other elements of civil society, and to raise public awareness of corruption and what can be done about it. Article 5 of the Convention enjoins each State Party to establish and promote effective practices aimed at the prevention of corruption.

(ii) Criminalization

The Convention requires countries to establish criminal and other offences to cover a wide range of acts of corruption, if these are not already crimes under domestic law. In some cases, States are legally obliged to establish offences; in other cases, in order to take into account differences in domestic law, they are required to consider doing so. The Convention goes beyond previous instruments of this kind, criminalizing not only basic forms of corruption such as bribery and the embezzlement of public funds, but also trading in influence and the concealment and laundering of the proceeds of corruption. Offences committed in support of corruption, including money-laundering and obstructing justice, are also dealt with. Convention offences also deal with the problematic areas of private-sector corruption.

(iii) International Co-operation

Countries agreed to co-operate with one another in every aspect of the fight against corruption, including prevention, investigation, and the prosecution of offenders. Countries are bound by the Convention to render specific forms of mutual legal assistance in gathering and transferring evidence for use in court, to extradite offenders. Countries are also required to undertake measures which will support the tracing, freezing, seizure and confiscation of the proceeds of corruption.

(iv) Asset Recovery

In a major breakthrough, countries agreed on asset-recovery, which is stated explicitly as a fundamental principle of the Convention. This is a particularly important issue for many developing countries where high-level corruption has plundered the national wealth, and where resources are badly needed for reconstruction and the rehabilitation of societies under new governments. Reaching agreement on this chapter has involved intensive negotiations, as the needs of countries seeking the illicit assets had to be reconciled with the legal and procedural safeguards of the countries whose assistance is sought.

Several provisions specify how cooperation and assistance will be rendered. In particular, in the case of embezzlement of public funds, the confiscated property would be returned to the state requesting it; in the case of proceeds of any other offence covered by the Convention, the property would be returned providing the proof of ownership or recognition of the damage caused to a requesting state; in all other cases, priority consideration would be given to the return of confiscated property to the requesting state, to the return of such property to the prior legitimate owners or to compensation of the victims.

Effective asset-recovery provisions will support the efforts of countries to redress the worst effects of corruption while sending at the same time, a message to corrupt officials that there will be no place to hide their illicit assets. Accordingly, article 51 provides for the return of assets to countries of origin as a fundamental principle of this Convention. Article 43 obliges state parties to extend the widest possible cooperation to each other in the investigation and prosecution of offences defined in the Convention. With regard to asset recovery in particular, the article provides *inter alia* that "In matters of international cooperation, whenever dual criminality is considered a requirement, it shall be deemed fulfilled irrespective of whether the laws of the requested State Party place the offence within the same category of offence or denominate the offence by the same terminology as the requesting State Party, if the conduct underlying the

offence for which assistance is sought is a criminal offence under the laws of both States Parties".

4. Provisions related to Corruption in Judiciary and Prosecution Authorities

Article 11, paragraph 1 of the Convention states that "[b]earing in mind the independence of the judiciary and its crucial role in combating corruption, each State Party shall, in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary."

Paragraph 2 states that "[m]easures to the same effect as those taken pursuant to paragraph 1 of this article may be introduced and applied within the prosecution service in those States Parties where it does not form part of the judiciary but enjoys independence similar to that of the judicial service."

Article 11 is based on the universal recognition that the judiciary and prosecutorial authorities should have a crucial role in preventing corruption and their independence and integrity should be secured in order to prevent corruption.

B. Basic Principles on the Independence of the Judiciary[3]

In the Charter of the United Nations in 1945, when the founding nations said they were determined to "establish conditions under which justice and respect for obligations arising from treaties and other sources of international law can be maintained".

The Universal Declaration of Human Rights, adopted three years later, enumerated certain essentials to the achievement of individual dignity and social order. It affirms that everyone is entitled to the equal protection of the law; that the accused must be presumed innocent until proven guilty, in a fair and public hearing, by an "independent and impartial" tribunal; and that no one should suffer arbitrary arrest, detention or exile.

A treaty adopted in 1966, the International Covenant on Civil and Political Rights, enshrines judicial rights as a matter of law, not just principle. These include the right of every human being to a fair trial, immunity from arbitrary arrest and immunity from retroactive sentences. The Covenant and two Optional Protocols -- along with the 1966 Covenant on Economic, Social and Cultural Rights and the Universal Declaration -- together make up the five-part omnibus document known as the International Bill of Human Rights.

In addition to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, the United Nations has set forth a set of standards known as the Basic Principles on the Independence of the Judiciary.

Adopted in 1985, the Principles envisage judges with full authority to act, free from pressures and threats, adequately paid and equipped to carry out their duties. Although this set of standards does not carry the force of law, it offers models for lawmakers everywhere, who are encouraged to write them into their national constitutions and to enact them into law.

Many countries have formally adopted the Principles and report regularly to the United Nations on their progress and problems, sometimes seeking help with legal education or the monitoring of procedures.

1. Independence of the Judiciary

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

[3] Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August – 6 September 1985: report prepared by the Secretariat (United Nations publication, Sales No. E.86..1), chap. I, sect. D.2, annex. and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

2. Freedom of Expression and Association

8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.

9. Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence.

3. Qualifications, Selection and Training

10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

4. Conditions of Service and Tenure

11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.

14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.

5. Professional Secrecy and Immunity

15. The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.

16. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

6. Discipline, Suspension and Removal

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

C. Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary[4]

These describe the process to implement Basic Principles on the Independence of Judiciary, and includes steps to enhance this implementation, and establishes a periodic reporting procedure to ensure compliance with the Principles.

1. Procedure 1

1. All States shall adopt and implement in their justice systems the Basic Principles on the Independence of the Judiciary in accordance with their constitutional process and domestic practice.

2. Procedure 2

No judge shall be appointed or elected for purposes, or be required to perform services, that are inconsistent with the Basic Principles. No judge shall accept judicial office on the basis of an appointment or election, or perform services, that are inconsistent with the Basic Principles.

3. Procedure 3

The Basic Principles shall apply to all judges, including, as appropriate, lay judges, where they exist.

4. Procedure 4

States shall ensure that the Basic Principles are widely publicized in at least the main or official language or languages of the respective State. Judges, lawyers, members of the executive, the legislature, and the public in general, shall be informed in the most appropriate manner of the content and the importance of the Basic Principles so that they may promote their application within the framework of the justice system. In particular, States shall make the text of the Basic Principles available to all members of the judiciary.

5. Procedure 5

In implementing principles 8 and 12 of the Basic Principles, States shall pay particular attention to the need for adequate resources for the functioning of the judicial system, including appointing a sufficient number of judges in relation to caseloads, providing the courts with necessary support staff and equipment, and offering judges appropriate personal security, remuneration and emoluments.

6. Procedure 6

States shall promote or encourage seminars and courses at the national and regional levels on the role of the judiciary in society and the necessity for its independence.

7. Procedure 7

In accordance with Economic and Social Council resolution 1986/10, section V, Member States shall inform the Secretary-General every five years, beginning in 1988, of the progress achieved in the implementation of

[4] Economic and Social Council resolution 1989/60 of 24 May 1989, annex.

the Basic Principles, including their dissemination, their incorporation into national legislation, the problems faced and difficulties a obstacles encountered in their implementation at the national level and the assistance that might be needed from the international community.

8. Procedure 8

The Secretary-General shall prepare independent quinquennial reports to the Committee on Crime Prevention and Control on progress made with respect to the implementation of the Basic Principles, on the basis of the information received from Governments under procedure 7, as well as other information available within the United Nations system, including information on the technical cooperation and training provided by institutes, experts and regional and interregional advisers. In the preparation of those reports the Secretary-General shall also enlist the cooperation of specialized agencies and the relevant intergovernmental organizations and non-governmental organizations, in particular professional associations of judges and lawyers, in consultative status with the Economic and Social Council, and take into account the information provided by such agencies and organizations.

9. Procedure 9

The Secretary-General shall disseminate the Basic Principles, the present implementing procedures and the periodic reports on their implementation referred to in procedures 7 and 8, in as many languages as possible, and make them available to all States and intergovernmental and non-governmental organizations concerned, in order to ensure the widest circulation of those documents.

10. Procedure 10

The Secretary-General shall ensure the widest possible reference to and use of the text of the Basic Principles and the present implementing procedures by the United Nations in all its relevant programmes and the inclusion of the Basic Principles as soon as possible in the United Nations publication entitled Human Rights: a Compilation of International Instruments, in accordance with Economic and Social Council resolution 1986/10, section V.

11. Procedure 11

As a part of its technical cooperation programme, the United Nations, in particular the Department of Technical Cooperation for Development of the Secretariat and the United Nations Development Programme, shall:

(a) Assist Governments, at their request, in setting up and strengthening independent and effective judicial systems;

(b) Make available to Governments requesting them, the service of experts and regional and interregional advisers on judicial matters to assist in implementing the Basic Principles;

(c) Enhance research concerning effective measures for implementing the Basic Principles, with emphasis on new developments in that area;

(d) Promote national and regional seminars, as well as other meetings at the professional and non-professional levels, on the role of the judiciary in society, the necessity for its independence, and the importance of implementing the Basic Principles to further those goals;

(e) Strengthen substantive support for the United Nations regional and interregional research and training institutes for crime prevention and criminal justice, as well as other entities within the United Nations system concerned with implementing the Basic Principles.

12. Procedure 12

The United Nations regional and interregional research and training institutes for crime prevention and criminal justice as well as other concerned entities within the United Nations system shall assist in the implementation process. They shall pay special attention to ways and means of enhancing the application of the Basic Principles in their research and training programmes, and to providing technical assistance upon the request of Member States. For this purpose, the United Nations institutes, in co-operation with national institutions and intergovernmental and non-governmental organizations concerned, shell develop curricula and training materials based on the Basic Principles and the present implementing procedures, which are suitable for use in legal education programmes at all levels as well as in specialized courses on human rights and related subjects.

13. Procedure 13

The regional commissions, the specialized agencies and other entities within the United Nations system as well as other concerned intergovernmental organizations shall become actively involved in the implementation process. They shall inform the Secretary-General of the efforts made to disseminate the Basic Principles, the measures taken to give effect to them and any obstacles and shortcomings encountered. The Secretary-General shall also take steps to ensure that non-governmental organizations in consultative status with the Economic and Social Council become actively involved in the implementation process and the related reporting procedures.

14. Procedure 14

The Committee on Crime Prevention and Control shall assist the General Assembly and the Economic and Social Council in following up the present implementing procedures, including periodic reporting under procedures 7 and 8 above. To this end, the Committee shall identify existing obstacles to, or shortcomings in, the implementation of the Basic Principles and the reasons for them. The Committee shall make specific recommendations, as appropriate, to the Assembly and the Council and any other relevant United Nations human rights bodies on further action required for the effective implementation of the Basic Principles.

15. Procedure 15

The Committee on Crime Prevention and Control shall assist the General Assembly, the Economic ad Social Council and any other relevant United Nations human rights bodies, as appropriate, with recommendations relating to reports of ad hoc inquiry commissions or bodies, with respect to matters pertaining to the application and implementation of the Basic Principles.

D. Bangalore Principles of Judicial Conduct[5]

1. Drafting History[6]

(i) Background

In April 2000, on the invitation of the United Nations Centre for International Crime Prevention, and within the framework of the Global Programme Against Corruption, a preparatory meeting of a group of Chief Justices and senior justices was convened in Vienna, in conjunction with the Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders. The objective of the meeting was to address the problem that was created by evidence that, in many countries, across all the continents, many people were losing confidence in their judicial systems because they were perceived to be corrupt or otherwise partial.

This evidence had emerged through service delivery and public perception surveys, as well as through commissions of inquiry established by governments. Many solutions had been offered, and some reform measures had been tried, but the problem persisted. This was intended to be a new approach.

It was the first occasion under the auspices of the United Nations when judges were invited to put their own house in order; to develop a concept of judicial accountability that would complement the principle of judicial independence, and thereby raise the level of public confidence in the Rule of Law.

At the initial stage, recognizing the existence of different legal traditions in the world, it was decided to limit the exercise to the common law legal system. Accordingly, the initial participants were from nine countries in Asia, Africa and the Pacific, which applied a multitude of different laws but shared a common judicial tradition.

(ii) The Judicial Integrity Group

The first meeting of the Judicial Group on Strengthening Judicial Integrity (or the Judicial Integrity Group, as this body has come to be known) was held at the United Nations Office in Vienna on 15 and 16 April 2000.

At this meeting, the Judicial Integrity Group took two decisions. First, it agreed that the principle of

[5] Economic and Social Council resolution 2006/23 of 27 July 2006, annex.

[6] United Nations Office on Drugs and Crime, Commentary on The Bangalore Principles of Judicial Conduct, September 2007, p.9.

accountability demanded that the national judiciary should assume an active role in strengthening judicial integrity by effecting such systemic reforms as are within the judiciary's competence and capacity. Second, it recognized the urgent need for a universally acceptable statement of judicial standards which, consistent with the principle of judicial independence, would be capable of being respected and ultimately enforced at the national level by the judiciary, without the intervention of either the executive or legislative branches of government.

The participating judges emphasized that by adopting and enforcing appropriate standards of judicial conduct among its members, the judiciary had the power to take a significant step towards earning and retaining the respect of the community. Accordingly, they requested that codes of judicial conduct which had been adopted in some jurisdictions be analysed, and a report be prepared by the Coordinator of the Judicial Integrity Group, concerning: (a) the core considerations that recur in such codes; and (b) the optional or additional considerations that occur in some, but not all, such codes and which may or may not be suitable for adoption in particular countries.

(iii) The Bangalore Draft Code of Judicial Conduct

The second meeting of the Judicial Integrity Group was held in Bangalore, India, from 24 to 26 February 2001. At this meeting the Group, proceeding by way of examination of the draft placed before it, identified the core values, formulated the relevant principles, and agreed on the Bangalore Draft Code of Judicial Conduct (the Bangalore Draft). The Group recognized, however, that since the Bangalore Draft had been developed by judges drawn principally from common law countries, it was essential that it be scrutinized by judges of other legal traditions to enable it to assume the status of a duly authenticated international code of judicial conduct.

(iv) Consultation Process

Over the following twenty months, the Bangalore Draft was disseminated widely among judges of both common law and civil law systems. It was presented to, and discussed at, several judicial conferences and meetings attended by Chief Justices and senior judges from over 75 countries of both common law and civil law systems. On the initiative of the American Bar Association's offices in Central and Eastern Europe, the Bangalore Draft was translated into the national languages of Bosnia and Herzegovina, Bulgaria, Croatia, Romania, Serbia and Slovakia, and then reviewed by judges, judges' associations, and Constitutional and Supreme Courts of the sub-region, including those of Kosovo. Their comments provided a useful perspective.

In June 2002, at a meeting in Strasbourg, France, the Bangalore Draft was reviewed by the Working Party of the Consultative Council of European Judges (CCJE-GT) which engaged in a full and frank discussion from the perspective of the civil law system.

The published comments of CCJE-GT on the Bangalore Draft, together with other relevant Opinions of the Consultative Council of European Judges (CCJE) – in particular, Opinion No.1 on standards concerning the independence of the judiciary – made a significant contribution to the evolving form of the Bangalore Draft.

The Bangalore Draft was further revised in the light of the draft Opinion of the CCJE on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality.

(v) The Bangalore Principles of Judicial Conduct

A revised version of the Bangalore Draft was next placed before a Round-Table Meeting of Chief Justices (or their representatives) from civil law countries held in the Japanese Room of the Peace Palace in The Hague, Netherlands – the seat of the International Court of Justice - on 25 and 26 November 2002. The meeting was facilitated by the Department for International Development of the United Kingdom, supported by the United Nations Centre for International Crime Prevention, Vienna, and the Office of the High Commissioner for Human Rights, Geneva; and organized with the assistance of the Director-General of the Carnegie Foundation at The Hague.

There was significant agreement among judges of the common law and the civil law systems The main divergence, however, was in respect of political activity. In one European country, judges were elected on the basis of their party membership. In some other European countries, judges had the right to engage in politics and be elected as members of local councils (even while remaining as judges) or of parliament (their judicial status being in this case suspended).

Civil law judges, therefore, argued that at present there was no general international consensus on whether judges should be free to participate in politics or not. They suggested that each country should strike its own balance between judges' freedom of opinion and expression on matters of social significance, and the requirement of neutrality.

They conceded, however, that even though membership of a political party or participation in public debate on the major social problems might not be prohibited, judges must at least refrain from any political activity liable to compromise their independence or jeopardize the appearance of impartiality.

The Bangalore Principles of Judicial Conduct emerged from that meeting. The core values recognized in that document are independence, impartiality, integrity, propriety, equality, competence and diligence. These values are followed by the relevant principles and more detailed statements on their application.

(vi) Commission on Human Rights

The Bangalore Principles of Judicial Conduct were annexed to the report presented to the fifty-ninth session of the United Nations Commission on Human Rights in April 2003 by the United Nations Special Rapporteur on the Independence of Judges and Lawyers, Dato Param Cumaraswamy. On 29 April 2003, the Commission unanimously adopted resolution 2003/43 which noted the Bangalore Principles of Judicial Conduct and brought those Principles "to the attention of Member States, the relevant United Nations organs and intergovernmental and nongovernmental organizations for their consideration".

In April 2004, in his report to the sixtieth session of the Commission on Human Rights, the new United Nations Special Rapporteur on the Independence of Judges and Lawyers, Dr Leandro Despouy, noted that:

The Commission has frequently expressed concern over the frequency and the extent of the phenomenon of corruption within the judiciary throughout the world, which goes far beyond economic corruption in the form of embezzlement of funds allocated to the judiciary by Parliament or bribes (a practice that may in fact be encouraged by the low salaries of judges). It may also concern administration within the judiciary (lack of transparency, system of bribes) or take the form of biased participation in trials and judgments as a result of the politicization of the judiciary, the party loyalties of judges or all types of judicial patronage. This is particularly serious in that judges and judicial officials are supposed to be a moral authority and a reliable and impartial institution to whom all of society can turn when its rights are violated.

Looking beyond the acts themselves, the fact that the public in some countries tends to view the judiciary as a corrupt authority is particularly serious: a lack of trust in justice is lethal for democracy and development and encourages the perpetuation of corruption. Here, the rules of judicial ethics take on major importance. As the case law of the European Court of Human Rights stresses, judges must not only meet objective criteria of impartiality but must also be seen to be impartial; what is at stake is the trust that the courts must inspire in those who are brought before them in a democratic society. Thus one can see why it is so important to disseminate and implement the Bangalore Principles of Judicial Conduct, whose authors have taken care to base themselves on the two main legal traditions (customary law and civil law) and which the Commission noted at its fifty-ninth session.

The Special Rapporteur recommended that the Bangalore Principles be made available, preferably in national languages, in all law faculties and professional associations of judges and lawyers.

(vii) Commentary on the Bangalore Principles of Judicial Conduct

At its fourth meeting, held in Vienna in October 2005, the Judicial Integrity Group noted that judges, lawyers and law reformers had, at several meetings, stressed the need for a commentary or an explanatory memorandum in the form of an authoritative guide to the application of the Bangalore Principles. The Group

agreed that such a commentary or guide would enable judges and teachers of judicial ethics to understand not only the drafting and cross-cultural consultation process of the Bangalore Principles and the rationale for the values and principles incorporated in it, but would also facilitate a wider understanding of the applicability of those values and principles to issues, situations and problems that might arise or emerge.

Accordingly, the Group decided that, in the first instance, the Co-ordinator would prepare a draft commentary, which would then be submitted for consideration and approval by the Group.

(viii) Commission on Crime Prevention and Criminal Justice

In April 2006, the fifteenth Session of the Commission on Crime Prevention and Criminal Justice met in Vienna and unanimously recommended to the Economic and Social Council the adoption of a draft resolution co-sponsored by the Governments of Egypt, France, Germany, Nigeria and the Philippines entitled "Strengthening basic principles of judicial conduct". The draft resolution requested the UNODC to convene an open-ended intergovernmental expert group, in cooperation with the Judicial Integrity Group and other international and regional judicial forums, to develop a commentary on the Bangalore Principles of Judicial Conduct, taking into account the views expressed and the revisions suggested by Member States.

(ix) Economic and Social Council

On 27 July 2006, the United Nations Economic and Social Council adopted resolution 2006/23, entitled "Strengthening basic principles of judicial conduct", without a vote.

(x) Intergovernmental Expert Group Meeting

In March 2006, the draft Commentary on the Bangalore Principles of Judicial Conduct prepared by the Co-ordinator of the Judicial Integrity Group, Dr Nihal Jayawickrama, was submitted to a joint meeting of the Judicial Integrity Group and of the Open-ended Intergovernmental Expert Group convened by UNODC.

The Draft was considered in detail, each of the paragraphs being examined separately. Amendments, including certain deletions, were agreed upon. The Commentary that follows is intended to contribute to a better understanding of the Bangalore Principles of Judicial Conduct.

2. Core Values

(i) Independence

Principle : Judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

Application

1.1. A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.

1.2. A judge shall be independent in relation to society in general and in relation to the particular parties to a dispute that the judge has to adjudicate.

1.3. A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom.[7]

Some examples of inappropriate connections and influence

The following are some examples of "inappropriate connections with and influence by" the executive and legislative branches of government, as determined by courts or judicial ethics advisory committees. These are offered as guidelines. In each case the outcome depends on all the circumstances of the case tested according to how those circumstances might be viewed by the reasonable observer:

[7] United Nations Office on Drugs and Crime, Commentary on The Bangalore Principles of Judicial Conduct, September 2007, p.48.

(a) If a legislator writes to a judge informing the judge of the legislator's interest, on behalf of a constituent, in an expeditious and just result in the constituent's divorce and custody case, the judge may reply by simply informing the legislator – personally or, preferably, through a representative – that the principles of judicial conduct prohibit him or her from receiving, considering or responding to such a communication. The scope of the prohibition includes responding to a legislator's inquiry about the status of a case or the date when a decision may be forthcoming, because to do so creates the appearance that the legislator is able to influence the judge to expedite a decision and thereby obtain preferential consideration for a litigant.

(b) It is inconsistent with the principle of judicial independence for a judge to accept, during a period of leave, full-time employment at a high, policy-making level in the executive or legislative branch (for example, as special adviser on matters related to reform of the administration of justice). The movement back and forth between high-level executive and legislative positions and the judiciary promotes the very kind of function-blending that the concept of separation of powers intends to avoid. That blending is likely to affect the judge's perception, and the perception of the officials with whom the judge serves, regarding the judge's independent role. Even if it does not, such service will adversely affect the public perception of the independence of the courts from the executive and legislative branches of government. Such employment is different from a judge serving in the executive or legislative branch before becoming a judge, and serving in those positions after leaving judicial office. In these cases, the appointment and the resignation processes provide a clear line of demarcation for the judge, and for observers of the judicial system, between service in one branch and service in another.

(c) Where a judge's spouse is an active politician, the judge must remain sufficiently divorced from the conduct of members of his or her family to ensure that there is not a public perception that the judge is endorsing a political candidate. While the spouse may attend political gatherings, the judge may not accompany or her. No such gatherings should be held in the judge's home. If the spouse insists on holding such events in the judge's home, the judge must take all reasonable measures to dissociate himself or herself from the events, including by avoiding being seen by the participants at the events and, if necessary, by leaving the premises for the duration of the events. Any political contributions made by the spouse must be made in the spouse's name from the spouse's own, separately maintained, funds, and not, for example, from a joint account with the judge. It must be noted that such activities do not enhance the public image of the courts or of the administration of justice.24 On the other hand, in such a case, the attendance of the judge with his or her spouse at a purely ceremonial function, for example, the opening of parliament or a reception to a visiting head of State, may not be improper, depending on the circumstances.

(d) A minister of justice who awards, or recommends the award of, an honour to a judge for his or her judicial activity, violates the principle of judicial independence. The discretional recognition of a judge's judicial work by the executive without the substantial participation of the judiciary, at a time when he or she is still functioning as a judge, jeopardizes the independence of the judiciary. On the other hand, the award to a judge of a civil honour by, or on the recommendation of, a body established as independent of the government of the day may not be regarded as inappropriate, depending on the circumstances.

(e) The payment by the executive of a "premium" (i.e. a particular incentive) to a judge in connection with the administration of justice is incompatible with the principle of judicial independence.26

(f) Where, in proceedings before a court, a question arises in respect of the interpretation of an international treaty, and the court declares that the interpretation of treaties falls outside the scope of its judicial functions and seeks the opinion of the minister of foreign affairs thereon, and then proceeds to give judgment accordingly, the court has in effect referred to a representative of the executive for a solution to a legal problem before it. The fact that the minister has been involved in the outcome of the legal proceedings in a way that is decisive and not open to challenge by the parties means that the case has not been heard by an independent tribunal with full jurisdiction.

1.4. In performing judicial duties, a judge shall be independent of judicial colleagues in respect of decisions

that the judge is obliged to make independently.

1.5. A judge shall encourage and uphold safeguards for the discharge of judicial duties in order to maintain and enhance the institutional and operational independence of the judiciary.

1.6. A judge shall exhibit and promote high standards of judicial conduct in order to reinforce public confidence in the judiciary, which is fundamental to the maintenance of judicial independence.

(ii) Impartiality

Principle: Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.

Application

2.1. A judge shall perform his or her judicial duties without favour, bias or prejudice.

2.2. A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.[8]

Conduct that should be avoided in court

The expectations of litigants are high. Some will be quick to perceive bias quite unjustifiably when a decision is not in their favour. Therefore, every effort should be made to ensure that reasonable grounds for such a perception are avoided or minimized. A judge must be alert to avoid behaviour that may be perceived as an expression of bias or prejudice. Unjustified reprimands of advocates, insulting and improper remarks about litigants and witnesses, statements evidencing prejudgments and intemperate and impatient behaviour may destroy the appearance of impartiality, and must be avoided.

Constant interference in the conduct of the trial should be avoided

A judge is entitled to ask questions to clarify issues, but if the judge constantly interferes and virtually takes over the conduct of a civil case or the role of the prosecution in a criminal case and uses the results of his or her own questioning to arrive at a conclusion in the judgment in the case, the judge becomes advocate, witness and judge at the same time and the litigant does not receive a fair trial.

Ex parte communications must be avoided

The principle of impartiality generally prohibits private communications between the judge and any of the parties or their legal representatives, witnesses or jurors. If the court receives such a private communication, it is important that it ensure that the other parties concerned are fully and promptly informed and the court record noted accordingly.

Conduct that should be avoided out of court

Out of court too, a judge should avoid deliberate use of words or conduct that could reasonably give rise to a perception of an absence of impartiality. Everything - from a judge's associations or business interests, to remarks that he or she may consider to be nothing more than harmless banter - may diminish the judge's perceived impartiality. All partisan political activity and association should cease upon the assumption of judicial office. Partisan political activity or out-of court statements concerning issues of a partisan public controversy by a judge may undermine impartiality and lead to public confusion about the nature of the relationship between the judiciary, on the one hand, and the executive and legislative branches, on the other hand. By definition, partisan actions and statements involve a judge in publicly choosing one side of a debate over another. The perception of partiality will be reinforced if, as is almost inevitable, the judge's activities attract criticism or rebuttal. In short, a judge who uses the privileged platform of judicial office to enter the partisan political arena puts at risk public confidence in the impartiality of the judiciary.

There are some exceptions. These include comments by a judge, on an appropriate occasion, in defence of the judicial institution, or explaining particular issues of law or decisions to the community or to a

[8] United Nations Office on Drugs and Crime, Commentary on The Bangalore Principles of Judicial Conduct, September 2007, p.61.

specialized audience, or defence of fundamental human rights and the rule of law. However, even on such occasions, a judge must be careful to avoid, as far as possible, entanglements in current controversies that may reasonably be seen as politically partisan. The judge serves all people, regardless of politics or social viewpoints. That is why the judge must endeavour to maintain the trust and confidence of all people, so far as that is reasonably possible.

2.3. A judge shall, as far as is reasonable, so conduct himself or herself as to minimize the occasions on which it will be necessary for the judge to be disqualified from hearing or deciding cases.

2.4. A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process, nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue.

2.5. A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially.

Such proceedings include, but are not limited to, instances where:

(a) The judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;

(b) The judge previously served as a lawyer or was a material witness in the matter in controversy; or

(c) The judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy;

provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice.

(iii) Integrity

Principle: Integrity is essential to the proper discharge of the judicial office.

Application

3.1. A judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer.[9]

In view of cultural diversity and the constant evolution in moral values, the standards applying to a judge's private life cannot be laid down too precisely. This principle, however, should not be interpreted so broadly as to censure or penalize a judge for engaging in a non-conformist lifestyle or for privately pursuing interests or activities that might be offensive to segments of the community. Judgments on such matters are closely connected to the society and times in question and few can be applied universally.

This is particularly evident in respect of sexual activity. For example, in the Philippines, a judge who flaunted an extra-marital relationship was found to have failed to embody judicial integrity, warranting dismissal from the judiciary (Complaint against Judge Ferdinand Marcos, Supreme Court of the Philippines, A.M. 97-2-53-RJC, 6 July 2001).

In the United States, in Florida, a judge was reprimanded for engaging in sexual activities with a woman who was not his wife, in a parked motor car (In re Inquiry Concerning a Judge, 336 So. 2d 1175 (Fla. 1976), cited in Amerasinghe, Judicial Conduct, 53).

In Connecticut, a judge was disciplined for having an affair with a married court stenographer (In re Flanagan, 240 Conn.157, 690 A. 2d 865 (1997), cited in Amerasinghe, Judicial Conduct, 53).

[9] United Nations Office on Drugs and Crime, Commentary on The Bangalore Principles of Judicial Conduct, September 2007, p.80.

In Cincinnati, a married judge who was separated from his wife was disciplined for taking a girl friend (whom he since married) on three foreign visits, although they did not ever occupy the same room (Cincinnati Bar Association v Heitzler, 32 Ohio St. 2d 214, 291 N.E. 2d 477 (1972); 411 US 967 (1973), cited in Amerasinghe, Judicial Conduct, 53).

But in Pennsylvania, also in the United States, the Supreme Court declined to discipline a judge who had engaged in an extra marital sexual relationship which included overnight trips and a one-week vacation abroad (In re Dalessandro, 483 Pa. 431, 397 A. 2d 743 (1979), cited in Amerasinghe, Judicial Conduct, 53). Some of the foregoing examples would not be viewed in some societies as impinging on the judge's public duties as a judge but relevant only to the private zone of consensual noncriminal adult behaviour.

3.2. The behaviour and conduct of a judge must reaffirm the people's faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done.

(iv) Propriety

Principle : Propriety, and the appearance of propriety, are essential to the performance of all of the activities of a judge.

Application

4.1. A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

4.2. As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. In particular, a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office.

4.3. A judge shall, in his or her personal relations with individual members of the legal profession who practise regularly in the judge's court, avoid situations that might reasonably give rise to the suspicion or appearance of favouritism or partiality.

4.4. A judge shall not participate in the determination of a case in which any member of the judge's family represents a litigant or is associated in any manner with the case.

4.5. A judge shall not allow the use of the judge's residence by a member of the legal profession to receive clients or other members of the legal profession.

4.6. A judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but, in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.

4.7. A judge shall inform himself or herself about the judge's personal and fiduciary financial interests and shall make reasonable efforts to be informed about the financial interests of members of the judge's family.

4.8. A judge shall not allow the judge's family, social or other relationships improperly to influence the judge's judicial conduct and judgment as a judge.

4.9. A judge shall not use or lend the prestige of the judicial office to advance the private interests of the judge, a member of the judge's family or of anyone else, nor shall a judge convey or permit others to convey the impression that anyone is in a special position improperly to influence the judge in the performance of judicial duties.

4.10. Confidential information acquired by a judge in the judge's judicial capacity shall not be used or disclosed by the judge for any other purpose not related to the judge's judicial duties.

4.11. Subject to the proper performance of judicial duties, a judge may:

(a) Write, lecture, teach and participate in activities concerning the law, the legal system, the administration of justice or related matters;

(b) Appear at a public hearing before an official body concerned with matters relating to the law, the legal system, the administration of justice or related matters;

(c) Serve as a member of an official body, or other government commission, committee or advisory body, if such membership is not inconsistent with the perceived impartiality and political neutrality of a judge; or

(d) Engage in other activities if such activities do not detract from the dignity of the judicial office or otherwise interfere with the performance of judicial duties.

4.12. A judge shall not practise law while the holder of judicial office.

4.13. A judge may form or join associations of judges or participate in other organizations representing the interests of judges.

4.14. A judge and members of the judge's family shall neither ask for, nor accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done by the judge in connection with the performance of judicial duties.

4.15. A judge shall not knowingly permit court staff or others subject to the judge's influence, direction or authority to ask for, or accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done in connection with his or her duties or functions.

4.16. Subject to law and to any legal requirements of public disclosure, a judge may receive a token gift, award or benefit as appropriate to the occasion on which it is made provided that such gift, award or benefit might not reasonably be perceived as intended to influence the judge in the performance of judicial duties or otherwise give rise to an appearance of partiality.

(v) Equality

Principle: Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.

Application

5.1. A judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes ("irrelevant grounds").

5.2. A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds.

5.3. A judge shall carry out judicial duties with appropriate consideration for all persons, such as the parties, witnesses, lawyers, court staff and judicial colleagues, without differentiation on any irrelevant ground, immaterial to the proper performance of such duties.

5.4. A judge shall not knowingly permit court staff or others subject to the judge's influence, direction or control to differentiate between persons concerned, in a matter before the judge, on any irrelevant ground.

5.5. A judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on irrelevant grounds, except such as are legally relevant to an issue in proceedings and may be the subject of legitimate advocacy.

(vi) Competence and Diligence

Principle: Competence and diligence are prerequisites to the due performance of judicial office.

Application

6.1. The judicial duties of a judge take precedence over all other activities.

6.2. A judge shall devote the judge's professional activity to judicial duties, which include not only the performance of judicial functions and responsibilities in court and the making of decisions, but also other tasks relevant to the judicial office or the court's operations.

6.3. A judge shall take reasonable steps to maintain and enhance the judge's knowledge, skills and personal qualities necessary for the proper performance of judicial duties, taking advantage for that purpose of the training and other facilities that should be made available, under judicial control, to judges.

6.4. A judge shall keep himself or herself informed about relevant developments of international law, including international conventions and other instruments establishing human rights norms.

6.5. A judge shall perform all judicial duties, including the delivery of reserved decisions, efficiently, fairly and with reasonable promptness.

6.6. A judge shall maintain order and decorum in all proceedings before the court and be patient, dignified and courteous in relation to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity. The judge shall require similar conduct of legal representatives, court staff and others subject to the judge's influence, direction or control.

6.7. A judge shall not engage in conduct incompatible with the diligent discharge of judicial duties.

E. Guidelines on the Role of Prosecutors[10]

1. Background

Prosecutors play a crucial role in the administration of justice, and rules concerning the performance of their important responsibilities should promote their respect for and compliance with the above-mentioned principles, thus contributing to fair and equitable criminal justice and the effective protection of citizens against crime.

It is essential to ensure that prosecutors possess the professional qualifications required for the accomplishment of their functions, through improved methods of recruitment and legal and professional training, and through the provision of all necessary means for the proper performance of their role in combating criminality, particularly in its new forms and dimensions.

In resolution 7 of the Seventh Congress, the Committee was called upon to consider the need for guidelines relating, inter alia, to the selection, professional training and status of prosecutors, their expected tasks and conduct, means to enhance their contribution to the smooth functioning of the criminal justice system and their cooperation with the police, the scope of their discretionary powers, and their role in criminal proceedings, and to report thereon to future United Nations congresses.

The Guidelines, which have been formulated to assist Member States in their tasks of securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings, should be respected and taken into account by Governments within the framework of their national legislation and practice, and should be brought to the attention of prosecutors, as well as other persons, such as judges, lawyers, members of the executive and the legislature and the public in general. The present Guidelines have been formulated principally with public prosecutors in mind, but they apply equally, as appropriate, to prosecutors appointed on an ad hoc basis.

2. Provisions

(i) Qualifications, Selection and Training

[10] Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August – 7 September 1990: report prepared by the Secretariat (United Nations publication, Sales No.E.91..2), chap. I, sect. C.26, annex.

1. Persons selected as prosecutors shall be individuals of integrity and ability, with appropriate training and qualifications.
2. States shall ensure that:
   (a) Selection criteria for prosecutors embody safeguards against appointments based on partiality or prejudice, excluding any discrimination against a person on the grounds of race, colour, sex, language, religion, political or other opinion, national, social or ethnic origin, property, birth, economic or other status, except that it shall not be considered discriminatory to require a candidate for prosecutorial office to be a national of the country concerned;
   (b) Prosecutors have appropriate education and training and should be made aware of the ideals and ethical duties of their office, of the constitutional and statutory protections for the rights of the suspect and the victim, and of human rights and fundamental freedoms recognized by national and international law.

(ii) Status and Conditions of Service

3. Prosecutors, as essential agents of the administration of justice, shall at all times maintain the honour and dignity of their profession.

4. States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.

5. Prosecutors and their families shall be physically protected by the authorities when their personal safety is threatened as a result of the discharge of prosecutorial functions.

6. Reasonable conditions of service of prosecutors, adequate remuneration and, where applicable, tenure, pension and age of retirement shall be set out by law or published rules or regulations.

7. Promotion of prosecutors, wherever such a system exists, shall be based on objective factors, in particular professional qualifications, ability, integrity and experience, and decided upon in accordance with fair and impartial procedures.

(iii) Freedom of Expression and Association

8. Prosecutors like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional disadvantage by reason of their lawful action or their membership in a lawful organization. In exercising these rights, prosecutors shall always conduct themselves in accordance with the law and the recognized standards and ethics of their profession.

9. Prosecutors shall be free to form and join professional associations or other organizations to represent their interests, to promote their professional training and to protect their status.

(iv) Role in Criminal Proceedings

10. The office of prosecutors shall be strictly separated from judicial functions.

11. Prosecutors shall perform an active role in criminal proceedings, including institution of prosecution and, where authorized 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.

12. 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.

13. 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 circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;

(c) Keep matters in the 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.

14. 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.

15. 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 recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences.

16. 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.

(v) Discretionary Functions

17. In countries where prosecutors are vested with discretionary functions, the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution.

(vi) Alternatives to Prosecution

18. 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.

19. 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.

(vii) Relations with Other Government Agencies or Institutions

20. In order to ensure the fairness and effectiveness of prosecution, prosecutors shall strive to cooperate with the police, the courts, the legal profession, public defenders and other government agencies or institutions.

(viii) Disciplinary Proceedings

21. Disciplinary offences of prosecutors shall be based on law or lawful regulations. Complaints against prosecutors which allege that they acted in a manner clearly out of the range of professional standards shall be processed expeditiously and fairly under appropriate procedures. Prosecutors shall have the right to a fair hearing. The decision shall be subject to independent review.

22. Disciplinary proceedings against prosecutors shall guarantee an objective evaluation and decision. They shall be determined in accordance with the law, the code of professional conduct and other

established standards and ethics and in the light of the present Guidelines.

(ix) Observance of the Guidelines

23. Prosecutors shall respect the present Guidelines. They shall also, to the best of their capability, prevent and actively oppose any violations thereof.

24. Prosecutors who have reason to believe that a violation of the present Guidelines has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial power.

F. Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors[11]

The standards are made by the International Association of Prosecutors. The International Association of Prosecutors was established in June 1995 at the United Nations offices in Vienna and was formally inaugurated in September 1996 at its first General Meeting in Budapest. In the following year in Ottawa, the General Meeting approved the Objects of the Association which are now enshrined in Article 2.3 of the Association's Constitution. One of the most important of these Objects is to :

".. promote and enhance those standards and principles which are generally recognised internationally as necessary for the proper and independent prosecution of offences."

In support of that particular objective a committee of the Association, chaired by Mrs Retha Meintjes of South Africa, set to work to produce a set of standards for prosecutors. A first draft was circulated to the entire membership in July 1998 and the final version was approved by the Executive Committee at its Spring meeting in Amsterdam in April 1999.

The International Association of Prosecutors' Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors is a statement which will serve as an international benchmark for the conduct of individual prosecutors and of prosecution services. We intend that this should not simply be a bold statement but rather a working document for use by prosecution services to develop and reinforce their own standards. Much of the Association's efforts in the future will be directed to promoting the Standards and their use by working prosecutors throughout the world.

1. Professional Conduct

Prosecutors shall:

a. at all times maintain the honour and dignity of their profession;

b. always conduct themselves professionally, in accordance with the law and the rules and ethics of their profession;

c. at all times exercise the highest standards of integrity and care;

d. keep themselves well-informed and abreast of relevant legal developments;

e. strive to be, and to be seen to be, consistent, independent and impartial;

f. always protect an accused person's right to a fair trial, and in particular ensure that evidence favourable to the accused is disclosed in accordance with the law or the requirements of a fair trial;

g. always serve and protect the public interest;

h. respect, protect and uphold the universal concept of human dignity and human rights.

2. Independence

2.1 The use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently and be free from political interference.

2.2 If non-prosecutorial authorities have the right to give general or specific instructions to prosecutors, such instructions should be:

- transparent;

[11] Commission on Crime Prevention and Criminal Justice resolution 17/2 of 18 April 2008, annex.

- consistent with lawful authority;
- subject to established guidelines to safeguard the actuality and the perception of prosecutorial independence.

2.3 Any right of non-prosecutorial authorities to direct the institution of proceedings or to stop legally instituted proceedings should be exercised in similar fashion.

3. Impartiality

Prosecutors shall perform their duties without fear, favour or prejudice. In particular they shall:

(a) carry out their functions impartially;

(b) remain unaffected by individual or sectional interests and public or media pressures and shall have regard only to the public interest;

(c) act with objectivity;

(d) have regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;

(e) in accordance with local law or the requirements of a fair trial,seek to ensure that all necessary and reasonable enquiries are made and the result disclosed, whether that points towards the guilt or the innocence of the suspect;

(f) always search for the truth and assist the court to arrive at the truth and to do justice between the community, the victim and the accused according to law and the dictates of fairness.

4. Role in Criminal Proceedings

4.1 Prosecutors shall perform their duties fairly, consistently and expeditiously.

4.2 Prosecutors shall perform an active role in criminal proceedings as follows:

(a) where authorised by law or practice to participate in the investigation of crime, or to exercise authority over the police or other investigators, they will do so objectively, impartially and professionally;

(b) when supervising the investigation of crime, they should ensure that the investigating services respect legal precepts and fundamental human rights;

(c) when giving advice, they will take care to remain impartial and objective;

(d) in the institution of criminal proceedings, they will proceed only when a case is well-founded upon evidence reasonably believed to be reliable and admissible, and will not continue with a prosecution in the absence of such evidence;

(e) throughout the course of the proceedings, the case will be firmly but fairly prosecuted; and not beyond what is indicated by the evidence;

(f) when, under local law and practice, they exercise a supervisory function in relation to the implementation of court decisions or perform other non-prosecutorial functions, they will always act in the public interest.

4.3 Prosecutors shall, furthermore;

(a) preserve professional confidentiality;

(b) in accordance with local law and the requirements of a fair trial, consider the views, legitimate interests and possible concerns of victims and witnesses, when their personal interests are, or might be, affected, and seek to ensure that victims and witnesses are informed of their rights; and similarly seek to ensure that any aggrieved party is informed of the right of recourse to some higher authority/court, where that is possible;

(c) safeguard the rights of the accused in co-operation with the court and other relevant agencies;

(d) disclose to the accused relevant prejudicial and beneficial information as soon as reasonably possible, in accordance with the law or the requirements of a fair trial;

(e) examine proposed evidence to ascertain if it has been lawfully or constitutionally obtained;

(f) refuse to use evidence reasonably believed to have been obtained through recourse to unlawful methods which constitute a grave violation of the suspect's human rights and particularly methods which constitute torture or cruel treatment;

(g) seek to ensure that appropriate action is taken against those responsible for using such methods;

(h) in accordance with local law and the requirements of a fair trial, give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally or diverting criminal cases, and particularly those involving young defendants, from the formal justice system, with full respect for the rights of suspects and victims, where such action is appropriate.

5. Co-operation

In order to ensure the fairness and effectiveness of prosecutions, prosecutors:

(a) shall co-operate with the police, the courts, the legal profession, defence counsel, public defenders and other government agencies, whether nationally or internationally; and

(b) shall render assistance to the prosecution services and colleagues of other jurisdictions, in accordance with the law and in a spirit of mutual co-operation.

6. Empowerment

In order to ensure that prosecutors are able to carry out their professional responsibilities independently and in accordance with these standards, prosecutors should be protected against arbitrary action by governments. In general they should be entitled:

(a) to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability;

(b) together with their families, to be physically protected by the authorities when their personal safety is threatened as a result of the proper discharge of their prosecutorial functions;

(c) to reasonable conditions of service and adequate remuneration, commensurate with the crucial role performed by them and not to have their salaries or other benefits arbitrarily diminished;

(d) to reasonable and regulated tenure, pension and age of retirement subject to conditions of employment or election in particular cases;

(e) to recruitment and promotion based on objective factors, and in particular professional qualifications, ability, integrity, performance and experience, and decided upon in accordance with fair and impartial procedures;

(f) to expeditious and fair hearings, based on law or legal regulations, where disciplinary steps are necessitated by complaints alleging action outside the range of proper professional standards;

(g) to objective evaluation and decisions in disciplinary hearings;

(h) to form and join professional associations or other organizations to represent their interests, to promote their professional training and to protect their status; and

(i) to relief from compliance with an unlawful order or an order which is contrary to professional standards or ethics.

G. Code of Conduct for Law Enforcement Officials[12]

The functions of law enforcement in the defence of public order and the manner in which those functions are exercised have a direct impact on the quality of life of individuals as well as society as a whole.

The important task which law enforcement officials are performing diligently and with dignity, in compliance with the principles of human rights. But there exist potentials for abuse which the exercise of such duties entails.

The establishment of a code of conduct for law enforcement officials is only one of several important measures for providing the citizenry served by law enforcement officials with protection of all their rights and interests.

[12] General Assembly resolution 34/169 of 17 December 1979, annex.

1. Article 1
Law enforcement officials shall at all times fulfill the duty imposed upon them by law, by serving the community and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession.

2. Article 2
In the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.

3. Article 3
Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.

Commentary:

(a) This provision emphasizes that the use of force by law enforcement officials should be exceptional; while it implies that law enforcement officials may be authorized to use force as is reasonably necessary under the circumstances for the prevention of crime or in effecting or assisting in the lawful arrest of offenders or suspected offenders, no force going beyond that may be used.

(b) National law ordinarily restricts the use of force by law enforcement officials in accordance with a principle of proportionality. It is to be understood that such national principles of proportionality are to be respected in the interpretation of this provision. In no case should this provision be interpreted to authorize the use of force which is disproportionate to the legitimate objective to be achieved.

(c) The use of firearms is considered an extreme measure. Every effort should be made to exclude the use of firearms, especially against children. In general, firearms should not be used except when a suspected offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender. In every instance in which a firearm is discharged, a report should be made promptly to the competent authorities.

4. Article 4
Matters of a confidential nature in the possession of law enforcement officials shall be kept confidential, unless the performance of duty or the needs of justice strictly require otherwise.

5. Article 5
No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

Commentary:

The Universal Declaration of Human Rights defines torture as follows:

". . . torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners."

6. Article 6
Law enforcement officials shall ensure the full protection of the health of persons in their custody and, in particular, shall take immediate action to secure medical attention whenever required.

7. Article 7
Law enforcement officials shall not commit any act of corruption. They shall also rigorously oppose and combat all such acts.

Commentary:

(a) Any act of corruption, in the same way as any other abuse of authority, is incompatible with the profession of law enforcement officials. The law must be enforced fully with respect to any law enforcement official who commits an act of corruption, as Governments cannot expect to enforce the law among their citizens if they cannot, or will not, enforce the law against their own agents and within their own agencies.

(b) While the definition of corruption must be subject to national law, it should be understood to encompass the commission or omission of an act in the performance of or in connection with one's duties, in response to gifts, promises or incentives demanded or accepted, or the wrongful receipt of these once the act has been committed or omitted.

(c) The expression "act of corruption" referred to above should be understood to encompass attempted corruption.

8. Article 8

Law enforcement officials shall respect the law and the present Code. They shall also, to the best of their capability, prevent and rigorously oppose any violations of them.

Law enforcement officials who have reason to believe that a violation of the present Code has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial power.

H. Guidelines for the effective implementation of the Code of Conduct for Law Enforcement Officials[13]

These describe the process to implement Code of Conduct for Law Enforcement Officials, and includes steps to enhance this implementation, and establishes a periodic reporting procedure to ensure compliance with the Principles.

1. Application of the code

(i) General Principles

1. The principles embodied in the Code shall be reflected in national legislation and practice.
2. In order to achieve the aims and objectives set out in article 1 of the Code and its Commentary, the definition of "law enforcement officials" shall be given the widest possible interpretation.
3. The Code shall be made applicable to all law enforcement officials, regardless of their jurisdiction.
4. Governments shall adopt the necessary measures to instruct, in basic training and all subsequent training and refresher courses, law enforcement officials in the provisions of national legislation connected with the Code as well as other basic texts on the issue of human rights.

(ii) Specific Issues

1. Selection, education and training. The selection, education and training of law enforcement officials shall be given prime importance. Governments shall also promote education and training through a fruitful exchange of ideas at the regional and interregional levels.
2. Salary and working conditions. All law enforcement officials shall be adequately remunerated and shall be provided with appropriate working conditions.
3. Discipline and supervision. Effective mechanisms shall be established to ensure the internal discipline and external control as well as the supervision of law enforcement officials.
4. Complaints by members of the public. Particular provisions shall be made, within the mechanisms mentioned under paragraph 3 above, for the receipt and processing of complaints against law enforcement officials made by members of the public, and the existence of these provisions shall be made known to the public.

[13] Economic and Social Council resolution 1989/61 of 24 May 1989, annex.

2. Implementation of the Code

(i) At the National Level

1. The Code shall be made available to all law enforcement officials and competent authorities in their own language.
2. Governments shall disseminate the Code and all domestic laws giving effect to it so as to ensure that the principles and rights contained therein become known to the public in general.
3. In considering measures to promote the application of the Code, Governments shall organize symposiums on the role and functions of law enforcement officials in the protection of human rights and the prevention of crime.

(ii) At the International Level

l. Governments shall inform the Secretary-General at appropriate intervals of at least five years on the extent of the implementation of the Code.

2. The Secretary-General shall prepare periodic reports on progress made with respect to the implementation of the Code, drawing also on observations and on the cooperation of specialized agencies and relevant intergovernmental organizations and non-governmental organizations in consultative status with the Economic and Social Council.

3. As part of the reports mentioned above, Governments shall provide to the Secretary-General copies of abstracts of laws, regulations and administrative measures concerning the application of the Code, any other relevant information on its implementation, as well as information on possible difficulties in its application.

4. The Secretary-General shall submit the above-mentioned reports to the Committee on Crime Prevention and Control for consideration and further action, as appropriate.

5. The Secretary-General shall make available the Code and the present guidelines to all States and intergovernmental and non-governmental organizations concerned, in all official languages of the United Nations.

6. The United Nations, as part of its advisory services and technical cooperation and development programmes, shall:
   (a) Make available to Governments requesting them the services of experts and regional and interregional advisers to assist in implementing the provisions of the Code;
   (b) Promote national and regional training seminars and other meetings on the Code and on the role and functions of law enforcement officials in the protection of human rights and the prevention of crime.

7. The United Nations regional institutes shall be encouraged to organize seminars and training courses on the Code and to carry out research on the extent to which the Code is implemented in the countries of the region as well as the difficulties encountered.

III. INSTANCES OF JUDICIAL CORRUPTION

A. Corrupt Judges and Land Rights in Zimbabwe[14]

The independence of Zimbabwe's judiciary has been the subject of many reports over the past five years and there is a general consensus that it is no longer independent and impartial.

By the end of the 1990s, Zimbabwe's Supreme Court had established an international reputation as an independent court that vigorously upheld human rights, although its human rights jurisprudence was mainly focused on civil and political rights. The high court also previously played a positive role in upholding fundamental rights.

Beginning in 2000, the government began a purge that resulted in most independent judges being replaced

[14] Transparency International, Global Corruption Report 2007, Gugulethu Moyo, Corrupt judges and land rights in Zimbabwe, p.35 Cambridge University Press.

by judges known to owe allegiance to the ruling party. This reconstituted judiciary has conspicuously failed to protect fundamental rights in the face of serious violation by legislative provisions and executive action. Corruption has also played a role in compromising judicial independence because the allocation of expropriated farms to several judges has made them more beholden to the executive. Most accounts of the trajectory of judicial independence in Zimbabwe inextricably link its decline to government policies adopted in 2000 aimed at accelerating the protracted land reform process.

The need for more equitable land distribution has been one of Zimbabwe's most intractable problems. At the beginning of black majority rule in 1980 about 6,000 white commercial farmers controlled 40 per cent of the most fertile land while seven million blacks were crowded into largely dry 'communal areas'. In the first decade of majority rule the government was faced with legal constraints, entrenched in the constitution that required it to pay prompt and adequate compensation if it wanted to appropriate land and, if the original owner requested, to do so externally in foreign exchange. This prevented it from carrying out meaningful re-distribution. Even after these constitutional restraints were removed, however, the government failed to adopt policies that addressed the problem effectively or to cooperate with international offers to provide financial assistance to an orderly programme.

Towards the end of the 1990s, the economy was in decline and the ruling Zimbabwe African National Union Patriotic Front (ZANU PF) party was in danger of losing support. A new party, the Movement for Democratic Change (MDC), had attracted a considerable following and posed a threat to the ruling party's hold on power. To counteract this, ZANU PF exploited the hunger for land felt by millions of black peasants to launch a populist, 'fast-track' land reform programme. At the end of February 2000, ZANU PF militias, who identified themselves as veterans of Zimbabwe's liberation struggle, invaded and occupied white-owned farms.

There is a considerable body of evidence that indicates that the occupations were not spontaneous actions by land-hungry peasants, as claimed by the government, but an orchestrated campaign by the ruling party, the security agencies and various government departments. The occupiers perpetrated widespread acts of violence against the commercial farmers and farm workers, who were seen as sympathetic to the MDC. Thousands of workers were driven off farms and left destitute. The occupiers used the farms as bases from which to hunt down and attack opposition supporters in rural areas. After white farmers were expelled, the government, which has been repeatedly criticized for corruption, allocated the best land not to landless peasants, but to high-ranking party and government officials, with some acquiring several farms each.

When the dispossessed farmers sought legal protection and the Supreme Court declared the farm invasions illegal, the executive portrayed the intervention as a racist attempt to protect the interests of the minority white farmers and mounted a vicious campaign against white judges. President Robert Mugabe and several ministers, prominent among them Justice Minister Patrick Chinamasa, took it in turns to condemn these judges as 'relics of the Rhodesian era', alleging they had obstructed implementation of the government's land reform programme. War veterans staged protests that culminated in the invasion of the main courtroom of the Supreme Court just as the court was due to sit. During this incident, the veterans shouted slogans such as 'kill the judges', and both Supreme Court and high court judges subsequently received death threats. In early 2001 Chief Justice Roy Gubbay was forced to resign. Heavy pressure was exerted on the other Supreme Court justices, two of whom also resigned. Relentless pressure against the remaining independent judges in the high court led first to the resignation in 2001 of the remaining white judges, followed later by a number of independent black judges, notably Justices Chatikobo, Chinhengo and Devittie. One high court judge, Judge Godfrey Chidyausiku, joined in the attacks, alleging that the chief justice and Supreme Court had pre-decided in their favour all the cases brought by commercial farmers. This accusation was unfounded since the Supreme Court had decided against the commercial farmers in 1996.

What led the government to declare war on the Supreme Court was a decision in 2000 that interdicted it from continuing with the acquisition and resettlement programme until a proper plan was in place and the rule of law had been restored on the farms. Two other black High Court judges had previously ruled that the land resettlement programme was being conducted in an illegal manner. In this earlier ruling, the government conceded the illegality of the farm invasions and consented to the order relating to them. In the 2000 ruling, despite adjudging the scheme unconstitutional, the Supreme Court gave the government

considerable latitude to remedy the illegality by suspending the interdict for six months. The Court said it fully accepted that a programme of land reform was essential for future peace and prosperity, but could not accept the unplanned, chaotic, politically biased and violent nature of the current policy. Despite this conciliatory approach, the judgment incensed the government. It became determined to purge the bench and replace it with judges who would legitimize its land grab.

Soon after Gubbay was forced out, the government appointed Godfrey Chidyausiku as chief justice, passing over several other Supreme Court judges. Chidyausiku's suitability was publicly questioned. When a fresh land case was brought before the Supreme Court in September 2001, the new chief justice dismissed an application by the Commercial Farmers Union (CFU) that he should recuse himself because of his close association with the ruling party and his previous statements endorsing the government's land policy. He and three newly appointed judges then determined that the government had fully complied with the Supreme Court order to put in place a lawful programme of land reform that was in conformity with the constitution. This was despite detailed evidence from the CFU that the rule of law had not been restored and that farmers were still being prevented unlawfully from conducting their operations.

The only judge from the Gubbay-led bench on this case, Justice Ahmed Ebrahim, dissented, finding that the government had failed to produce a workable programme of land reform or to satisfy the Court that it had restored the rule of law in commercial farming areas. The law that the government had passed was unconstitutional in that it deprived landowners of their rights or interests without compensation; allowed arbitrary entry into property and occupation; and denied landowners the protection of the law and the right to freedom of association. The judge expressed the opinion that the majority decision had been predicated not on issues of law, but issues of political expediency. The reconstituted Supreme Court has made several other questionable rulings upholding the legality of the land reform programme and the limits imposed on compensation for expropriated farms.

Of the seven current justices in the Supreme Court, all but one were appointed in 2001, after the land acquisitions began. Reports have emerged that all the new appointees, including Chief Justice Chidyausiku, were allocated farms after the eviction of their former owners. There is no doubt that the possession of the farms, often violently taken from their owners, has seriously compromised the independence of judges, particularly in legal challenges to land requisition. Two judges, Benjamin Hlatshwayo and Tendai Chinembiri Bhunu, even invaded and took over commercial farms personally. Reports of such cases have deepened the perception that judges have subordinated their obligations to justice to the desire to amass wealth. In 2006, Arnold Tsunga, executive director of the NGO Zimbabwe Lawyers for Human Rights, said: 'A number (of judicial officers) have accepted farms which are contested. These farms have not come as written perks (in their contracts of employment) but as discretionary perks by politicians. When judges and magistrates are given and accept discretion perks because of poverty, surely their personal independence is compromised as well.'

According to several credible independent organizations, judges with the integrity to resist undue influence by the government and ZANU PF have been prevented from independently dispensing justice by intimidation and harassment. Walter Chikwanha, the magistrate for Chipinge, was dragged from his courtroom in August 2002 by a group of veterans and assaulted after he dismissed an application by the state to remand five MDC officials in custody. The attack took place in full view of police who did not try to prevent it. Several court officials were also assaulted and one had to be hospitalized. In December 2003, Judge President Michael Majuru of the administrative court resigned and fled the country after an altercation with Justice Minister Patrick Chinamasa over a controversial case involving a government agency and Associated Newspapers of Zimbabwe (ANZ), publishers of the Daily News, Zimbabwe's only independent newspaper. Majuru later claimed that Chinamasa offered him a farm as an inducement to rule in favour of the government.

When dispossessed farmers continued to bring cases before the administrative court challenging technical aspects of the land acquisition programme, the government amended the constitution in 2005 making 'state land' all land acquired, or to be acquired for resettlement or whatever purpose, and barring any legal challenge to such acquisition, although legal challenges as to the amount of compensation payable for improvements are still allowed.

The failure of the courts to uphold the rule of law in land cases has created the impression that the

security of property rights is no longer guaranteed, precipitating a general breakdown in the rule of law. Land grabs by government and party officials continue to occur with the new black occupiers of the first wave of possession now being forced off their property.

Zimbabwe is said to have the fastest shrinking economy in the world and various economists have attributed this primarily to the loss of property rights. The government has tried to blame Zimbabwe's woes on the sanctions imposed by western states, although these are not economic but instead target government officials through travel restrictions and the freezing of their external accounts.

But it is not only in respect of land that courts have so conspicuously failed to uphold fundamental rights. Despite mounting criticism, the judiciary repeatedly demonstrates a tendency, especially in high-profile and electoral cases, to lend its process to the service of the state. In numerous cases challenging the constitutionality or legitimacy of measures that are palpably in violation of the law, the Supreme Court has departed from established legal principle in order to legitimate executive action. With few exceptions, judges are seen to have collaborated with a government that has violated many of the rights of its citizens, including freedom of expression, freedom of the press, freedom of assembly and the right to free and fair elections.

B. Mexico: the Traffickers' Judges[15]

Mexico's justice system reacts oddly when dealing with criminals involved in organized crime, especially drug trafficking. Since drug trafficking is a federal crime, it must be addressed by judges from the federal jurisdiction; state and municipal-level justice systems cannot be involved (nor local governments and local police). This leaves the fight against drug trafficking in the hands of a very few people who are therefore more vulnerable to corruption, as well as to pressure, threats and physical attacks from criminal elements.

Judges involved in drugs trafficking cases do not receive any special protection and are more susceptible to coercion and corruption. *Plata o plomo* (meaning 'silver or lead', in other words what will make a judge comply with a corrupt demand: money or a bullet?) is the question asked in trafficking circles to assess how amenable a judge might be to corruption when it comes to sentencing. This 'choice' is repeated at every level of investigation throughout the police and judicial systems. This does not mean that there are not police, prosecutors and judges who are honest and carry out their work efficiently. But in such an environment corruption easily penetrates the system.

José Luis Gómez Martínez, a judge in Mexico's highest security prison, has handed down numerous decisions in the past few years absolving a number of people linked to the Sinaloa drug cartel. His sentences sparked complaints by the attorney general's office, which denounced him to the federal judicial council (CFJ), the agency responsible for evaluating judges' sentences and protecting their integrity, and also started an investigation against him. To date, the CFJ has not found any 'irregularities' in the judge's decisions.

But some irregularities are easy to spot. Judge Gómez Martínez presided in the case against Olga Patricia Gastelum Escobar and Felipe de Jesús Mendivil Ibarra, both accused of harbouring and transporting money belonging to the Sinaloa cartel to drug trafficker Arturo Beltrán Leyva, a close associate of El Chapo, the head of the cartel. The couple were detained while attempting to escape from police with close to US $7 million in cash and US $500,000 worth of jewellery and watches. They were armed.

In April 2005, Judge Gómez Martínez cleared Olga Patricia Gastelum Escobar of wrongdoing in a sentence that was marred by many irregularities, most notably that the public prosecutor's office (which instigated the case) was notified of the result only 24 hours after the woman was freed from prison. This violated article 102 of the Criminal Procedural Code, which stipulates that decisions cannot be executed without first notifying the public prosecutor. The defendant went free although a separate investigation had been initiated against her. A complaint about the decision was filed with the CFJ, which argued that verdicts of innocence did not need to be notified to the public prosecutor. Although Judge Gómez Martínez was not sanctioned, an appeal against the sentence was brought before the second circuit appeals court, which found that Gastélum Escobar's criminal liability had clearly been demonstrated. Nonetheless, she remains at liberty.

[15] Transparency International, Global Corruption Report 2007, Jorge Fernández Menéndez, Mexico: the traffickers' judges, p.77, Cambridge University Press.

But the scandal does not end there. Despite the appeal court's decision against Gastelum Escobar and the fact that she had already declared that her partner, Mendívil Ibarra, was a drug trafficker, the same judge considered that he, too, was innocent.

There are other cases involving Gómez Martínez. In 2004, a group of 18 hit men loyal to the Sinaloa cartel were detained in Nuevo Laredo by the Mexican army. They were carrying 28 long guns, two short guns, 223 cartridges, 10,000 bullets, 12 grenade launchers, 18 hand grenades, smoke grenades, bullet-proof vests and equipment reserved for military use. Gómez Martínez set them free, arguing they were innocent of charges of involvement with organized crime. The same judge ordered Archivaldo Iván Guzmán Salazar, son of El Chapo, to be set free after he was accused of money laundering and murdering a young Canadian while leaving a bar.

The case of Gómez Martínez is not exceptional. A judge in Guadalajara, Amado López Morales, decided that Héctor Luis 'El Güero' Palma, one of Mexico's best known drug traffickers, was no such thing (he called him an 'agricultural producer') despite the fact that he was detained in charge of an arsenal of weapons. He decided the crime of amassing weapons should merit only five years in prison. A second judge, Fernando López Murillo, reduced the penalty to two years and also decided that the former commander of the federal judicial police, Apolinar Pintor, who had sheltered El Güero, should be exonerated because he only did it out of 'friendship' – and not because he was paid. When Arturo Martínez Herrera, leader of a group of hit men known as Los Texas, was detained with 36 long weapons, and 10 kg of cocaine and marijuana, Judge López Morales dismissed the charges. The only sentence he gave was for criminal association, for which he awarded a sentence of two years, commutable for a fine of US $10,000. When the sentence was reviewed, the appeals court condemned Martínez Herrera to 40 years in prison.

Another notable judge is Humberto Ortega Zurita from Oaxaca. Two men were detained in a car in 1996 with 6 kg of pure cocaine: the judge absolved them declaring that no one could be sure that the cocaine was theirs. Some time later, a woman was detained in a bus with 3 kg of cocaine taped to her stomach. The judge had no doubt: the woman was set free because he considered that 'she did not carry the drugs consciously'. A short time later, Judge Ortega Zurita 'committed suicide' by stabbing himself several times in the heart.

The Mexican judicial system does not function adequately. But it is also true that there are protections against corruption, and institutions, such as the CFJ, that should bring some order to the chaos.

What is unusual about cases like that of Gómez Martínez is not the quality of his decisions, but the CFJ's refusal to take any action against him when in most cases the appeals court drastically altered the sentences, denouncing the judge's 'ineptitude and lack of knowledge of criminal law'.

The rule of *plomo o plata* continues to taint the justice system. Some traffickers have been detained for years without receiving a firm sentence, exploiting the deficiencies of the justice system with the sole objective of avoiding deportation to the United States where they would face more serious charges.

C. Trinidad and Tobago : Tolerance of Corruption[16]

The belief that corruption has become the norm prepares the ground for social tolerance of it. The level of tolerance is one of the most powerful forces preventing or abetting corruption. Where tolerance is high, even a case where an abuse of office has become public knowledge need not result in communal condemnation and exclusion. Values such as family ties, friendship or the social need to keep in touch are considered more important than the moral impulse to distance oneself from a corrupt person. Only in a climate of extreme social tolerance is it possible to pervert the course of justice as openly as described in 'Mexico: the traffickers' judges'.

It is often the case that holding a particular political view or belonging to a particular ethnic group can be seen as a bigger problem than dishonesty in a corruption-tolerant society. This point was illustrated by the case of Satnarine Sharma, chief justice of Trinidad and Tobago. In July 2006 Sharma was arrested (although

[16] Transparency International, Global Corruption Report 2007, Marina Kurkchiyan, Judicial corruption in the context of culture, p.105, Cambridge University Press.

the arrest was later stayed on technical grounds) for attempting to help a former prime minister who had been tried for corruption. He was also charged with interfering with the course of justice by trying to stop the prosecution of his family doctor, who had been accused of murder two years previously. These were not trivial allegations, but in the view of the Trinidad and Tobago public they mattered less than the political and ethnic divisions in the country. Among the Indo-Trinidadian population to which Sharma belongs, he continued to enjoy support.

D. China: The Wuhan Affair[17]

In response to demands for a more fair and effective judiciary, the Supreme People's Court (SPC) issued a code of ethics in 2003 setting down 13 rules strictly prohibiting certain corrupt behaviour. That same year the National People's Congress joined the anti-corruption fight by embracing open trials, the separation of trials from enforcement and monitoring, evaluation of judges, and amendments to the criminal code that laid down a 10-year prison term for abuse of judicial power. Since then, thousands of judges and other court staff have been arraigned or prosecuted for corruption. For example, in 2004 the procuratorates opened 9,476 investigations into law enforcement personnel and judicial staff, almost 67 times the number in the early 1990s. This number is very small in comparison to the number of judges and judicial personnel in China, however. A review of the World Bank's annual World Business Survey indicates that overall corruption in China appears to be less than in other developing countries with similar per capita income.

From the late 1990s to 2006, senior officials investigated for corruption included the former chief procurator of Shenyang municipal procurator's office, the former vice-procurator of Jiangsu province, the former presidents of the high courts in Liaoning, Guangdong and Hunan provinces, and the former director general of Jiangsu province's anti-corruption bureau. The number of high-level judges charged and convicted of corruption in China can probably be explained, in part, by the fact that it is easier and less costly to bribe one senior judge than all the members of the court's adjudication committee.

The most revealing case in China's anti-corruption campaign is the Wuhan court affair. In Wuhan, Hubei province, 91 judges were charged with corruption, including a vice-president of the high court, two presidents of the intermediate courts and two presidents of the basic courts. The ringleaders, two former Wuhan intermediate court vice-presidents, were ultimately convicted of corruption and sentenced to six and a half and 13 years in prison, respectively. Ten judges under their supervision were also sent to jail and a 13-member group was found to have pocketed almost 4 million yuan (approximately US $510,000). The investigation implicated more than 100 other judges and court officials, who were disciplined or reassigned to other courts. Finally, 44 lawyers were investigated and 13 were charged with bribery.

The significance of the Wuhan affair is threefold. First, it signalled that senior officials were committed to rooting out judicial corruption. Secondly, it provided the impetus for more, not less, judicial reform. Thirdly, and for the first time, it revealed a ring of corrupt judicial and law enforcement networks running a system of bribery at all levels. By the end of the investigation in 2004, 794 judges in China had been disciplined for irregularities (though only 52 were investigated for serious crimes). China's Chief Justice Xiao Yang has reported that the number of corrupt judges and court officials had fallen steadily from 6.7 per 1,000 in 1998 to 2 per 1,000 in 2002, although this is difficult to verify independently.

In 2006, Chief Justice Xiao and Minister of Justice Zhang Fusen announced a crackdown on the relationship between judges and lawyers following a 2004 ruling by the SPC to regulate control between them. Zhang said that some of China's 100,000 lawyers depended on bribes to win lawsuits and that the income gap between judges and lawyers made this type of corruption more likely. He urged courts to improve judges' working and living conditions so they could better resist the lure of private interests. Rules governing 'justifiable relationships between judges and lawyers' were announced, and lawyers' associations and the public were asked to report any improper behaviour.

E. Croatia: Still In Transition[18]

In September 2006 the Office for Corruption and Organised Crime (USKOK) filed charges of bribe taking,

[17] Transparency International, Global Corruption Report 2007, Keith Henderson, The rule of law and judicial corruption in China; half-way over the Great Wall, p.155, Cambridge University Press.

[18] Transparency International, Global Corruption Report 2007, TI Croatia, Croatia: still in transition, p.195, Cambridge University Press.

fraud and abuse of office against Zvonimir Josipovic, a former president and judge of the municipal court of Gvozd. He was indicted for exacting bribes worth up to US$4,000 from litigants to 'speed up' court processes. An investigation into his affairs began in 2005 when his assets were found to amount to HRK1.4 million (US $240,000).

Judge Juraj Boljkovac was sentenced to three and a half years in prison for taking a € 15,000 bribe to arrange the release of a person in custody. The case against Boljkovac began in June 2002 and lasted more than three years. According to the state judicial council (SJC), the body that appoints and supervises judges, five other members of the judiciary were under investigation for corruption in mid-2006

A number of recent allegations involve bankruptcy proceedings. In February 2006 the state attorney's office accused several judges in the high commercial court in Zagreb of embezzlement, but the indictments were quashed after the SJC rejected a request to lift their immunity. As the scandal unfolded newspapers reported on unusual decisions by the high commercial court, such as a decision to borrow money from companies involved in bankruptcy proceedings. In the case of the Zagreb-based company Derma, the company lent K3.5 million (US $600,000) to the high commercial court for the renovation of the court house, even as it was fighting bankruptcy proceedings. When the proceedings, which began in 1992, were finally resolved in 2001, the court's debt was mysteriously written off.8 Other allegations involving bankruptcy include suspected collusion between judges and administrators at the expense of creditors and debtors.

F. Ghana[19]

A clear illustration of the difficulties of identifying the sources of corruption can be seen in the case of Justice Anthony Abada. He was accused of bribery in February 2004, but not prosecuted. Instead it was found that Jarfro Larkai, a man he knew, had purported to represent the judge when he informed the litigant's lawyer that the judge would be 'soft' on sentencing if he received a bribe of C5 million (US $560,000), and offered to act as the middleman. Police investigations found that Justice Abada knew nothing of this and did not receive any money, while Larkai was charged with accepting a bribe to influence a public officer.

Other cases are more clear-cut. For example two high court judges, Boateng and Owusu, and a court registrar were arrested for stealing money from an escrow account held on behalf of litigants over a piece of land. The two judges are alleged to have connived with the registrar to withdraw the interest on the money for personal use. A disciplinary committee of the judicial council set up to investigate the matter found that there was a prima facie case of theft and referred the matter to the attorney general for criminal prosecution. The director of public prosecutions duly brought charges against the three men in an Accra high court.

G. Israel[20]

It is difficult to find evidence of corruption to alter judicial decisions, but critics point to a number of practices that amount to abuse of entrusted power for personal gain. Nepotism is one charge, with critics pointing to the practice by some judges of nominating their colleagues' offspring as assistants; family ties between high court judges and advocates; married couples working in the courts system; and members of government legal councils who have relatives at the bar.

Other allegations relate to misconduct. In August 2005 the disciplinary tribunal of judges convicted magistrate Hila Cohen of falsifying the minutes of court sessions and destroying court documents. Two of the three Supreme Court justices sitting on the case settled for a reprimand, rather than dismissal. Cohen received enormous public criticism after defying a recommendation by Chief Justice Aharon Barak that she resign. In December 2005 the judges' selection committee voted unanimously to dismiss her.

Also in August 2005 the attorney general decided to bring to trial Judge Osnat Alon-Laufer, who confessed to hiring a private investigator to check on her husband's fidelity. Alon-Laufer was subsequently charged with using illegal telephone-record printouts. Alon-Laufer may have broken the law, but there was no evidence that

[19] Transparency International, Global Corruption Report 2007, Dominic Ayine, Mechthild Ruenger and Daniel Badidam, Computerized courts reduce delays in Ghana, p.209, Cambridge University Press.

[20] Transparency International, Global Corruption Report 2007, Doron Navot, Israel's Supreme Court: still making up its own mind, p.219, Cambridge University Press.

she abused entrusted power to acquire the printouts. Nevertheless, the incidents jeopardized trust in the court system, and judges agreed that the judiciary needed more regulation if it were to maintain public confidence.

The Supreme Court responded in late 2004 with an ethical code for judges. As the Chief Justice explained, the rules of behaviour in the past had been conventional wisdom, common sense, tradition and experience, and were neither formal nor written. The time had come, he said, to write down those conventions and create a binding code of ethics.

On 24 November 2005, the Supreme Court announced the introduction of a more robust policy for disqualifying judges from hearing a case, specifically when one of the parties is represented by a law firm with which the judge has had a close relationship. The case that drove the decision was a dispute between Slomo Narkis and Isaiah Waldhorn over a debt of more than US $500,000 that the district court ordered the latter to pay. The court delayed implementation of its decision, however, and Narkis appealed. In June 2005 Waldhorn requested that the court ruling be thrown out on grounds of partiality. Waldhorn's attorney claimed that Judge Sara Dotan displayed bias when she had said in a previous discussion that the debt was not controversial (suggesting the judge had already accepted Narkis' side of the story). Waldhorn further claimed that there was a substantive kinship relationship between Dotan and Narkis' attorney, Ishai Bet-On; Bet-On had represented Dotan's son in various cases.

The Supreme Court ruled that substantive grounds for a conflict of interests had been sufficient for disqualification. Although Bet-On did not appear in court, his involvement in the case was crucial. He had represented Narkis in the procedures that led to the appeal, and would have to evaluate an appeal written by Bet-On. As senior partner in the law firm representing Narkis, Bet-On also had an interest in professional fees of more than US $100,000. Under those circumstances the Supreme Court determined there was a substantive apprehension for partiality and disqualified Judge Dotan. The Supreme Court stressed that the decision did not reflect on the judge's partiality, but that the substantive conflict of interest was enough for her to be disqualified.

H. Kenya[21]

The National Rainbow Coalition(NARC) led by President Mwai Kibaki, came to power in 2002 when the judiciary was afflicted by corruption and executive interference. Kenya needed judicial reform as part of a wider process of strengthening democracy and the government won office on the strength of promises made to that end. There were discernible gaps between rhetoric and the implementation of policy, however. Although the public generally views the judiciary as less corrupt than it was, many in the legal fraternity believe that corruption is still a problem.

The NARC initiated a reform programme, known as 'radical surgery', which saw the removal of former chief justice Bernard Chunga, and the suspension of 23 judges and 82 magistrates on grounds of corruption. The move won immediate public approval and was hailed as evidence of a commitment to tackle corruption in the judiciary.

In February 2003, President Kibaki appointed a tribunal to investigate Chief Justice Bernard Chunga on charges of corruption. Chunga resigned and the president appointed Evans Gicheru to replace him. The following month the new Chief Justice launched a committee with a mandate to address administrative problems within the judiciary, at the same time appointing a sub-committee, headed by Justice Aaron Ringera, which was instructed to investigate and report on the magnitude of corruption; consider the causes of corruption in the judiciary; consider strategies to detect and prevent corruption; and propose disciplinary action.

The committee's findings, known as the Ringera report, implicated five of the nine court of appeal justices, 18 of 36 high court judges and 82 of 254 magistrates in corrupt activities. Many of the judges and magistrates resigned or 'retired'. For the rest, President Kibaki appointed two tribunals, one for the high court and the other for court of appeal, to investigate allegations against them.

[21] Transparency International, Global Corruption Report 2007, TI Kenya, 'Radical surgery' in Kenya's judiciary, p.221, Cambridge University Press.

The government has been criticized for the way the tribunal mechanism was implemented, in particular having single tribunals investigating multiple judges, and allowing for the department of public prosecutions, a key player in the executive, to play a substantial role in the tribunals, considering they were intended to be a 'peer-review exercise'.

I. Republic of Korea

In Republic of Korea, There were three major corruption cases where judges, public prosecutors and law enforcement officials were convicted or disciplined.

1. Uijongbu Corruption Scandal

Mr. Lee, a lawyer had worked as a judge for several years and resigned in 1996 when he worked at the Uijongbu District court. After the resignation, he started new career as a lawyer in the Uijongbu area. He took almost all of criminal cases in that area and numerous complaints was applied to the Uijongbu Public Prosecutors Office that he might grant commissions to the middlemen - such as policemen, and general staffs in public prosecutors office and court - to take the criminal cases.

In 1997, one public prosecutor at the Uijongbu Public Prosecutors Office started to investigate the connection between the lawyer and the middlemen and prove that about 30 policemen, general staffs in public prosecutors office and court got commissions from the lawyer. In 1998, They are all prosecuted and convicted of corruption. The lawyer was prosecuted with granting commission to the middlemen to take the criminal cases and sentenced to eight months' imprisonment.

The prosecutor didn't stop the investigation at that stage. He continued to investigate against the lawyer's bank account and trace the money flow. Finally, he got evidence that the money at the lawyer's account was flowed to 14 present judges.

After it was revealed to the media, the Prosecutor-General announced that the Prosecutors Office would not investigate or prosecute the corrupt judges any more but would inform the Supreme Court for the commencement of the discipline procedures.

After completing the discipline procedures, the Supreme Court has relocated all of the judges at Uijongbu District court, regardless of their involvement or not, to the country side as a form of reprimand and some of the judges had to submit their resignations.

This is the case to show the deep-rooted problems in the judiciary of Korea, so called 'favorable treatment to the former judges'.

2. Taejon Corruption Scandal

There was similar scandal involved in the former public prosecutor. Another lawyer Mr. Lee started his new career in the Taejon area after he retired from the duties of a senior prosecutor at the Taejon District Public Prosecutors' Office.

In 1999, the lawyer's staff revealed to the press a note with records that the lawyer had granted commissions to the over 200 middlemen to take criminal cases. The special investigation team was formed and started the investigation.

The team proved that 25 public prosecutors and five judges got the money from the lawyer. Six of the 25 public prosecutors had to leave their office, seven of the 25 public prosecutors got disciplined and the rest were admonished. The judges were also disciplined.

3. Broker Kim Hong-soo Scandal

This is the most astonishing and shocking corruption scandal in Korea. For the first time in the history of Korea, Mr. Cho, the high-level judge of Soeul High Court, Mr. Kim, the public prosecutor of Seoul Central District Public Prosecutors' Office and Mr. Min, the the present senior Seoul police officer were arrested, prosecuted in detention and convicted of corruption.

Kim Hong-soo was one of the most famous middlemen who insisted to the people involved in criminal cases that he knew well the judge, public prosecutor and police officer in charge of the their cases and could help them to get favourable decisions. Many people believed in him and gave money to him asking for his assistance.

In 2006, After Kim Hong-soo was arrested and in detention, the public prosecutors expanded investigation to the judges, the public prosecutors and the police officers suspicious to get bribes from Kim Hong-soo. At last, they succeeded in proving that the three persons mentioned above got bribes from Kim Hong-soo.

Mr Cho influenced verdicts in up to six cases after receiving over US$60,000 in cash and US$70,000 worth of luxury carpets and household furnishings between October 2001 and April 2005. Mr. Kim received US$10,000 for stopping an internal probe by prosecutors. Mr. Min received US$30,000 for the launching of an investigation at the broker's request

Other 12 judges, public prosecutors and police official were convicted or disciplined relating to this scandal.

IV. CAUSES AND CONSEQUENCES OF JUDICIAL CORRUPTION

A. Causes of Judicial Corruption[22]

The few studies conducted suggest that the causes for judicial corruption vary significantly from state to state. Some of the possible causes are low remuneration, a high concentration of jurisdictional and administrative roles in the hand of judges, combined with far-reaching discretional powers and weak monitoring of the execution of those powers. This does not only generate extensive possibilities for the abuse of power but it also creates an environment where whistle blowing becomes more unlikely because of the extensive powers of individual holding these powers.

Such a situation is often worsened by a lack of transparency due to defective information collection and information sharing systems, in particular the absence of a comprehensive and regularly updated database jurisprudence. This leads easily to inconsistencies in the application of the law and makes it impossible to track those decisions, which might have been motivated by corruption. Not surprisingly, the lack of computer systems is one of the main causes for inconsistencies, according to Latin American lawyers and judges. It should be noted that inconsistencies in this context might not only arise with regard to the substance of court decisions but also with respect to court delays. The cause in this context is the lack of time standards and their close monitoring.

B. Indicators of Judicial Corruption[23]

Indicators of corruption, as perceived by the public, include: delay in the execution of court orders; unjustifiable issuance of summons and granting of bails; prisoners not being brought to court; lack of public access to records of court proceedings; disappearance of files; unusual variations in sentencing; delays in delivery of judgments; high acquittal rates; conflict of interest; prejudices for or against a party witness, or lawyer (individually or as member of a particular group); prolonged service in a particular judicial station; high rates of decisions in favour of the executive; appointments perceived as resulting from political patronage; preferential or hostile treatment by the executive or legislature; frequent socializing with particular members of the legal profession, executive or legislature (with litigants or potential litigants); and postretirement placements.

C. Factors that Contribute to the Judicial Corruption[24]

What follows are seven factors that contribute to judicial corruption and that can be remedied regardless of the type of legal system that exists.

1. Undue Influence by the Executive and Legislative Branches

Despite constitutional guarantees of equality between the three government branches (the legislature,

[22] Petter Langseth and Edgardo Buscaglia, Judicial Integrity and its Capacity to Enhance the Public Interest, p.5, UNODC.
[23] Petter Langseth and Oliver Stolpe, Strengthening Judicial Integrity Against Corruption, p.6, UNODC.
[24] Transparency International, Global Corruption Report 2007, Mary Noel Pepys, Corruption within the judiciary: causes and remedies, p.4, Cambridge University Press.

which makes the laws; the executive agencies, which administer the laws and manage the business of government; and the judiciary, which resolves disputes and applies the law), the executive and legislature have significant control over the judiciary in many countries. Where the rule of law has been historically weak, the judiciary is frequently viewed as an acquiescent branch of government. Judges in weak judiciaries are deferential to politically connected individuals in the executive and legislative branches.

Often the president of the country or a politically motivated body (such as the Ministry of Justice or Parliament) has the power to appoint and promote judges without the restraints of transparent and objective selection procedures, or eligibility requirements may be vague, allowing for arbitrary compliance. Unless compelled by law, officials in the executive and legislative branches are averse to relinquishing their influence over the judiciary. This was true in Thailand where the judiciary was a part of the Ministry of Justice until 1997 when the courts became independent and subject to the control of the Supreme Court.

Once appointed, judges may feel compelled to respond positively to the demands of the powerful in order to maintain their own status. Rather than act as a check on government in protecting civil liberties and human rights, judges in corrupt judiciaries often promote state interests over the rights of the individual. In many countries, the president has the power to reward judges who abide by his wishes with modern office equipment, higher quality housing and newer cars.

2. Social Tolerance of Corruption

In many countries social interactions are governed less by law than customary or familial codes of conduct. To regard as corrupt judges who support the interests of their relatives overlooks the notion that it may be more dishonourable for a judge to ignore the wishes of a family member than to abide strictly by the law. Nor is the rule of law as important in such countries as individual relationships. Government decisions may be based more on personal influence than merit. The strength of personal relationships is so great in some countries that all judicial decisions are suspected of being a product of influence.

In some countries, paying a bribe is considered an essential prerequisite for judicial services and, indeed, the only avenue for accomplishing results. In Kenya, the saying 'Why hire a lawyer, if you can buy a judge?' is common. In countries where court processes are laborious, court users prefer to pay bribes as a cheaper means of receiving quicker service. Court staff also demand bribes for services to which citizens are legally entitled. In some countries, the payment of fees for judicial services is so engrained that complaints arise not if a bribe is sought, but if Comparative analysis of judicial corruption the requested bribe is greater than.

3. Fear of Retribution

One influence that can lead judges to make decisions based on factors other than the facts and applicable law is fear of retribution by political leaders, appellate judges, powerful individuals, the public and the media.

Rather than risk disciplinary action, demotion or transfer, judges will apply a politically acceptable decision. It is interesting to note that recently in Egypt two senior judges, under the threat of disciplinary action, publicly determined that the 2005 multi-party election results were manipulated.

Death threats and other threats of harm against judges are powerful incentives to sidestepping the law in deciding the outcome of a case. Fear for one's safety, as with Kosovar judges immediately after the Kosovo war, caused many to rule in favour of Kosovar defendants even though the law supported the Serb plaintiffs. While international judges in Kosovo worked under UN protection, Kosovar judges had no such insurance.

In some countries, including Bulgaria, judges who correctly apply the law in controversial criminal cases can be vilified by the press even though the evidence failed to justify a conviction. Fearful of applying the correct, but unpopular, decision, inexperienced or insecure judges will modify their judgment in order to avoid public scorn. A member of a special court appointed to investigate Italian football managers and referees involved in rigging top league matches openly told a newspaper that its decision had taken into account Italy's victory in the 2006 World Cup, a spate of popular demonstrations and the support of some mayors of the cities whose teams were most implicated.

4. Low Judicial and Court Staff Salaries

Judicial salaries that are too low to attract qualified legal personnel or retain them, and that do not enable

judges and court staff to support their families in a secure environment, prompt judges and court staff to supplement their incomes with bribes.

Although judges' salaries are not as attractive as those of legal professionals in the private sector, the security of the judicial position and the respect afforded to the profession should compensate for loss of earnings. In relation to other government employees judges should receive among the highest salaries. While the salary of a federal judge of a district court in the United States is not commensurate with what a judge might have earned in private practice, it is higher than most government employees and the prestige of the post makes it a sought-after position. The salary differential between different branches of government can be galling in some countries. Not so long ago, police in Uzbekistan received higher salaries than judges.

In addition to low salaries, judges often assume their positions with a significant financial burden. Judgeships in some countries are for sale and the cost can be many times the official annual salary of a judge. Judges who purchased their position have to recoup their investment by seeking bribes. Some Azerbaijani judges reportedly tolerate their court staff demanding bribes as they recognize that illicit payments are the only way they can achieve a moderate standard of living.

Countries such as Ecuador, Georgia, Nigeria and Peru have significantly raised judicial salaries in recent years in a bid to reduce the incentives for corruption. It is difficult to prove that an increase in salary is a causal factor in reducing corruption. Even where incidents of illicit payments to judges have clearly been reduced, the public continues to believe that corruption persists at the same level. In Georgia, judges' salaries have increased by as much as 400 percent in the past two years, but perceptions of judicial corruption remain high and the prevailing view is that the nature of corruption has simply changed. Instead of selling decisions for bribes, judges are now perceived as succumbing to executive pressure. At the least, a respectable salary for judges and court staff enhances the public perception of the judiciary as an equal branch of government.

5. Poor Training and Lack of Rewards for Ethical Behaviour

In some countries, judges who make decisions based solely on the facts and applicable law have no assurance they will receive a positive evaluation. Ethical behaviour is punished, rather than rewarded. In corrupt judiciaries, judges who make correct decisions can see their judgments routinely overturned by corrupt appellate judges, thereby giving the impression that the lower court judge is incompetent.

Court presidents, who have the power to assign cases, can punish an ethical judge by assigning a disproportionately heavy caseload, causing a major case delay that can be grounds for reprimand. In Sri Lanka, judges who have the courage to rule against the government's interests are allegedly ignored by the Chief Justice who has broad discretion concerning the composition of Supreme Court panels. Those judges who are resolute in their independence can be the subject of bogus charges or can face early retirement.

6. Collusion among Judges

In countries where judicial corruption is rife, judges conspire to support judicial decisions from which they will personally benefit. In Zimbabwe the government allocated farms expropriated under the fast-track land reform programme to judges at all levels, from lower court magistrates to the Chief Justice, to ensure that court decisions favour political interests. In a criminal case where the stakes are high, judges from the first instance court to the highest appellate court will collude to exonerate the guilty or reduce the defendant's sentence in return for a payoff.

7. Inadequately monitored Administrative Court Procedures

Where procedural codes are ambiguous, perplexing or frequently amended, as in transitional countries, judges and court staff can exploit the confusion. Without modern office systems and computerized case processing, detection of the inappropriate use of case documents and files is difficult. Poorly trained and low paid court staff are enticed to use their discretionary powers to engage in administrative corruption since there is little accountability for their decisions. In Guatemala, for example, the disappearance of case files is a common source of extortion.

D. Consequences of Judicial Corruption[25]

Judicial corruption undermines citizens' morale, violates their human rights, harms their job prospects and national development and depletes the quality of governance.

It erodes the ability of the international community to tackle transnational crime and terrorism; it diminishes trade, economic growth and human development; and, most importantly, it denies citizens impartial settlement of disputes with neighbours or the authorities. When the latter occurs, corrupt judiciaries fracture and divide communities by keeping alive the sense of injury created by unjust treatment and mediation. Judicial systems debased by bribery undermine confidence in governance by facilitating corruption across all sectors of government, starting at the helm of power. In so doing they send a blunt message to the people: in this country corruption is tolerated.

V. UNITED NATIONS ANTI-CORRUPTION ACTIVITIES AND MEASURES

A. UN Conventions & Standards and Norms

As reviewed above, the UNODC has developed and distributed UN convention against Corruption and the Standards and Norms.

B. General Activities to curb Corruption[26]

1. Technical Assistance

Projects undertaken in the framework of the Global Programme against Corruption have a specific global logic, leading to the identification of good practices and the production of materials that are not only relevant to one specific country or limited geographic context, but are able to inform policymaking and strategic planning worldwide. The Global Programme functions as a focal point for the UNODC field office network in the development and implementation of anti-corruption projects designed to support Member States build local capacities in the long run.

2. Policy Development and Research

Through the Global Programme against Corruption, UNODC contributes to programmes and projects that identify, disseminate and apply good practices in preventing and controlling corruption. It has also produced several technical and policy guidelines, including the Anti-Corruption ToolKit. The Global Programme has facilitated the production of assessment publications based on information collected during country missions.

Both through the International Group for Anti-Corruption Coordination and bilateral relations, UNODC engages with other agencies in its anti-corruption work. For example, the UNODC Anti-Corruption Unit is working with the United Nations Industrial Development Organization on the development and implementation of measures and tools to assist small and medium-size enterprises in protecting themselves against corruption.

Finally, the Anti-Corruption Unit has partnered with the United Nations Interregional Crime and Justice Research Institute on a project for the development of a guide on best practices and the creation of an electronic library for the implementation of the United Nations Convention against Corruption. The Anti-Corruption Unit continues its efforts to coordinate and facilitate the development of benchmarks, methodologies and approaches for a global assessment of corruption, as well as anti-corruption efforts.

3. Awareness-raising and Outreach

Public awareness materials are produced that can be used globally in anti-corruption campaigns by UNODC field offices, Governments, non-governmental organizations and other civil society organizations. Special attention is paid to corruption-related issues on 9 December, every year, on the occasion of the International Day against Corruption to raise awareness about the problem of corruption.

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[25] Transparency International, Global Corruption Report 2007, Executive Summary: Key Judicial Corruption Problems, p.xxi, Cambridge University Press.

[26] http://www.unodc.org/unodc/en/corruption/index.html

C. Strengthening the Integrity of the Judiciary[27]

To confront widespread corruption in the courts in many parts of the world, the UN is taking a variety of approaches. It is examining judicial corruption in detail and seeking to identify means of addressing it, in higher and lower levels of court systems.

The objectives of strengthening judicial integrity are to: (1) Formulate the concept of judicial integrity and devise the methodology for introducing that concept without compromising the principle of judicial independence; (2) Facilitate a safe and productive learning environment for reform minded chief justices around the world; (3) Raise awareness regarding judicial integrity and to develop, guide, and monitor technical assistance projects aimed at strengthening judicial integrity and capacity.

UNODC has provided support in strengthening judicial integrity and capacity to Nigeria, South Africa, Indonesia, Mozambique and Iran, cooperating with a variety of partners including UNDP, GTZ, DFID, and USAID. Further projects are planned for Montenegro and Kenya.

UNODC especially developed the 'Judicial Ethics Training Manual for the Nigerian Judiciary' and conducted the training for the Nigerian judges.[28] This course is intended not to "teach" judicial ethics but to create a forum for judges to consider a variety of ethical problems and to discuss appropriate responses. It is intended to be participatory: the judges are expected to participate actively, with the course presenter assuming the role principally of a facilitator. The purpose of the course is to provide the judges with a framework for analysing and resolving ethical issues that may arise in the future. The "teaching" element in respect of the content of judicial ethics is intended only to assist a judge to choose the most prudent course of action when faced with an ethical issue.

D. Developing of a Computer-Based Training Tools

A project proposal for the "Development of a Computer-Based Training (CBT) To Promote Judicial Ethics in Arabic-Speaking Countries" is submitted for further action.

The project on promoting judicial integrity takes into account several problems encountered in this field in Arabic-speaking countries. It aims thus at providing a quality training to judges and prosecutors to raise awareness in this field and to increase knowledge on professional ethics. It is being implemented in established training centres and can train a large number of judges and prosecutors at the same time and allows students to become an active part of a multimode training program with life voice commentators which provide feedback on answers.

The CBT aims at fostering the Bangalore Principles through numerous training sessions. Students are confronted with problematic issues of ethical relevance in everyday life situations. The training is supposed to raise awareness und illustrate inappropriate behaviour and test the student's understanding. The CBT is based on the Commentary of the Bangalore Principles and the training manual of these. It is targeted to judges already in office and those starting soon office work, and help them promote integrity within courts, among court staff and giving them the capacity to evaluate their own behaviour.

The project is targeted towards countries in the Middle East and thus is produced primarily in Arabic at the moment. In order to design this CBT a training needs analysis of the judicial situation of these countries has to be carried out. With the help of judicial experts a script needs to be written for the computer program and video-scenes showing inappropriate judicial behaviour designed by a multimedia company.

The content of the CBT will focus basically on three core parts: (1) Awareness rising through Video Clips; (2) Identification of Inappropriate Behaviour; (3) Testing the Participants' Understanding

After the composition and development of this CBT it will be disseminated at selected jurisdictions. After an evaluation of the UNODC and UNDP it is possible to expand this project to other areas, and translate it into other languages.

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[27] http://www.unodc.org/unodc/en/corruption/judiciary.html

[28] You can find materials, including the Judicial Ethics Training Manual for the Nigerian Judiciary, related to judicial integrity at the following website: http://www.unodc.org/unodc/en/corruption/publications.html

E. The International Anti-Corruption Academy[29]

1. Proposal

INTERPOL, the UNODC and the Republic of Austria agreed in 2007 to create a global anti-corruption academy to transfer knowledge and skills to those engaged in the prevention, detection and prosecution of corruption, and to provide technical assistance to enhance transparency and for the implementation of the UN's Convention against Corruption. INTERPOL, as the implementing agency and the coordinator of the project, is leading the transition period until the International Anti-Corruption Academy (IACA) is established as an internationally recognized institution. The Republic of Austria has agreed to provide a state-of-the-art facility for the IACA campus on the outskirts of Vienna in the village of Laxenburg. The Academy will open its doors in fall 2010.

The principal goals of the IACA are (a) to professionalize anti-corruption work and exchange practices and standards in jurisdictions globally; and (b) to improve the efficiency and efficacy of all agencies, entities or individuals throughout the world whose primary function is to prevent, detect or prosecute corruption. In the longer term, the partners will support an expansion of the IACA to include regional academies, and to establish cooperation with existing training centres in Asia and the Pacific, the Americas and Africa, to take into account linguistic, cultural and regional differences, and to reduce costs to students and faculties.

2. Curriculum

The curriculum will be a mixture of longer-term courses on corruption and ethics, shorter "module" courses that address specific needs and skills, and case studies. The courses are targeted at both the public and private sectors.

In addition to traditional course-work, the IACA will offer case-studies in a seminar setting. Students, together with teachers and facilitators, will become authors and editors of an electronic "tool box" that may be of use to those who seek assistance in combating corruption. The Academy will also provide shorter training of varying formats all through the year.

3. Faculty

The IACA intends to have full-time faculty, and to rely upon part-time faculty drawn from police organizations, governments, NGOs, educational institutions and the private sector. The full-time faculty will teach longer-term anti-corruption and ethics courses. The part-time faculty will assist in teaching "module" courses, skills courses and case studies.

4. Students

The students will come from police organizations, governments seeking to implement the UNCAC and other anti-corruption standards, NGOs seeking to enhance transparency and from the private companies needing assistance in the development of compliance programmes. It will also offer programmes to degree-seeking students from academic institutions.

The curriculum will be flexible enough for students to balance their professional obligations with learning. Therefore, students may select modules based on their schedules and the needs of their organizations.

VI. CONCLUSION[30]

I would like to conclude by addressing lessons learnt from supporting judicial reform efforts with a particular focus on strengthening judicial integrity. First and foremost, addressing corruption in isolation is unlikely to yield good results. Corruption is the result of overall weaknesses in the governance system and as such needs to be tackled through a holistic approach.

It is common knowledge that any reform effort will require leadership at the top. This is even more true so for the fight against corruption. However, it has become quite evident that leadership at the top is not

[29] For more information, please see http://www.interpol.int/Public/Corruption/Academy/default.asp

[30] UNAFEI, the Office of the Attorney General of Thailand, and the UNODC Regional Centre for East Asia and the Pacific, First Regional Seminar on Good Governance for Southeast Asian Countries, Corruption Control in the Judiciary and Prosecutorial Authorities, Oliver Stolpe, Strengthening Judicial Integrity and Capacity – Successes and Lessons Learned, p.164.

enough. In particular, when the leadership moves on to address new challenges, sustainability becomes problematic when the leadership at the top did not allow by time for leadership at all hierarchical levels to emerge and take ownership of the reform process.

As mentioned earlier, judiciaries are typically small institutions with very little capacities to manage and monitor the implementation of reforms. It is therefore necessary that technical assistance pays particular attention to the identification and strengthening of an organizational unit within the judiciary to carry forward the reform efforts.

Moreover, judiciaries are typically under funded and, unlike institutions of the executive arm, have little or no influence over their resource allocations. Projects and programmes aimed to assist judicial reform need to take this into account, and ensure the active involvement in and support of the legislature and the executive.

In order to ensure that judges of all levels fully embrace measures to enhance accountability, oversight and integrity in the judiciary there is a need to review remuneration and working conditions. If these are not conducive some judicial officers may consider the adherence to standards of professional ethics and conduct impossible and therefore improper.

Another important lesson is that, contrary to the concerns voiced by some judges, it was possible to enhance accountability without jeopardizing judicial independence. As matter of fact it turned out that, if carefully designed, measures aimed to increase accountability of judges, at the same time can strengthen judicial independence.

Overall it can be concluded that low-cost reforms can have a significant impact on the overall performance of and trust in the judiciary, if measures to enhance integrity of the judiciary are carefully balanced with measures aimed to increase the capacity of the judiciary.

ETHICS, DEONTOLOGY, DISCIPLINE OF JUDGES AND PROSECUTORS IN FRANCE

*Eric J. Maitrepierre**

I. INTRODUCTION: ETHICS, DEONTOLOGY, DISCIPLINE: THREE DIFFERENT WORDS, THREE CONCEPTS

The questions of ethics, deontology and discipline are at the core of the contemporary reflection on the role of justice. Justice only exists by the intervention of men and women who make it. There is not a country in world which does not wonder how to make its judiciary really independent, how to make its judges and prosecutors more just and more impartial and how to strengthen their integrity. It is often a political and very significant question, and a question of balance of power between the executive and the judiciary. That is the case in Canada or in South Africa, in France or in Brazil, in Italy or in Cambodia: the reflection is ongoing and must lead to new rules which meet citizens' needs and democratic requirements. The goal is simple: increased confidence in justice, in prosecutors and in judges.

Whatever the topic, it is always necessary to start by giving a direction to the words. We never should forget the etymology of the words.

Ethics comes from the Greek word *ta éthé* that means manners or habit. The latin word (*more*s), means habit, has the same signification. It underlines the idea of "ways of acting given by the use".

1. *Mores* will be translated in French as "morale" and in English as "moral".

2. Deontology standards are different from the statutory and disciplinary rules.

3. Ethics means an intention to make well, with the aim of the common good in the exercise of a task.

4. Deontology states the explicit principles which guide this intention, in facts.

5. Discipline is the sanction of the faults made when acting.

6. Ethics relates to the training of a behaviour.

7. Discipline sanctions bad acting. Discipline sanctions immediately or quite immediately a kind of "badly making" but Ethics characterizes the idea of "to make well". Ethics is a process.

8. Ethics serves the objectives of global improvement.

9. Discipline is restricted to intervene a *posteriori* and punctually.

All the difficulty is concentrated on the ambiguous position of deontology, which can have two very different directions according to whether it is associated with discipline or is directed by ethics. In the first case, what is important is the will to make an instrument of control of an a *posteriori* individual behaviour. It is the penal model of the infringement and the penalty which plays again, if I may say, on the disciplinary field.

But, close to ethics, deontology standards become a source of help for a decision-maker exposed to the risks. Together, ethics and deontology create a model of desirable behaviour. Deontology is not restricted

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anymore to underline behaviour in a polarity fault/sanction, but becomes a reference to values. Trying to solve this question supposes as a precondition a democratic will: to recognize an effective independence of Justice that authorizes to assign duties to it. An assumed responsibility makes independence credible. Without this preoccupation of a balance, deontology becomes a pure instrument of control.

Nowadays, be a judge is to be visible. No state can hide the courts. The function of judging open is to civil society which expresses the need for justice but which wants, the other hand, to have a right to see and to criticize. Formerly founded on silence and discretion, confidence in justice finds today its justification in the transparency of the revealed faults and the reality of the sanctions which are inflicted on prosecutors or judges who do not act properly.

One cannot be satisfied with an exclusively disciplinary responsibility *a posteriori* where the power of the judge does not cease growing. The ethical approach implies a widened responsibility. Beside a more transparent system of sanctions, ethics has its own dimension which concerns the standards in a situation. The individual virtues (fidelity, prudence, honour) are found to apply either only to one individual action or to the service of an institution.

Deontology is the science of professional duties. Is this moral or is this right? That is the question. The word and the concept were invented by Jeremy Bentham (1748-1832), an English philosopher, representing the "utilitarian" current in philosophy. The essence of his concept is in a posthumous book, "Deontology or The Science of Morality".

The basic idea of Bentham is "to emphasize the ratios which link the interest with the duty in all the events of the life". According to him, "the duty of a man could never consist in doing what it is of his interest not to make". Thus, "the task of a modern moralist is to show that an immoral act is a false calculation of the personal interest and that the vicious man makes an erroneous estimate of the pleasures and sorrows". It was Bentham who forged the neologism "Deontology".

The word "deontology" is derived from two Greek words, "*deon*" (what is suitable) and "*logos*" (knowledge), i.e. knowledge of what is right and suitable. Its conclusion is that "the base of the deontology is the principle of utility. In another word, an action is good or bad, worthy or makes indignant, deserves approval or blame, in proportion to its tendency to increase or decrease the sum of public satisfaction".

Bentham thus estimates that deontology is a utility moral which is used to limit the need for legal regulation. But the question still remains on the core nature of deontology. For some people, it is a moral which is moulted in law. For others, it is a moral sanctioned by the law.

II. AN HISTORICAL APPROACH TO PROFESSIONAL DEONTOLOGY IN FRANCE

Deontology in France "met the law" when the first Code of Ethics, for medical practitioners, was created by a regulation of 27 June 1947. What is the value of this code and those which came later on? It cannot be doubted that it is, formally, administrative regulations: a great majority of theses "codes" are decrees of the executive branch of the government. But here the State, while legislating, does nothing but sanction: it is not the State which works out. The codes are generally discussed within responsibility and leadership of the professional orders (in particular for health professionals). Generally these professional orders then propose that the government gives them consistency by lawful meaus. Moreover, for lawyers, there is a paradox: for them deontology remains essentially abstract: there is not a single word written that could be considered the beginning of a code of conduct.

Let us be clear: deontology concerns thus the capacity of reflection of the professional bodies to which it is addressed. The codes which enact it are endorsed by the government. It is thus with this distribution of tasks that the government supervises and imposes professional deontology.

Therefore, we have to return to the definition of the word: it happens quite often today that deontology not only includes what belongs to it naturally but also all the "professional duties", moral and legal. Briefly, deontology tends to be understood as additional rules that the professional must respect, whether these rules

have a moral origin or are the result of a technical regulation. This is why it is more suitable to speak about "rights and deontology" of such professions rather than simply deontology.

In addition it should not be denied that contemporary deontology tends to move away from its normal source to become legal, i.e. dependent on a process of control and sanctions. The result is, step by step, a professional regulation where the government, by simplification, through its concern to arrive at a consensus, by safety, and even by a form of demagogy, entrusts the development of deontology to professional organizations (authorities of the type of "the Higher Council", professional orders, trade unions, etc.).

At the end of the process, deontology, as it is conceived in France, is a strange mixture of "soft law" and "hard morals". In the worst of the cases, it can even be the mechanical voice of a conscientiousness having lost any reference point to the real problems of the people to which it applies. Deontology should not sink in such confusion.

Deontology can also exist outside of legal frameworks. In fact, it should be underlined that this slow conquest of deontology by the law is due to an inescapable contemporary phenomenon. In a society which is affirmed as secular, the only point of convergence ends up being the law.

The rule of law, it is a State/government which, little by little, conquers all capacities. It is the government being introduced into all the aspects of life since it replaces Providence, chance, the conscience. As opposed to what many legal authors write, the rule of law is not the deterioration of the Legal State but its absolute triumph. All becomes law, all is moulted in law. A law which, to be accepted, can take on multiple alternatives (law of the State, law of the European Union, law of the professions, etc.), which can even accept a certain control (Constitution, international treaties, etc.). But finally, that is law nevertheless: it is the drift of a civil society which tends to reduce the role of morals by transforming it into rights.

However, it is certain that if any disciplinary fault is a deontology fault, any failure with deontology does not involve a disciplinary action or an action of civil liability. The aggravated behaviour of a judge during the hearings; behaviour not confraternal of a lawyer; the lack of eagerness of a bailiff to execute an order of the court, certainly constitute deontology failures for which it is advisable to formulate adapted remedies. But these remedies will be different from those which the discipline or the civil liability applies. Comparative studies show that the various legal systems do not consider deontology and ethics in the same way.

III. REFLECTION ON ETHICS AND DEONTOLOGY OF JUDGES AND PROSECUTORS IN FRANCE

In France, the debate on deontology and responsibility of judges was renewed at the beginning of this century, in particular by the installation of a Commission on reflection on ethics in the magistracy, under the chairmanship of a member of the Constitutional Council in June 2003. Several reasons justified this revival.

It was initially a question of answering specific difficulties inherent in the democracy of opinion which is ours. Justice is made under the great expectation and requirements of citizens, the citizens of the rule of law, and especially, of the media. The media are capable of deeply emphasizing miscarriages of justice. It is likely to throw discredit upon the judicial institution and to make citizens' lose the legitimate confidence that they should have in the judicial system. The answer of the judges and prosecutors thus passes by a reflection publicly shown and constructive on their own deontology.

It was then a question of reinforcing the public image of equitable lawsuits, for civil cases as for criminal cases. One cannot be unaware of the requirements that the European Court of Human Rights (in the city of Strasbourg, in the east of France) made weigh on judges when it ruled on the requests formed against the French State. I recall that the European Court is competent to rule on the litigations relating to the application of the European Convention on Human Rights. This convention, in its Article 6, provides in particular that any person is entitled to an equitable lawsuit, within a reasonable time and in front of an impartial judge. A citizen of a country having ratified the Convention can, after having exhausted the possibilities for appeal in his or her country, sue before the Court his or her own government. It is the State

which will be condemned if there is violation of the Convention, i.e. if it did not do anything, or did not make enough effort to implement a justice which is impartial, equitable and gives decisions in reasonable time.

It is obvious that the instruments of the Council of Europe lead to a reinforcement of the subjective and objective impartiality of judges, to the introduction of a professional duty of diligence, to the increase in professionalism of judges and prosecutors. The reflection on the deontology makes it possible to adapt the internal standards to these European requirements.

It was finally a question of answering new demands of the citizens with regard to their judges. The rule of law confers on judges an essential mission. It is certain that the rule of law, the legal safety, the principle of effectiveness of the rights can be ensured in a rule of law only via judges: the recourse to judges, which since 1996 is at the level of a constitutional value in France, is a protected human right. In the same direction, judges have increasingly important capacities: since they can control the conformity of the internal laws to the provisions of the European Convention on Human Rights, and draw aside the application from it if necessary, judges are located even above the legislative power. This new mission, these increased capacities, are not legitimated if they are not accompanied by an equal increase in responsibility. Of course, it is particularly true in countries such as France where the legitimacy of the judges does not come from an democratic election process.

The turning in the reflection on the questions of ethics is a famous criminal case known in France as the "*Outreau* case" (named after a small city in the North of France).

What about this case? It was a criminal case of sexual abuse of minors. Based upon the complaints of several minors, in 2001, the police began an investigation of a supposed network of paedophiles. Some of the defendants were parents of these minors. The investigation, begun with the police, was entrusted, under the regulations of French penal procedure, to an examining magistrate. Several people were remanded in custody before the trial to avoid pressure on the minors.

Moreover, one of the defendants died in prison, probably by suicide. Several psychological experts appointed by the examining judge confirmed the charges alleged by the children. In May and June 2004, the criminal trial opened before the criminal court, called in France "*court d'assises*". Finally, after the hearings, of 17 people charged:

- Four were convicted after pleading guilty to incest;
- Six were convicted but deny the facts;
- Seven were finally discharged;

However, the burden of proof appeared during the hearings to be particularly insufficient. The six people convicted made an appeal. The case was judged again in November 2005 (the French penal procedure allows a second judgment in a criminal case in a law dated 15 June 2000). From the first days of the hearing, the charges and the evidence broke down, following the declarations of the principal witness already convicted. She declares that the six appealing convicted persons had not done anything. She said she had lied. Her husband finally confirmed that she had lied. During the hearings, the psychological experts were also criticized, so much they appeared unprofessional. The denials of two children who admitted having lied weakened the charges further. Finally, the decision of the criminal court was a general acquittal on 1 December 2005. The Minister of Justice ordered an investigation into the miscarriage of justice revealed by this case. The president of the Republic himself presented his excuses to the discharged people on 5 December 2005. It provoked very great emotion all through the country.

A Parliamentary committee was set up to try to shine some light on the judicial miscarriage which led to this disaster. Between 10 January and 12 April 2006, the committee heard 221 people over more than 200 hours (judges, former defendants of the case, journalists etc). As any Parliamentary committee, this one had six months to publish its report. The committee had numerous powers, including the power to force any person to testify in front of it. It could also have access to all the documents it wished. It was set up with 30 members, divided proportionally between the political representation in the French National Assembly.

This committee highlighted many problems concerning this case and criticized the entire system of

criminal investigation. It underlined:

- the non-observance of the presumption of innocence;
- the abuse of committal and preventive custody;
- the bad quality of the psychological experts and psychiatrists;
- the inexperience and the loneliness of the examining judge;
- the absence of understanding of the prosecutor;
- the inefficiency of the appeal procedure during the investigation.

The role of the media, which charged the defendants at the beginning of the case and supported them at the end, was also criticized.

The report of the committee led to an important reform of the criminal procedure in March 2007. The rights of the defendant were increased; the criminal procedure reinforced protection and control of the second degree of jurisdiction and created an obligation of video tape recordings of hearings by police.

Especially for the question of deontology and discipline, which concerns us, the *Outreau case* created the bases of a new approach which takes account at the same time of the need for a better training of judges and prosecutors. High representatives of the parliament and of the judiciary suggestted working on deontology in terms of "coding", and for the first time suggested the possibility of citizens directly denouncing miscarriages at the High Council of the Judiciary (CSM).

This reflection is joined not only with a reform of the criminal procedure but also by the law of 5 March 2007, with a new approach to the deontology, seen under the angle, on one hand, of the development of a "collection" of deontology obligations for judges and prosecutors, and on another hand, under the angle of their recruitment and initial training.

IV. A NEW APPROACH TO DEONTOLOGY: TOWARDS A CODE?

Article 64 of the constitution of 4 October 1958 states: "The President of the Republic guarantees the independence of the Judicial Authority. He is assisted by the High Council of Judiciary (CSM). A Law is drafted for the status of judges and prosecutors. The judges are irremovable. "

The Parliament, at the time of the vote on the law of 5 March 2007, related to the recruitment, training and the responsibility of judges and prosecutors, quite naturally decided, taking into account the essential role of the CSM in the institutional framework of the Judiciary, that "the High Council of Judiciary shall devise and publish a collection of deontology obligations for judges and prosecutors" (Article 18).

This order of the Parliament has a precise objective. But it gives the CSM any latitude to reach that point. No particular requirement, no policy, no calendar are fixed.

From April 2007, the CSM set up a working group with a double challenge: reflection and drafting.

With this intention, the CSM initially took rather traditional steps of research of precedents and comparative data, in particular of foreign countries. The CSM then engaged in a step more innovating. It started from the idea that the wish of the Parliament to write such a collection reveals a situation in which exists, before all kinds of other considerations, a crisis of public confidence in the justice system.

The CSM wanted to know the state of mind of judges and prosecutors but also that of the opinion. It thus ordered two surveys at a polling organization.

These surveys have not yet been completely analysed by the CSM. They will be however extremely useful to know which operational conclusions precisely to draw. But right now one can say that France, like other countries, but without admitting it openly, will take the way of something that looks like a code. The surveys reveal that judges and prosecutors have a good image of the judiciary. They are sceptics however on the image that French citizens have: they consider that French people are critical of their justice system. It is interesting to stress that this perception is in shift compared to what the general public thinks of the

magistrates, since 63% of French citizens rely on their justice system.

The French people place honesty, integrity, impartiality and legality of the core of the deontological values which they require for judges and prosecutors. Up to 94% consider that the creation of a collection of rules will improve the daily functioning of justice. Among those who know of the existence of the CSM, 84% estimate to trust it to work out the collection of deontology obligations.

It is thus too early to know what will come out from this work but there is an obvious conclusion. The idea has advanced, in France, for 10 years, towards what is not called yet a code but which looks like a code. It will probably not be a whole book of prohibitions or regulations. It will not be a kind of "ten commandments" nor a collection of recipes (even if France is the country of good cooking!). It will not be a text with a disciplinary vocation. It will be rather a compromise between all of these things, a mixture of deontology rules resulting from international texts and of conclusions - by broad topics - that exist, issued from the disciplinary decisions published since 1958.

V. DISCIPLINE

Before speaking about the disciplinary questions in France, it is important to precisely set out the number of judges and prosecutors in France, a country of sixty two million inhabitants.

As of 31 December 2008, the total staff of professional judges and prosecutors in courts, including the Supreme Court, was 7,817 (5,886 judges, that is to say 75.30%; 1,931 prosecutors, i.e. 24.70%), which represents 112 judges and prosecutors (+1.45%) more than at 31 December 2007.

The number of judges and prosecutors working out of jurisdictions (i.e in the Ministry of Justice, Inspection of the Judicial Services, magistrates detached in other ministries, including at the National Judicial Academy, magistrates in positions working abroad in international institutions) rose on this date to 491.

The real number of active judges and prosecutors was thus: 8,308 (868 in the high-rank hierarchy (HH), i.e 10.45% of the body; 4,512 of the first rank, i.e 54.31% of the body; and 2,928 of the second rank, i.e 35.24% of the judicial body).

It is necessary to add to that approximately 20,000 magistrates are not professionals but work in a temporary capacity in specialized courts like the commercial courts, the juvenile courts or the courts regulating litigations rising from contracts of employment.

The body of professional judges and prosecutors is thus relatively not very important. Compared with other European countries, France has a lower number of judges per 100,000 inhabitants.

France:	11. 9/100,000
Germany:	24. 5/100,000
Italy:	11/100,000
The Netherlands:	12. 7/100,000
The United Kingdom:	7/100,000
Spain:	10. 1/100,000

For the prosecutors, France is definitely lower than the average.

France:	2. 9/100,000
Germany:	6. 2/100,000
Italy:	3. 8/100,000
The Netherlands:	4. 1/100,000
The United Kingdom:	4. 6/100,000
Spain:	4. 5/100,000

From all that, we can say:

- That prosecutors and judges are professionals;
- That the judicial body is not very important compared to the population;
- That France falls within a European average.

Let us add to that historical and sociological information. France is a country of Law and of rights but it is not a country of judges. By saying that, I want to emphasize that justice is not a powerful political body and that the balance of power is not in France what it is in the United States, for example. In addition, judges and prosecutors do not come from the bar. They are recruited via competition after having obtained a law degree. They have a career, from approximately 25 years old, until (on average) 63 years with a hierarchical progression.

The question of discipline was tackled over a long period of time, with discretion. The magistracy did not wish that is evoked on the public opinion the faults made by judges and prosecutors, both in the service and outside the service.

Therefore, since 1996, before the legislator agreed with this practice by the law of 25 June 2001, the CSM had decided that with regard to disciplinary matters that the hearings of the CSM would be public, to conform to the principles of the equitable lawsuit and the spirit of the decisions of the European Court of Human Rights, already evoked.

In addition, the first edition of a collection of the disciplinary decisions of the CSM was published in the first half of 2006. The Council had decided the drafting of this work, by a will of transparency, to fight the criticism of corporatism often conveyed against the magistracy and, finally, to inform the judges and the prosecutors of the jurisprudence regarding their duties. As it stated, the Council wanted "to allow the judges and prosecutors to know their professional requirements, and to allow citizens to know the conditions of an impartial exercise of justice".

By these two series of initiatives, the Council had thus shown the importance which it intended to give to the questions of deontology and discipline.

The publication of this work was truly a revelation. It showed that over a priod of fifty years, 201 judges and prosecutors were disciplined. It was possible to find all kinds of misconduct: paedophilia, theft, acceptance of gifts, absence of any work, delays in addressing files, and excesses of all kinds, including in private life. One finds magistrates who lodge young delinquents in their residence and drive after consuming alcoholic beverages. One finds on the other hand very few cases of corruption. When there are some, the corruption relates to small sums and, curiously, is matched with small counterparts. All in all, the corrupters offer little for small services.

To those who claim that J&Ps are never sanctioned for their failures, the CSM delivered a strong denial: a book of 863 pages, in which their problems dating from 1958 are indexed (1958 was the foundation year of the CSM). By reading that, professionals, citizens and media discovered strange cases or astonishing decisions. Former disciplinary decisions, in particular, show that the evaluation of faults varies with time and with a new level of conscience. What was slightly condemned twenty years ago is heavily sanctioned today.

VI. DISCIPLINARY ACTION: CONDITIONS AND PROCEDURES

The deontology questions, as I have just explained, are in full reflection. However, discipline in between was based, for a long time, on precise rules.

As I previously mentioned, Article 64 of the Constitution of 4 October 1958 states: "The President of the Republic guarantees the independence of the Judicial Authority. He is assisted by the High Council of Judiciary (CSM). A Law is drafted for the status of judges and prosecutors. This law is Regulation N° 58-1270 dated 22 December 1958.

Even if they are independent in the exercise of their functions, judges and prosecutors are obliged to

respect the duties and obligations which appear in the regulation dated 22 December 1958 (law related to the statute of the magistracy).

Thus, pursuant to Article 6 of the statute, any judge or prosecutor, before his or her nomination to his or her first position, takes an oath "to well and accurately fulfil his or her functions, to maintain the secrecy of the deliberations religiously and to act a worthy and honest judge (or prosecutor)".

Article 10, relating to the duty of reserve, forbids judges and prosecutors from "any political deliberation"; "any demonstration of hostility to the principle or the organisation of the government of the Republic"; "any demonstration of a political nature not compatible with the reserve that their functions impose on them"; and "any joint action likely to stop or block the functioning of the courts".

The statute of the magistracy also envisages a series of incompatibilities, such as prohibition on practicing any other profession, public or private, or on holding an elective public office. Moreover, Article 43 of the statute of the magistracy defines the disciplinary fault as "any failure by a magistrate in the duties of his or her situation and duties of the honour, scrupulousness or dignity".

The CSM is the disciplinary authority of judges and prosecutors. The Council of State is a judge of cassation of the disciplinary decisions pronounced by Council. Indeed, if the judges receive a warning of the chiefs of court within the framework of the hierarchical disciplinary proceedings, it is the Council sitting in disciplinary formation which intervenes when the faults justify disciplinary continuations.

In accordance with Articles 50-1 and 50-2 of the statute, the disciplinary action with regard to judges belongs to the Minister for Justice as well as to the first presidents of the Court of Appeal, while the disciplinary power is exerted by the CSM. The disciplinary proceedings respect the rights of defence and the principle of the contradictory debate. The disciplinary decisions are justified in a drafted decision and pronounced publicly during a hearing.

Article 45 of the statute draws up the list of the applicable sanctions, from the reprimand with inscription in the administrative file of the judge/prosecutor until the dismissal with suspension of the rights to the retirement pension, but does not lay down any rule of correspondence between the faults and the sanctions.

The disciplinary actions applicable to judges and prosecutors are:

1° reprimand with inscription in the administrative file;

2° displacement;

3° withdrawal of certain specialized judicial functions;

3° (a) prohibition from appointment to the functions of single presiding judge for a maximum of five years;

4° lowering of hierarchical level;

4° (a) temporary exclusion of functions for a maximum duration of one year, with total or partial annulations of salary;

5° downgrading;

6° retirement or admission to cease his or her functions when the judge or the prosecutor is not entitled to a retirement pension;

7° dismissal with or without suspension of the right to get a pension.

It should be also underlined that apart from any disciplinary action, the General Inspector of the Judicial Services, the first presidents of appeal courts, the Attorneys General and the directors or heads of departments of the Ministry of Justice have the capacity to give a warning to the judges and prosecutors placed under their authority. The warning is automatically erased from the administrative file at the end of three years if no new warning or no disciplinary action was taken during this period.

An innovation of the Law of 2007 was to introduce the disciplinary proceedings when the State was condemned for operating faults. The new Article 48-1 of the statute of the magistracy states that any final decision of a national or international court condemning the [French] State for operating faults of the judicial

service is communicated to the chiefs of Court of Appeal by the Minister for Justice. The involved judge or prosecutor is advised under the same conditions. Disciplinary proceedings can be sued by the Minister of Justice or the chiefs of Court of Appeal under the conditions drafted in Articles 50-1, 50-2 and 63.

Is it possible for the condemned judge or prosecutor to make an appeal? No right of appeal is expressly envisaged by the statute of the magistracy. However, for a long time, the Council of State recognizes its competence as a jurisdiction of cassation because the Council of State considers that the decision of the CSM comes from an administrative authority.

Obviously, there is no particular procedure as regards corruption. Corruption is not aimed at by the texts like a specific fault opening to a specific procedure. There is no disciplinary list of the faults where the theft would be found, as well as corruption or the absence of work. A perfect formula is drafted in Article 43 of the statute: the fault will be "any failure by a judge or a prosecutor with the duties of his (her) condition, the honour, delicacy or dignity". That is the framework. But, by its jurisprudence, the CSM says the shapes and the limits of the disciplinary faults.

VII. INITIAL TRAINING OF JUDGES AND PROSECUTORS ON QUESTIONS OF ETHICS AND DISCIPLINE

France has a unique academy of training for judges and prosecutors called the National Judicial Academy (ENM). One enters this academy by a competition.

- First contest: it is necessary to have a Baccalaureate plus four years' study at a law faculty for the candidates at the maximum of 31 years old. It is thus a competition opened to students;
- Second contest: it is necessary to have four years of public service for the candidates less than 46 years old. It is thus a competition open to civil servants;
- Third contest: it is necessary to have eight years experience in a private firm for candidates less than 40 years old. It is thus a competition, to summarize, open to lawyers.

From now, the recruitment, the initial training and the ongoing training of judges and prosecutors are more structured around competences and capacities awaited from them today and in a foreseeable future. These fundamental competences of judges and prosecutors constitute the deep mark of the recent evolution of the Academy in its various components. Four major principles guide the activity of the Academy:

- The competition must help ascertain the capacity of trainees to acquire these fundamental competences;
- The initial training must allow the acquisition of these competences;
- The evaluation during 31 months' training, the examination of capability and the classification, at the end of the training, must allow the checking of the acquisition of knowledge and of know how;
- The ongoing training must, in particular, allow the updating of these competences.

The ENM is a professional academy. After courses of higher training for the acquisition of an initial professional experiment, it has the role of preparing trainees for the duty of judge and prosecutor in the judiciary. The objective of training developed in the ENM in its dimension of initial training is defined as follows: "To train future judges and prosecutors in the various functions by the acquisition of fundamental skills allowing a decision-making conforms to the law and adapted to its context, respectful of the individual and the ethical and deontology rules, framed under its national and international institutional environment".

The initial training lasts 31 months. It alternates courses and training courses, stages in courts, in the penitentiary premises and in law firms, but also in private companies or international institutions such as the European commission.

It is thus not an academic teaching. The judicial academy does not re-teach what is supposed to be already learned at the Law faculty. The existence of a competition including written tests and oral tests guarantees the knowledge by the trainees of a necessary legal background. It is a specific vocational training which will be focused on the control of fundamental capacities.

It should be stressed that since December 2008 tests of the contest were modified: psychological tests have been added. This way, the jury has complementary element, in an opinion written by a psychologist, on the capacity of the candidate to acquire fundamental competences of the judges and prosecutors. This opinion will be written after aptitude and personality tests. The aptitude and personality tests (the duration does not exceed three hours), will comprise two types of tests:

- Evaluation of the aptitudes for communication, the relation and the vocational retraining. This test is built upon tools used internationally. They will integrate an approach of the personality appreciating five main tendencies and an approach of the main pathological tendencies;
- Evaluation of the aptitudes of comprehension and reasoning logically. This second test is based on two traditional tests of appreciation of the aptitudes for comprehension. It studies the capacities of verbal comprehension and aptitudes to pass quickly from a mode of reasoning to another.

The discussion with the psychologist, carried out in the presence of a professional judge or prosecutor, lasts a maximum of thirty minutes.

The thirteen fundamental abilities of judges and prosecutors to be acquired are the capacity to:

- identify, adapt and implement the deontologied rules;
- analyze and synthesize a situation or a file;
- identify, respect and guarantee a procedural framework;
- adapt;
- adopt a position of authority or humility adapted to the circumstances;
- listen and to exchange information;
- prepare and lead a hearing or a judicial meeting in the respect of the fair debate rules;
- get an agreement or reconciliation;
- make a decision, founded in law and, registered in its context, printed with good sense and direction, and achievable;
- justify, formalize and explain a decision;
- take into account the national and international institutional environment;
- work in a team;
- be organized, to manage and innovate.

The capacity to identify, to adapt and to implement the deontology rules will be studied by a collective work in small teaching groups. Members of the CSM are often there, in particular, as teachers. What will be worked on there will be:

- Significance of the oath;
- The responsibility;
- The collection of the deontology rules;
- Jurisprudence;
- Disciplinary proceedings;
- Deontology of lawyers, rules of the bar associations;
- The career and the statute of judges and prosecutors.

The famous “three Is”, integrity, independence and impartiality, are discussed between the trainees and the professors. The goal is to make an impression, on the conscience of the trainees, on the reflections, the role and the place of judges and prosecutors in the society, on the need for justice, and finally on fundamental competences of judge or prosecutor out of technical ones.

It is thus seen, to be summarized, that recruitment is not only centred on a control of academic knowledge. It has also as a main goal to distinguish as much as possible the professional and ethical skills of future judges and prosecutors.

VIII. THE DIRECT ACCESS OF CITIZENS TO THE CSM

The constitutional reform of 23 July 2008 made a major innovation which tends to give a very new approach to the questions of discipline. Indeed, from now on, the Council for judiciary can receive complaints

by citizens under the conditions fixed by a law. This law is currently under discussion before the French Parliament.

The Parliament is animated by a triple concern:

- To facilitate the exercise by the citizen of the right which is guaranteed to him or her by the Constitution to complaint before the CSM, so that the CSM can sanction the disciplinary faults made by judges and prosecutors;
- To reinforce the independence of justice, in the spirit of the constitutional revision of 23 July 2008;
- To guarantee the impartiality of the CSM.

On the first point, the Parliament intends to support the creation of a commission of the requests in charge of the filtering of the complaints against judges or prosecutors. It would include a judge, a prosecutor and two officials external of the judiciary. The citizen could complain before the CSM when he or she estimates that the behaviour of a judge or prosecutor constitutes a disciplinary fault, even if the judge or the prosecutor is still in charge of the procedure.

On the second point, the Parliament wanted the judge or the prosecutor to be informed of his or her impeachment as soon as the commission plans to examine the reality of the disciplinary fault. The material and human resources of the CSM would be reinforced so that the council can carry out investigations. An immediate prohibition of exercise would be eventually possible with the obligation of the CSM to answer within 15 days.

Lastly, on the third point, the Parliament wants that the members of the CSM are subject themselves to rules of independence, impartiality and integrity. It specified the conditions under which a member of the CSM must abstain from sitting at the bench because of the doubts that his or her presence or participation in hearing and decision could get influence on the impartiality of the CSM decision.

It should be stressed that the different points I evoke are under discussion by the law committee of the National Assembly. It is too early to say which text precisely will be drafted after the parliamentary discussion. But, at this stage of the procedure, it is almost certain that there will be very few differences with what I expose. It is thus towards a form of control of the activity of the judges and prosecutors. Of course, this control will be done by an independent organization but it is an invitation to all the judges and prosecutors to have a greater vigilance and the best follow up to their work and their decisions.

IX. INTERNATIONAL PERSPECTIVES ON THE QUESTIONS OF ETHICS

A. Within the Framework of the Council of Europe

In 2002, the Council of Europe gave a mandate to the Consultative Committee of European Judges (CCJE) to give an opinion on this question of ethics. The European model of deontology which was adopted rests on a distinction between the ethical dimension of deontology and the disciplinary approach, resulting from the statutes, oaths, rules and disciplinary proceedings existing. The CCJE considers that the deontology must show the capacity of the profession to reflect on its function, and on the capacities which are allotted to it.

The CCJE considers the development of a "declaration of standards of deontology" based on some essential principles, not on an exhaustive list of the behaviours prohibited to the judge which would be defined beforehand, and which is, especially, independent of the disciplinary system. These principles of deontology should be the emanation of the judges themselves and designed like an instrument of self-checking of the body, generated by itself, which would make it possible the judicial power to acquire an additional legitimacy through the awaited performance of its duties in accordance with the unanimously allowed ethical standards. For the achievement of this objective, the CCJE recommends that the judiciaries obtain Consultative Committees entitled to answer the interrogations of judges and prosecutors.

B. Within the Worldwide Framework

With its first meeting in Vienna in April 2000, a group of lawyers who worked for the reinforcement of the integrity of the legal profession was at the origin of a first project known under the name of the Code

of Bangalore. The group of lawyers from *common law* systems compiled the provisions of national codes of ethics which seemed to them to have to take a lead in the international plan. A meeting of a delegation in the presence of the special *rapporteur* of the United Nations with the Consultative Committee of European Judges (CCJE) led to a modification of project, taking into account the opinion of the so-called *civil law judiciaries*. The Bangalore Principles of Judicial conduct were born in The Hague (The Netherlands) in November 2002. It does not act as more than a code, but as principles which, as in Europe must tend towards the promotion of ethics rather than the disciplinary action of professional failures (respect for suitability, independence, integrity, impartiality, equality, competence and diligence, responsibility).

X. CONCLUSIONS

In conclusion, the response to the increased request of citizens is in the definition of rigorous professional duties, supplied with a true deontology and disciplinary responsibility. It is by the means of a marked deontology and a strong ethics that will be consolidated the respect in the legal institution and the credibility of justice.

The choice made by France is more clearly now than it was two or three years ago. The constitutional and statutory reforms help a lot for the evolution of the question.

We have the characteristic, in France, to have chosen several legal instruments and several methods. Separately, they do not solve the problem. But, combined together, they seem to give to the legal body more ethics and to the citizens a greater confidence in justice:

- The recruitment is done in a more adequate way. It is accompanied by personality tests to be able to draw aside from the candidates identified like having problems of personality;
- The initial training insists more than before on all the ethical and deontology aspects;
- Throughout career, the judges and prosecutors will have access to a collection, constantly updated, of deontology obligations to which it will be able to refer for better reflecting and to wonder about the limits of action ;
- The control is also made by the citizens who will be able without excessive formalities to complain before an independent disciplinary body. It is likely to invite the judges and the prosecutors to a greater attention with their tasks;
- The publicity of hearings on the CSM and the mediatisation of the disciplinary proceedings oblige the CSM itself to have a great vigilance on its decisions which must respect the principles of an exemplary State of law.

In the recent democracies, the judicial independence underlined by governments and the determination of the professional values are the signs of membership of the rule of law: the existence of codes or collections of deontology principle is often the mark of a real democracy. It is certain that the judge cannot force the citizens to respect the fundamental values of the democracy that if he or she does not respect them itself. We can say that the judge and the prosecutor is related to the citizens by a democratic pact comprising of the particular professional requirements founded on values such as the impartiality, independence, diligence in the implementation of the right. Its legitimacy is related to its competence, its responsibility, and the respect of what is regarded as the bases of the State of law, and either only with its official nomination and attribution of a part of public authority. The reflexion on deontology makes it possible to consolidate this legitimacy. It is the price to be paid for a true democracy but I am sure that you will agree with me for saying that this price is not so high for that.

THE UNITED STATES DEPARTMENT OF JUSTICE'S OFFICE OF PROFESSIONAL RESPONSIBILITY

*Judith B. Wish**

I. INTRODUCTION

The United States Department of Justice's Office of Professional Responsibility (OPR) was created in 1975 as one response to the ethical abuses and misconduct committed by Justice Department officials during the Watergate scandal. OPR's mission is to hold accountable Justice Department attorneys, and law enforcement agents who work with those attorneys, who abuse their power as prosecutors or otherwise violate the high ethical standards required of the nation's chief law enforcement agency. OPR's mission is also to exonerate those who have been wrongfully accused of misconduct. OPR is an independent office that reports to the Attorney General and the Deputy Attorney General. It is staffed and led by career Justice Department attorneys.

In this article, I describe the history of OPR. I also discuss major reform legislation enacted in 1978, including the Ethics in Government Act, the Civil Service Reform Act, and the Inspector General Act, directed also at preventing the abuses of power that occurred during Watergate. With respect to the Justice Department particularly, in addition to OPR, there are four other components and offices that focus on ensuring that Department attorneys adhere to the highest ethical standards. They are the Public Integrity Section of the Criminal Division, the Office of the Inspector General, the Professional Responsibility Advisory Office, and the Department's Ethics Office. I discuss the function of each of these offices, as well as the Department's substantial training programme for its attorneys. In addition, I detail the sources of ethical and professional obligations with which Department attorneys must comply. Finally, I describe the organization and function of OPR, the most common kinds of misconduct Department attorneys commit and the types of attorneys who most often engage in misconduct, as well as various kinds of cases handled by OPR.

II. BRIEF OVERVIEW OF THE FEDERAL SYSTEM OF GOVERNMENT AND THE JUSTICE DEPARTMENT

By way of brief background, there are three components of the federal system of government in the United States. The Legislative Branch, consisting of the Congress, which enacts the laws, including the criminal laws; the Executive Branch, consisting of the President and Executive Agencies and Departments, including the Justice Department, which is primarily responsible for ensuring that the laws are enforced; and the Judicial Branch, including all federal courts, which hear cases involving alleged violations of federal laws, arising in both criminal and civil cases.

All federal prosecutors as well as most of the attorneys who represent the United States in civil litigation are employed by the Justice Department. The Justice Department is headed by an Attorney General who is appointed by the President and confirmed by the U.S. Senate. The Attorney General is a member of the President's cabinet. The current Attorney General is Eric Holder. He previously served as Deputy Attorney General from 1997 – 2001, during President Clinton's administration. There are an additional thirty-seven political appointees who, like the Attorney General, are nominated by the President and confirmed by the Senate, and who head up various offices and divisions within the Justice Department. Most of the prosecutors and other Department attorneys are career civil servants. That is, their employment does not depend on which political party is in power. Indeed, it is unlawful to consider the political affiliation of these employees in any personnel decisions.

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The federal judiciary is a separate and independent branch of government. Prosecutors, the Justice Department and the Executive Branch have no power to tell judges how to handle cases, or to prescribe or enforce rules of conduct or ethics for judges. Congress enacted the Code of Conduct for U.S. Judges but the Judicial Conference of the United States, not the Justice Department, enforces it. However, if a judge engages in criminal conduct such as taking a kickback or a bribe, the Justice Department has authority to investigate and prosecute the criminal conduct as it does with respect to any person who violates the law.

Justice Department attorneys direct criminal investigations and handle prosecutions involving alleged violations of federal laws. Department attorneys also defend the United States government in nearly all civil actions brought against the government and its agencies. In addition, they provide legal advice to investigators, Executive Branch agencies and the White House. There are about 10,000 Department attorneys, and about 110,000 Department employees in all. Criminal investigations are often handled by the Federal Bureau of Investigation (FBI), which is a component of the Justice Department. The FBI employs about 25,000 people, including 10,000 special agents stationed in FBI Field Offices throughout the country. The Justice Department has hundreds of offices throughout the United States, including ninety-four separate U. S. Attorneys' Offices, each located in its own district and each headed by a U.S. Attorney who is nominated by the President and confirmed by the Senate. The U.S. Attorney is the chief law enforcement officer within the district. The attorneys who work in the U.S. Attorneys' Offices are called Assistant U.S. Attorneys. With such a large number of offices and attorneys in the Justice Department, it is very important to have clear ethical rules and policies to govern the exercise of prosecutorial power and the day-to-day actions of prosecutors. It is also essential to ensure that those rules are enforced fairly and administered consistently throughout the country. When similar issues are handled differently by the same or different offices, there is a substantial possibility of creating a perception among the public and within the Justice Department of injustice, unfairness and (possibly) even corruption.

III. HISTORY OF THE CREATION OF THE OFFICE OF PROFESSIONAL RESPONSIBILITY

The creation of the Office of Professional Responsibility dates back to one of the more infamous episodes in modern American history: the events that led to the resignation of then President Richard Nixon and that involved the unprecedented misuse of the Justice Department by the White House for partisan political purposes. On New Year's Day in 1975, a former Attorney General of the United States and head of the Justice Department from 1969 to 1972, John N. Mitchell, along with other former Justice Department officials, was convicted of conspiracy, perjury and obstruction of justice in connection with the break-in and bugging of the Democratic National Committee (DNC) Headquarters located in the Watergate Office Building in Washington, DC, and the subsequent cover-up of those crimes. What became known as the Watergate scandal began in June 1972, when five men were arrested after breaking into the DNC Headquarters at the Watergate. It was later discovered that this was the second of two break-ins at the DNC Headquarters to plant electronic listening devices its offices to gain intelligence for the Republican presidential campaign. At the time of the arrests, one of the men was carrying an address book containing the name and telephone number of E. Howard Hunt, a White House aide who worked for a high-ranking assistant to President Nixon.

The subsequent investigation into that break-in brought to light an immense pattern of corruption and abuses of government power by President Nixon and his aides, including campaign fraud, political espionage and sabotage, illegal break-ins, improper federal tax audits by the Internal Revenue Service, illegal wiretapping on a massive scale by the FBI, and a secret "slush fund" laundered in Mexico to pay those who conducted these operations. It was a grand scheme to use the power of the government for improper partisan political purposes, that is, to keep the Republican Party and President Nixon in power.

After nearly two years of investigation, the fact that President Nixon had tape recorded conversations in the White House during his years in office came to light, and Archibald Cox, who had been appointed special prosecutor to conduct the Watergate investigation, issued subpoenas for certain of the tapes. A special prosecutor from outside the Justice Department had been named precisely because of concern over actual and perceived conflicts of interest if a Justice Department prosecutor handled the investigation. After a lengthy legal battle involving broad claims of Executive Privilege by the White House, the U.S. Supreme

Court ruled that President Nixon was required to turn over the tapes for use in the special prosecutor's criminal investigation. The incriminating tape recordings were used in subsequent prosecutions of government officials, and cited by the Judiciary Committee of the House of Representatives in its articles of impeachment against President Nixon. Before the full House of Representatives could vote on impeachment, President Nixon resigned and was succeeded by then Vice President Gerald Ford. Shortly after assuming office, Ford pardoned Nixon of "all offenses against the United States which he, Richard Nixon, has committed or may have committed or taken part in . . . .".

As a result of the various schemes that were discovered, two Attorneys General were convicted or pled guilty to crimes. As noted, President Nixon's first Attorney General, John Mitchell, was convicted of conspiracy, obstruction of justice and perjury. The tape recordings proved that Mitchell had participated in planning the Watergate break-ins and had repeatedly assisted in trying to cover up the White House's involvement in the scheme after the arrests.

Richard Kleindienst was Deputy Attorney General under John Mitchell. When Mitchell stepped down to run Nixon's campaign for reelection in 1972, Kleindienst was nominated to succeed Mitchell as Attorney General. During his confirmation hearing before the Senate Judiciary Committee, Kleindienst testified in response to questioning that no one in the White House had interfered with his decision making while he was Deputy Attorney General in an antitrust case against International Telephone and Telegraph (ITT). ITT had, at about that time, offered to make a very large contribution to help pay for the Republican National Convention at which President Nixon would be nominated for re-election. Kleindienst had testified to the Committee, "In the discharge of my responsibilities as Acting Attorney General in [the ITT case], I was not interfered with by anybody at the White House. I was not importuned. I was not pressured. I was not directed." *NY Times*, 17 May 1974. During the Watergate investigation, the White House's direct role in Kleindienst's decision came to light and he was forced to resign as Attorney General, and in 1974, Kleindienst pleaded guilty to testifying falsely to Congress. In entering his guilty plea, Kleindienst admitted that President Nixon had telephoned him and ordered him to drop the antitrust case against ITT. In the tape recording of that call, now on the Internet, Nixon ordered Kleindienst to drop the case, not to file a brief due in court the following day, and to "stay the hell out of it."

Kleindienst's successor, Attorney General Elliot Richardson, held office for only a few months. In what became known as the Saturday Night Massacre because the events occurred on a Saturday, Richardson resigned rather than follow President Nixon's order to fire special prosecutor Cox, who was then insisting on being given access to the incriminating White House tape recordings. Richardson's Deputy Attorney General, William Ruckelshaus, also resigned rather than fire the special prosecutor. The official who was third in command of the Justice Department at the time, Solicitor General Robert Bork, ultimately fired Cox. President Nixon then promptly abolished the special prosecutor's office and directed the FBI to seal its records. The public outcry and Constitutional crisis created by the Saturday Night Massacre forced the White House to agree to the appointment of a second special prosecutor, Leon Jaworski, and ultimately led to the resignation of President Nixon.

Upon assuming office, President Ford inherited a Justice Department that was demoralized and widely disrespected. A 1975 law review article (50 N.Y.U. L. Rev. 382 1975) observed: "Except, perhaps, for the Presidency itself, no government institution suffered greater dishonor from Watergate revelations than did the Justice Department. The criminal conduct of incumbent and former Attorneys General, the early mishandling of the Watergate investigation and discrediting testimony before the Watergate Committee - such factors produced a widespread perception that politics and Justice had become intolerably intertwined."

As a first step toward turning the Justice Department around, President Ford appointed Edward Levi to be Attorney General. Levi was a well-respected university president and distinguished legal scholar with no background in politics. He was not a stranger to Washington, however. He had experience working in the Antitrust Division of the Justice Department earlier in his career, and working in Congress as Chief Counsel to the House Committee on Monopolies and with the White House on two White House task forces in the 1960s.

Attorney General Levi was immediately faced with competing proposals, from Congress and elsewhere,

about how the Justice Department should be restructured to prevent Watergate-style abuses of prosecutorial power in the future, and to give the Department a measure of independence from the White House. These proposals included taking the Attorney General out of the President's cabinet and the Justice Department out of the Executive Branch so it would not report to the President. Another would have required the Attorney General, the Deputy Attorney General and the several Assistant Attorneys General (who head up various offices and components within the Department) to belong to a different political party than the President. A third proposal would have split the Department into two parts, one headed by the Attorney General which would serve as legal advisor to the President and the other headed by a Chief Prosecutor responsible for law enforcement. Yet another would have established a permanent Special Prosecutor outside the authority of the Attorney General and the Justice Department.

In his first year in office in 1975, as one response to the Watergate abuses and to these proposals, Attorney General Levi issued an order creating the Office of Professional Responsibility and directed it to "receive and review any information or allegation concerning conduct by a Department employee that may be in violation of law, regulations or orders, or applicable standards of conduct or may constitute mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health and safety." The mission of OPR was "to ensure that Departmental employees continue[d] to perform their duties in accord with the professional standards expected of the nation's principal law enforcement agency." To head the office, Attorney General Levi appointed Michael Shaheen, a career Department of Justice lawyer. Shaheen served as the Counsel for Professional Responsibility and head of OPR for more than 20 years, until retiring from that post at the end of 1997.

The Attorney General also created the Public Integrity Section within the Criminal Division to strengthen the Department's ability to combat corruption through the prosecution of elected and appointed public officials at all levels of government, state and federal, who are involved in actual violations of federal law. The Public Integrity Section also has exclusive jurisdiction over allegations of criminal misconduct by federal judges and monitors the investigation and prosecution of election fraud and conflict-of-interest crimes. Thus, Public Integrity Section attorneys prosecute selected cases against federal, state and local officials, and are available as a source of advice and expertise to other Justice Department prosecutors and investigators throughout the country.

The Public Integrity Section has been highly successful in handling such cases. Most importantly, the creation of a special unit in Washington has had the effect of removing potential conflicts of interest that may exist when local prosecutors investigate local lawyers and officials, and of increasing public trust in the system of justice as it is applies to public officials. Because the office consists of career prosecutors who make decisions based on an objective set of standards, the Public Integrity Section can and does make critical decisions without regard to political considerations. It also brings uniformity to the investigation of corruption charges involving federal, state and local officials throughout the country.

With these affirmative steps, Attorney General Levi was able to resist Congressional attempts to split the Justice Department or establish prosecutorial and other law enforcement authority outside of the Executive Branch and the control of the President.

Following the election in 1976, Democratic President Jimmy Carter came into office and he, along with a newly elected Congress, was intent on reforming the federal government to prevent the abuses of Watergate from recurring. Three very important reform measures were enacted in the same month in 1978, and require mention here to put OPR's role in perspective. The first was the Ethics in Government Act of 1978 (Pub. L. No. 95-521, 92 Stat. 1824 (1978)). In addition, Congress passed the Civil Service Reform Act of 1978 (Pub. L. No. 95-454, 92 Stat. 1111 (1978)), and the Inspector General Act of 1978 (Pub. L. No. 95-452, 92 Stat. 1101 (1978)). Each of these laws has had a significant impact on preventing the abuse of government power so evident in Watergate, and the Ethics in Government Act and the Civil Service Reform Act provide many of the ethical obligations with which Department attorneys must comply and which OPR enforces.

IV. POST-WATERGATE MAJOR REFORM LEGISLATION

A. Ethics in Government Act

The Ethics in Government Act was intended to "increase public confidence in the level of integrity of federal government officials, to deter conflicts of interest from arising, and to stop unethical persons from entering public service." Through the creation of the Office of Government Ethics (OGE), the Act formalized and institutionalized a consistent, ongoing programme to provide all federal government employees with clear rules of conduct, access to professional ethics advice and procedures to resolve questions of conflict of interest as they arose. The OGE is headed by a Director who is appointed by the President and confirmed by the Senate, and serves a five year term. The fact that his appointment is for a term of years, rather than at the pleasure of the President, confers a measure of independence on the director.

The Ethics in Government Act has several important parts. First, in order to guard against and identify potential conflicts of interest, the law mandates annual public financial disclosure reporting for senior government officials, both political and career. OPR's Counsel and Deputy Counsel are among those who must file such reports. The annual reports must include the listing of certain gifts, financial holdings, outside income, positions in organizations and debts. The annual reports must also include the sources of a spouse's income, and certain assets bought, sold or held by a spouse or dependent child of the employee. The reports are reviewed by the employee's supervisor and by ethics officials in his or her agency to identify potential conflicts of interest with respect to the work each employee performs. These detailed reporting requirements, for example, would quickly disclose to the Justice Department whether an employee was making official decisions that could affect his or her finances or was making investment decisions based on official information concerning a specific individual or entity. In addition, these financial disclosure forms must be available, upon request, to the public and news media. Although intrusive, these reporting obligations are deemed necessary to guard against conflicts of interest by highly-placed officials. The reporting requirement also applies to Members of Congress, federal judges and certain senior staff members of both, although the OGE is not responsible for the contents or enforcement of those reports.

Certain other government employees are required to file annual confidential and more abbreviated disclosure reports. With respect to the Justice Department, a Confidential Financial Disclosure Report must be filed by all non-executive employees whose duties require them to participate personally and substantially through decision or the exercise of significant judgment in a matter which could have an economic impact on a non-federal entity. This includes any employee involved in contracting or administering grants, regulating or auditing any non-Federal entity and, in some cases, investigating or prosecuting a case. All OPR attorneys fall within this category and must file the annual report. The reports are reviewed by the head of their offices to identify possible conflicts of interest with their work assignments. The reports remain confidential, however (5 U.S.C. § 2634.907).

Second, the OGE is responsible for reviewing the financial disclosure forms prepared by persons the President nominates for appointments that require the consent of the Senate, including all cabinet members and the politically appointed executives who report to them. The law requires that nominees to positions that require confirmation by the Senate transmit their financial disclosure reports to OGE. The Director of OGE reviews the forms, advises the nominee if corrective action is necessary and then, as appropriate, certifies to the Senate that reports filed with the OGE are "in compliance with applicable laws and regulations." This process has become so much a part of the "vetting" of nominees that the Senate confirmation committees normally do not schedule a hearing on the candidate until the Director of OGE certifies that the nominee's financial disclosure report is in order.

Third, the Ethics in Government Act amended and expanded the legal restrictions on the jobs federal employees may accept after leaving government employment and on their future dealings with the government. Those restrictions generally prevent the employee from "switching sides" after leaving government service. Thus, a former employee is permanently prohibited from representing anyone else before the government on a particular matter involving specific parties in which the employee participated personally and substantially while working for the government. A former employee is prohibited for two years from representing another person before the government on a particular matter involving specific parties that was pending under his of her official responsibility during the employee's last year of government service,

even if he did not participate in the matter himself. In addition, a senior employee is generally prohibited for one year from representing another person before the agency in which he or she served during his last year of government service.

Finally, the law gives OGE the authority to develop additional standards regarding conflicts of interest and ethics in the Executive Branch. The OGE did so in the form of regulations entitled Standards of Ethical Conduct for Employees of the Executive Branch (Standard of Conduct) which are applicable to all executive branch employees.

Finally, the law provided for the appointment of an Independent Counsel who would, under specified circumstances, investigate allegations of wrongdoing by certain members of the Executive Branch, including the President. That provision, reenacted several times, has since expired.

B. The Civil Service Reform Act

The Civil Service Reform Act (CSRA) was the second piece of major reform legislation enacted in 1978. Among the high crimes and misdemeanours with which President Nixon was charged in the articles of impeachment voted by the House Judiciary Committee in July 1974, was the use of governmental power to harass and intimidate political opponents. The Final Report of the Senate Select Committee on Presidential Campaign Activities addressed abuses in grant and regulatory programmes directed at punishing the "enemies" of the president. Employees were ordered to install illegal wiretaps, to improperly award contracts, and to release grant funds to unqualified recipients. After committee hearings, Congress concluded that there had been extensive violations of civil service laws and procedures.

The Civil Service Reform Act sought to correct that situation by protecting federal employees and restraining the ability of officials to abuse governmental power in the future. First, the Act articulates aspirational "Merit System Principles" intended to condemn abuses of authority for political or other improper purposes. In brief, the principles call for recruitment, selection and advancement in employment based on ability, knowledge and skills, after fair and open competition. They specify fair and equitable treatment of all applicants and employees without regard to political affiliation, race, colour, religion, national origin, sex, marital status, age, or handicapping condition, and with regard for their privacy and constitutional rights. They further provide for protection of employees from arbitrary action, personal favoritism, or coercion for partisan political purposes. They also provide protection for "whistleblowers" who lawfully disclose information pointing to mismanagement, waste or violation of any law, rule or regulation. Finally, they prohibit any government official from using official authority or influence for the purpose of affecting the results of an election.

The law also establishes a list of "Prohibited Personnel Practices," which form enforceable standards. These principles forbid any official with authority to make or recommend personnel actions to discriminate against an employee or applicant based on race, colour, religion, sex, national origin, age, handicapping condition, marital status or political affiliation. They also prohibit the consideration of employment recommendations based on factors other than personal knowledge or records of job-related abilities or characteristics. They forbid the coercion of political activity of any person, and prohibit the willful obstruction of anyone from competing for employment and improperly influencing anyone to withdraw from competition. They also prohibit reprisal for whistleblowing. In addition, they prohibit nepotism and discrimination based on personal conduct which is not adverse to on-the-job performance.

C. The Inspector General Act of 1978

The third piece of reform legislation was the Inspector General Act of 1978 (Pub. L. No. 95-452, 92 Stat. 1101 (1978)). In the United States' system of government, Congress has the authority to appropriate funds for all government agencies and programmes, and the oversight power to ensure that those funds are properly expended. In a series of hearings in 1977, Congress concluded that "fraud, abuse and waste in the operations of federal departments and agencies and in federally-funded programmes are reaching epidemic proportions," and further that "[t]he federal government has . . . failed to make sufficient and effective efforts to prevent and detect fraud, abuse, waste and mismanagement in federal programmes." S. Rep. 95-1071, S. Rep. No. 1071, 95th Cong., 2nd Sess. 1978, 1978 U.S.C.C.A.N. 2676, 1978 WL 8639 (Leg. Hist.). The Inspector General Act was enacted to correct these problems. The law created Inspectors General in thirteen executive agencies with the authority to, among other things, conduct, supervise, and co-ordinate

audits and investigations relating to the programmes and operations of the agency; make recommendations to improve the economy and efficiency of programmes and operations administered by the agency; and keep the agency head and Congress "fully and currently informed . . . concerning fraud and other serious problems, abuses, and deficiencies relating to the administration of programmes and operations, . . . recommend corrective action concerning such problems, abuses, and deficiencies, and to report on the progress made in implementing such corrective action" (5 U.S.C. App. 3, § 4).

The Act gave Inspectors General their own staffs and budgets and a level of independence from the agency head to which he or she reported. Although appointed by the President with the consent of the Senate, Inspectors General may not be removed by the President unless the agency head gives written notice to Congress of the reason for the removal. The Act also limits the authority of the agency head vis-a-vis the Inspector General such that the agency head "shall not prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subp[o]ena during the course of any audit or investigation." The act also requires all Inspectors General to issue semiannual reports of their activities to the agency head, and the agency head must transmit the Inspector General's report to Congress within thirty days. The agency head may comment on the Inspector General's report, but may not change it.

The Inspectors Generals' relationship with Congress has been a source of controversy since the Act was passed. In 1978, the Justice Department successfully argued that it would be inappropriate to place an Inspector General, a law enforcement official with reporting obligations to the legislative branch, in an executive branch agency whose business is law enforcement, an inherently executive branch function, and whose head, the Attorney General, is the highest ranking law enforcement official in the country. In addition, the Justice Department argued that OPR already existed and had broad authority and responsibility to conduct investigations and "monitor the integrity and professionalism of the Department."

Nearly a decade later, however, in 1986, Congress again proposed to establish an Inspector General in the Department of Justice along with several other agencies that also had been exempt from the original Act. For similar reasons, the Department opposed the change. In a compromise, the Congress in 1988 created an Inspector General for the Justice Department, but reserved to OPR jurisdiction over certain misconduct (Pub. L. 100-504). Thus, the Act requires the Inspector General to "refer to the Counsel, Office of Professional Responsibility of the Department, for investigation, information or allegations relating to the conduct of an officer or employee of the Department of Justice employed in an attorney, criminal investigator, or law enforcement position that is or may be a violation of law, regulation, or order of the Department or any other applicable standard of conduct . . . ." (5 U.S. C. App. 3, sec. 8E).

Thus, in 1988, the mission of OPR was codified by statute and narrowed to focus on the most serious types of allegations against attorneys and criminal investigators and agents working with those attorneys. In the 1990s, further refinements were made to OPR's and the Inspector General's respective jurisdictions. As a result, OPR's current jurisdiction extends to "allegations of misconduct involving Department attorneys that relate to the exercise of their authority to investigate, litigate or provide legal advice, as well as allegations of misconduct by law enforcement personnel when such allegations are related to allegations of attorney misconduct within the jurisdiction of DOJ-OPR." In addition, OPR has authority to pursue special investigations as assigned by the Attorney General; allegations of reprisal against any employee for reporting misconduct to OPR; and complaints by FBI employees of retaliation for whistleblowing.

As I will discuss more fully below, many of the obligations imposed by the Ethics in Government and Civil Service Reform Acts provide the basis for misconduct investigations conducted by OPR, the OIG and the Public Integrity Section of the Justice Department.

V. ETHICS ENFORCEMENT WITHIN THE DEPARTMENT OF JUSTICE

As the history of abuses of governmental power that led to the creation of OPR and enactment of the reform legislation detailed above makes clear, ethics enforcement is essential to ensure that Department officials working with career Justice Department attorneys do not abuse for partisan political or other improper purposes, the unique power they exercise as prosecutors, but rather exercise it fairly and

impartially. Ethics enforcement is also important to ensure that Department attorneys conduct themselves in accordance with the myriad other professional obligations governing their day-to-day activities as attorneys. Equally important, ethics enforcement is essential to demonstrate to the public that the Justice Department adheres to the rule of law and not to the will of the officials who happen to hold office when that will contravenes the rule of law. Thus, ethics enforcement is important both to ensure that Justice Department attorneys act ethically in performing their jobs and that the public knows that they do so.

The Justice Department's commitment to the maintenance of high ethical conduct by its attorneys is demonstrated by the fact that it has five separate offices that handle ethics issues, as well as a significant training programme. I have already discussed the creation of the Office of Professional Responsibility, the Public Integrity Section in the Criminal Division, and the Office of the Inspector General. Those offices primarily focus on investigating allegations of ethics violations that have already occurred. The Professional Responsibility Advisory Office (PRAO) and the Department Ethics Office, on the other hand, are focused on providing ethics advice to all Department employees prior to any allegations having arisen. In addition, the Department makes available throughout the year a large array of training courses for attorneys in a variety of settings, and recently adopted a policy of mandatory annual Professionalism Training.

A. Professional Responsibility Advisory Office (PRAO)

This office of about twenty-five attorneys and support staff was established by the Department in 1999 to ensure the provision of prompt and consistent advice to Department attorneys on issues related to professional responsibility. By law and Department policy, all Department attorneys must be duly licensed and authorized to practice law as an attorney by at least one state bar and they must comply with that state bar's Rules of Professional Conduct as well as the rules of the court before which they appear. PRAO was created to provide Department attorneys with advice concerning compliance with the various state bar rules. For example, most state bar rules prohibit an attorney from contacting a person about a matter regarding which the person is represented by a lawyer unless the lawyer consents or the contact is authorized by law. If a prosecutor is not sure whether it would be considered "authorized by law" under a particular state's rules to allow a law enforcement officer working undercover in an investigation to remain in contact with a criminal suspect who has a lawyer, PRAO is available to advise on whether and how the prosecutor may do so. Each U.S. Attorney's Office and other component within the Department has an attorney who serves as a Professional Responsibility Officer, or PRO, trained by PRAO, who provides advice within the office and acts as a liaison to PRAO.

If a Department attorney seeks advice from PRAO, provides all relevant information pertaining to the issue in question, and follows all the advice given but is later found by a court, or is otherwise alleged to have engaged in misconduct, OPR will not hold that attorney responsible for any wrongdoing. This policy is intended to encourage Justice Department attorneys to seek counsel and advice from PRAO or their PRO to do the right thing before they act, rather than taking a chance and running afoul of the ethics rules.

B. Justice Department Ethics Office

As noted, the Office of Government Ethics promulgated the Standards of Conduct and provides ethics advice and opinions with regard to those standards. Those standards cover such areas as receipt of gifts and entertainment, travel, conflicts of interest, financial disclosure requirements, outside employment and activities, political activities, procurement integrity, misuse of position and government resources and restrictions on post-government employment.

The standards may be supplemented by agencies with OGE's approval and the Justice Department has adopted several additional standards that specifically relate to attorneys. They include a provision prohibiting an employee from participating in a criminal investigation or prosecution if the employee has a personal or political relationship with any person or organization substantially involved in the conduct that is the subject of the investigation or prosecution; or with any person or organization which the Department attorney knows has a specific and substantial interest that would be directly affected by the outcome of the investigation or prosecution.

An employee who believes that his or her participation might be prohibited by the rule must report the matter to his or her supervisor. If the supervisor agrees, he or she must relieve the employee from further

participation in the matter unless the supervisor determines, and records in writing, that the employee can remain impartial and professional, and that his or her participation would not create an appearance of a conflict of interest likely to affect the public perception of the integrity of the investigation or prosecution.

Another pertinent Justice Department standard of conduct prohibits employees from engaging in outside employment that involves the practice of law, without obtaining a waiver from the Department, unless the work is uncompensated and in the nature of community service, or unless it is on behalf of the employee, his or her parents, spouse or children. It also prohibits employees from engaging in any criminal matter, litigation, investigation, grants or other matters in which the Justice Department is or represents a party, witness, or litigant, investigator or grant-maker.

The Justice Department's Ethics Office is also responsible for administering the Department-wide ethics programme and for implementing policies on ethics issues. That office also provides individual advice and periodic training to all Department employees on compliance with the Standards of Conduct and the Department's supplemental standards. Similar to the PRAO structure, each component and office has a Deputy Designated Agency Ethics Official (a DDEO) who is responsible for administering the ethics programme within the component, and who acts as a liaison to the Department's Ethics Office.

C. Ethics Training for Department of Justice Attorneys

As noted, Department attorneys are required to be licensed to practice law by at least one state bar licensing authority. Many state bar licensing authorities have annual continuing legal education (CLE) requirements, such that licensed attorneys in that state must fulfill a certain number of hours of legal training, often including ethics training. The Justice Department has a training center, the National Advocacy Center (NAC), in Columbia, South Carolina, which offers training year round in a variety of subjects, including ethics, many of which provide CLE credit for the attorneys attending.

In addition, in 2008, the Department adopted a new policy on Professionalism Training for its attorneys. In announcing the new policy, the Attorney General noted, "[t]here are few priorities that are more important to the Department's mission than ensuring that we are properly trained so that we may continue to demonstrate the highest levels of ethical conduct and professionalism for which the Department is known." The new policy applies to most Department attorneys and requires them to take at least four hours of professionalism training each calendar year, including at least two hours of Justice Department professional responsibility, one hour of government ethics, and one hour of sexual harassment and non-discrimination or equal employment opportunity training. The Professionalism Policy is a Department requirement and not tied to the requirements of any individual state bar. Department attorneys may satisfy the Professionalism Policy's requirements through training conducted by their component, courses at the NAC, or by watching training videos offered by the Department's Office of Legal Education and available via each attorney's desktop computer. Department attorneys are required to certify at the end of each calendar year to their component's management that they have complied with the Professionalism Policy and its requirements.

In addition, the Department provides training targeted at specific issues as they arise. For example, earlier this year, in a much-publicized decision, Attorney General Holder dismissed the prosecution against former Alaska U.S. Senator Ted Stevens, in which he was charged with making false statements in his financial disclosure report (discussed above). While Senator Stevens had been convicted by a jury of all the charges against him, the Department later learned that, prior to trial, prosecutors apparently had not disclosed to the defence all impeachment evidence, as is required by the Constitution, state bar rules and Department policy. In this case, they did not turn over to defence counsel notes that contradicted testimony from an important government witness. As a result, defence counsel did not have those notes available at trial for their cross-examination of the witness. Under the U.S. system of justice, the question is not whether Senator Stevens was in fact guilty; the question is whether he had been fairly convicted under our Constitution and the rules of criminal procedures. Because these assurances of a fair conviction were lacking since not all impeaching evidence had been disclosed, the Attorney General dismissed the case. Two consequences flowed from the Senator Stevens case for our purposes. First, OPR is conducting an investigation to determine whether the prosecutors committed professional misconduct. That investigation is on-going. Second, the Department has begun a programme of re-training its prosecutors with regard to their discovery obligations under the Constitution, state bar rules, rules of criminal procedure and

Department policy to avoid the recurrence of such a case. In addition, the Department has created working groups to consider new policies to govern criminal and civil discovery.

VI. ADDITIONAL SOURCES OF PROFESSIONAL OBLIGATIONS AND STANDARDS

In addition to the duty not to abuse the unique power of prosecutors for improper purposes, which abuse led to the creation of OPR, attorneys are subject to a myriad of professional obligations that govern their conduct as attorneys. Specifically, Department attorneys are subject to obligations imposed by the U.S. Constitution and case law, federal laws, state bar and court rules of professional conduct, the Standards of Conduct, and Justice Department regulations, policies, and procedures. In our legal system, many of these rules and regulations are designed to ensure that our criminal justice system is fair and that the rights of the accused are protected. In helping to guarantee that Department attorneys respect, and do not abuse, the power they have, making certain that they scrupulously adhere to these rules and regulations is an important part of OPR's mission.

A. Obligations Imposed by the Constitution and Case Law

The Constitution establishes numerous rights for criminal defendants with which Department attorneys must comply. For example, the Fifth Amendment to the Constitution provides that no one may be compelled to testify against himself in a criminal case. That right has been extended by case law to prevent a prosecutor from suggesting during a criminal trial that the defendant should have testified. Thus, if the defendant chooses not to testify, which the defendant has an absolute right to do, a prosecutor may not ask the jury to draw an inference of guilt from the defendant's failure to testify.

The due process clause of the Fifth Amendment as interpreted by the U.S. courts requires prosecutors to provide to the defence all exculpatory evidence they may have gathered during an investigation – for example, police notes, witness statements, scientific tests and other evidence that might raise doubts as to the defendant's guilt. By case law, this right has been extended to include impeaching evidence. The right also applies to certain kinds of pretrial proceedings as well as trials. The remedy for failing to turn over such information can be severe; a judge can reverse a conviction if he or she finds that, had the evidence been disclosed, there is a reasonable probability that the result of the trial would have been different.

In addition, the Fourth Amendment protects a person's reasonable expectation of privacy against government intrusion. Under that right, a prosecutor must first obtain a search warrant issued by an independent judge showing that the government has probable cause before authorizing a search by law enforcement officers.

B. Federal Laws

Federal laws impose a variety of ethical obligations on Department attorneys. For example, in 1957, Congress enacted the Jencks Act, 18 U.S.C. § 3500, which gives a criminal defendant in a federal prosecution the right to discover any witness statement against him which is relevant to the witness's trial testimony and which is in the possession of the government. The law extends to police notes, memos, reports, summaries, letters or verbatim transcripts used by government agents or employees to testify at trial.

Also, in 1968, Congress enacted Title III, prohibiting private citizens from using certain electronic surveillance techniques, but exempting law enforcement agents so long as they complied with explicit directives that controlled the circumstances under which the agent's use of such surveillance would be permitted. Although many of the restrictions were required by the Fourth Amendment, several of Title III's provisions are more restrictive than that Constitutional protection. One of the statute's most restrictive provisions is the requirement that federal agencies must submit requests for the use of certain types of electronic surveillance to the Justice Department for review and approval before applications for such interception may be submitted to a court for an order authorizing the interception.

C. Court Rules

Federal Rules of Criminal and Civil Procedure as well as the Federal Rules of Evidence and local federal court rules also impose obligations on Department attorneys. For example, the Federal Rules of Criminal Procedure require government attorneys well before trial to allow the defendant to inspect any exhibits that the government intends to use at trial. And Rule 6(e) prohibits government attorneys from disclosing

matters occurring before a grand jury. These various rules also set deadlines and rules affecting the pretrial disclosure of evidence. Thus, for example, the Federal Rules of Civil Procedure allow each party to a civil suit, during the discovery phase of a case, to serve upon the opposing party written requests for admissions of fact. Under the rules, if the opponent admits a fact, the party is relieved from having to prove the fact at trial. The Federal Rules specify that answers to such requests must be filed within thirty days.

In addition, courts establish obligations for government attorneys in particular cases. For example, courts frequently adopt a scheduling order governing pre-trial discovery and pleadings. On occasion, courts issue pre-trial rulings regarding the admissibility of evidence or that limiting the purpose for which such evidence may be admitted. Such rulings and orders bind the prosecutor in that case.

D. State Rules of Professional Conduct

This is a source of rules and obligations that has become more important for Department attorneys in recent years: the professional rules of conduct developed by state bars and adopted by state supreme courts or enacted by state legislatures. Some time ago, there had been uncertainty as to whether Department of Justice attorneys were bound by such rules, because of the constitutional doctrine known as preemption. According to this doctrine, federal authorities are not bound by state rules that interfere with federal laws.

In 1998, Congress clarified this issue by enacting the Citizens Protection Act, 28 U.S.C. § 530B, that explicitly requires federal prosecutors to abide by the rules of the court before which they appear. The Citizens Protection Act was a response to a concern by certain Congressmen that Justice Department prosecutors had to be reined in and made subject to the same professional standards applicable to private attorneys. Most federal courts have their own local rules which incorporate the rules of professional conduct of the state bars in which they are located. This law then clearly requires federal prosecutors to comply with the rules of professional conduct of the states in which they appear in court. These state provisions are a significant source of the rules that bind Department attorneys. Typically, such rules include provisions requiring reasonable diligence and promptness in representing a client, providing objective and independent legal advice, guarding the confidentiality of information received from a client, and compliance with the client's lawful instructions. Such rules also normally require candor to the court and opposing counsel as well as correction of testimony later discovered to be false. They also normally prohibit prosecutors from communicating with parties they know are represented by an attorney unless the party's attorney consents, and from communicating with the court unless the opposing lawyer is present (*ex parte* communications).

E. Department of Justice Regulations and Policies

The Department has its own extensive regulations and policies that impose professional obligations on Department attorneys. For example, because of the sensitive Constitutional rights at issue, there are regulations that require prior approval by the head of the Criminal Division before a Department attorney may issue a grand jury subpoena to a reporter [First Amendment] or a lawyer [Sixth Amendment]. There are also rules requiring certain types of plea agreements to be approved by a supervisor who stands in the shoes of the client for this purpose. The Department also has extensive regulations governing the kinds of information that can be provided to the news media while a case is pending, in order to protect the defendant's right to a fair trial.

In some cases, the Department imposes rules that are stricter than those imposed by state bars or courts and the Constitution. For example, the Department recently adopted provisions governing the disclosure of exculpatory information before a criminal trial that are considerably more expansive - - that is, they require more information to be disclosed - - than the Constitution requires. In addition, while state bar rules typically prohibit prosecutors from prosecuting a criminal case if they know the charges are not supported by probable cause, the Department's Principles of Federal Prosecution prohibit a prosecutor from indicting a defendant unless a stricter standard is met – namely, that he believes that the admissible evidence will probably be sufficient to obtain and sustain a conviction.

The Department's regulations limit the exercise of a prosecutor's discretion in other ways as well. Thus, in determining whether to commence prosecution, or take other action against a person, Department regulations provide that the prosecutor should not be influenced by a person's race, religion, sex or national origin, or political association, activities or belief, the attorney's own personal feelings concerning the person, his associations or the victim; or the possible effect of the decision on the attorney's professional or personal circumstances.

VII. HOW OPR CONDUCTS INVESTIGATIONS AND DISPOSES OF THEM

A. OPR's Jurisdiction

As noted, when it was created in 1975, OPR had jurisdiction over all Department employees and all allegations of misconduct as well as fraud, waste and abuse. The office effectively served as both OPR and the Inspector General at the time. The office consisted of only a few attorneys and conducted relatively few investigations itself; rather, it oversaw investigations conducted by the internal affairs offices of the various components and agencies within the Justice Department such as the FBI and Drug Enforcement Administration (DEA). From time to time, an allegation of abuse of prosecutorial or investigative power by Department officials at the direction of the White House arose, necessitating OPR's direct involvement in the investigation, sometimes with the assistance of the FBI, such instances were not the norm, however. For the most part, OPR served in an oversight capacity on behalf of the Department's leadership.

After an Inspector General was established for the Department in 1988, OPR's jurisdiction became more focused on the conduct of attorneys acting as attorneys and on law enforcement agents assisting them. Thus, since 1994, OPR has had jurisdiction to investigate allegations that Department of Justice attorneys engaged in misconduct in the exercise of their authority to investigate, litigate, or render legal advice. OPR's jurisdiction includes attorneys assigned to the various components of the Justice Department, including the FBI, DEA, Bureau of Alcohol, Tobacco & Firearms, Bureau of Prisons, and the U.S. Marshals Service. OPR also investigates allegations of professional misconduct made against Department attorneys who serve as immigration judges and enforce the Immigration and Nationality Act. Further, OPR investigates misconduct allegations against Department of Justice law enforcement agents when Department attorneys are involved in the alleged misconduct. Other allegations of misconduct against attorney and law enforcement agents are investigated by the Office of the Inspector General – example, for off-duty misconduct, voucher fraud, and the like.

OPR is an independent office, not within any of the Divisions or components of the Justice Department, and reports directly to the Attorney General and Deputy Attorney General. As noted, the office is headed by a Counsel for Professional Responsibility and a Deputy Counsel. Throughout the decade of the 1990s, and at the direction of then Attorney General Janet Reno, OPR grew in size from seven to twenty-four attorneys along with additional support staff. Its attorneys also began to conduct many more investigations themselves and the investigations focused largely on compliance by Department attorneys with their numerous professional obligations. Currently, there are four Associate Counsel who oversee the work of twenty-two Assistant Counsel and eight support staff members. Five of the Assistant Counsel are Assistant U.S. Attorneys on detail to OPR from U.S. Attorneys' Offices across the county. Most of the permanent OPR attorneys have prior experience as Assistant U.S. Attorneys or as Department of Justice litigators. Within the Justice Department, OPR's investigations are uniformly regarded as fair and thorough. However, the office continues to be understaffed and as a result is not able to complete the investigations it conducts in as timely a manner as the attorneys who are subjects of the investigations, the Department, and the public deserve.

B. Sources of Complaints

Department employees have a duty to report to an appropriate supervisor, any evidence or non-frivolous allegations of misconduct concerning themselves or their colleagues. The supervisor must evaluate whether the misconduct allegation at issue, if true, is serious. If so, the supervisor must report the matter to OPR. Any statement by a judge indicating a belief that a Department attorney has engaged in misconduct must be reported to a supervisor and he must report it to OPR if he determines it to be a non-frivolous allegation of serious misconduct. The duty to report is not limited to instances where the court uses the term "misconduct" because courts do not always use that term when an attorney fails to abide by his professional responsibilities. In cases where a judge *finds* that a Department attorney committed misconduct or requests an inquiry into possible misconduct, the attorney or his supervisor must immediately report the matter to OPR, even if the reporting attorney considers the judge's action to be frivolous. Such matters are usually tracked for full and often expedited investigations.

As a result of that reporting requirement, about half of all allegations of misconduct against Department attorneys are brought to OPR's attention by Department sources. These include self-referrals and referrals

of complaints by officials in U.S. Attorneys' Offices and Department litigating divisions. The remaining complaints received by OPR come from a variety of sources, including private attorneys, defendants, inmates and civil litigants, other federal agencies, state or local government officials, congressional referrals, and media reports.

In addition, OPR regularly searches the Westlaw (legal) database for cases involving judicial criticism and findings of misconduct, and reviews such matters that have not already been referred to OPR to determine whether an investigation is warranted.

C. Miscellaneous Matters and Inquiries

OPR receives about 1,100 letters, emails and other forms of communication each year, asking for assistance. Many complaints are frivolous on their face, vague and unsupported by any evidence, or not within OPR's jurisdiction. For example, a prisoner might complain about jail conditions, or about the public defender who represented him, or the judge who presided over his case. Such complaints are referred to the appropriate component within the Department or the complainant is directed to an office or agency outside the Department for assistance.

About twenty-five percent or 250 of the complaints are determined to be serious enough to require OPR to open inquiries into the allegations. Typically in such cases, OPR asks the subject attorney to provide a written response to the allegations, one that is written by him and not edited by anyone in his office or the Department, along with relevant documents. A large majority of these inquiries are closed with a finding of no misconduct based on a review of these materials and the individual bringing the matter to our attention is advised by letter that his complaint did not warrant further investigation. However, if in the course of an inquiry, OPR determines that further investigation is needed, the matter is converted to an investigation, the conduct of which is described below. In addition, we open some matters as investigations from the outset due to the serious nature of the allegations. For example, a finding of misconduct or serious judicial criticism of a Department attorney by a court is normally opened as a full investigation.

D. Investigations

In a typical year, we initiate between 80 and 100 full investigations. When a matter is handled as an investigation, two OPR attorneys are assigned to the matter. Normally the case file is reviewed and each witness with information about the allegations is interviewed. The interviews are recorded with a digital tape recorder. If the matter is an administrative investigation, and nearly all OPR investigations are administrative in nature, the subject of the allegations is required to sit for an interview on the record under oath with a court reporter transcribing the interview. The subject attorney is later given an opportunity to review the transcript and provide additional information in writing regarding the allegations. All Department attorneys have a duty to co-operate with an OPR investigation. Employees who do not co-operate may be formally disciplined, including termination of their employment with the Department (28 CFR § 45.13 (2006)). In administrative investigations, OPR will normally permit the subject to have privately retained counsel present at his or her interview as long as the counsel does not interfere with the questioning. OPR administrative investigations are occasionally hampered by the fact that we cannot compel non-Department witnesses to participate in OPR administrative investigations and some refuse to do so. Because the investigation is not criminal, OPR cannot conduct a grand jury investigation and serve grand jury subpoenas to compel participation.

If the allegations are criminal in nature and OPR is deemed the appropriate office to investigate, the subject attorney is notified of that fact and is not required to participate in the investigation. Thus, if a decision is reached to try to interview him because it would advance the investigation, he or she is told that he or she is not required to submit to an interview and that, if he or she does, his or her statements may be used against him or her in a subsequent criminal trial. Under these circumstances, the subject attorney has a right to be represented by counsel. A Department attorney cannot be fired for refusing to participate in a criminal investigation, but if the investigation is conducted administratively and he or she is compelled to testify, he or she can be disciplined administratively for what he or she admits to.

At the conclusion of an investigation, the assigned OPR Assistant Counsel prepares a report outlining the results of the investigation and findings and conclusions as to whether the subject attorney committed professional misconduct, exercised poor judgment, made a mistake or acted appropriately under the circumstances.

E. Overview of Disposition of Investigations, 2001 to 2009

1. OPR Findings and Conclusions

In analyzing whether a Department attorney committed professional misconduct, OPR first determines whether the attorney violated the obligation or duty at issue. For example, if an attorney is alleged to have violated his duty of candor toward the court by making a false statement or failing to correct a statement he subsequently learned was false, OPR first determines whether the attorney in fact breached his duty. OPR then determines whether that conduct constituted professional misconduct, poor judgment, mistake, or was appropriate under the circumstances.

OPR finds that an attorney committed intentional professional misconduct if it finds that the attorney acted with the purpose of violating his or her obligation, or knowing that the natural and probable consequences of his or her action will be to violate the obligation.

OPR finds that an attorney committed misconduct in reckless disregard of the attorney's professional obligation when the attorney knows, or should know, of the obligation and that his or her conduct involves a substantial likelihood that he or she will violate the obligation, and the attorney nonetheless engages in the conduct, which is objectively unreasonable under all the circumstances.

Even if an attorney did not breach an obligation, OPR may find that he or she exercised poor judgment when, faced with alternative courses of action, the attorney chose a course of action that is in marked contrast to the action the Department may reasonably expect an attorney exercising good judgment to take. Alternatively, OPR may find that the attorney made an excusable human error, or a mistake, despite his or her exercise of reasonable care under the circumstances.

2. Different Roles for OPR and the Courts

Between January 2001 and June 2009, OPR found professional misconduct in twenty-four percent of the investigations it completed during these eight years, and found poor judgment in eleven percent. OPR made no negative findings in sixty-five percent of the investigations it closed in the last eight years. Among the sixty-five percent are many involving serious criticism or findings of misconduct by the courts. It is noteworthy that OPR disagrees with courts frequently. It does so for several reasons, including the fact that the roles of OPR and the courts in addressing possible misconduct by Justice Department attorneys are significantly different. The courts' interests are in protecting the rights of defendants, enforcing the court's orders and maintaining decorum, and imposing sanctions for rule violations. In fashioning an appropriate course of action, a court is limited to the record in the case before it, and often does not permit the individual prosecutor to address his or her individual culpability.

OPR, on the other hand, focuses on the individual attorney's personal responsibility to uphold the standards of professionalism established by the Constitution, statutes, court and bar rules, and Department regulations and policies. In so doing, OPR takes a more in-depth look at what led to the court's criticism, and delves into the entire background of the case and the scienter level of the attorney. Thus, in making an assessment of the attorney's culpability in handling the matter, we look at such factors as the attorney's communications with the client agency, investigators, and supervisors, what the attorney knew or should have known based on his or her level of experience and the obvious applicability of the rule to the situation, and his or her options for dealing with unexpected problems. In addition, courts use varying definitions of what constitutes "professional misconduct" and often criticize attorneys without using that term at all. For example, a court may use the term "professional misconduct" to describe conduct that OPR refers to as "poor judgment" or a "mistake." Or, conversely, a court may describe as an "error" conduct that we determine constituted reckless misconduct.

3. Most Frequent Allegations and Findings of Misconduct

As noted, much of the day-to-day work of OPR involves ensuring that Justice Department attorneys adhere to the highest standards of professionalism and do not allow anything, including a zeal to convict, to compromise those standards. Between January 2001 and June 2009, the most common allegations of misconduct by Department attorneys were that an attorney made misrepresentations to the court or opposing counsel, and that an attorney failed to act diligently in performing performed his or her duties as a Department attorney, including neglecting assigned cases or committing discovery violations.

Attorneys were also alleged to have made improper remarks to a grand jury or a petit jury, made unauthorized disclosures of client secrets or confidences or of non-public information, failed to comply with Department rules and regulations, missed court deadlines, or failed to perform some other obligation in a timely manner.

As to findings of professional misconduct during the same period, allegations of failure to diligently perform duties resulted in the most findings of misconduct, followed by allegations of making misrepresentations to the court or opposing counsel. OPR also made findings of misconduct for failure to comply with Department rules or regulations, for making unauthorized disclosures, for making improper remarks to a jury, and for discovery violations.

4. Investigations Involving Allegations of Misuse of Power

From time to time, OPR is called upon to investigate allegations of misuse of prosecutorial power by Department officials and line attorneys. As noted, such investigations have been part of OPR's mission since the office's creation in the aftermath of Watergate. Since the early 1990s, OPR has investigated and where appropriate found misconduct in cases involving allegations that criminal prosecutions were started, or terminated, for partisan political purposes, and the FBI's investigative powers were misused to benefit the incumbent administration.

More recently, OPR along with the Department's Inspector General, jointly investigated allegations that seven U.S. Attorneys were simultaneously removed from their positions, and two others were removed a short time before, for improper partisan political purposes. We focused on the reasons for the U.S. Attorney removals and whether the U.S. Attorneys were removed by the Department's leadership, in conjunction with the White House, to influence an investigation or prosecution or to retaliate for their actions in any specific investigation or prosecution for partisan political purposes. We found substantial evidence that partisan political considerations played a part in the removal of several of the U.S. Attorneys. Because several White House officials and former Department officials refused to be interviewed by us and the White House refused to provide internal White House documents related to the removals of the U.S. Attorneys, we recommended that a counsel specially appointed by the Attorney General conduct further investigation, with a grand jury and subpoena power, to determine whether the evidence demonstrates that any criminal offense was committed with regard to the removal of any U.S. Attorney.

We also found evidence that several other U.S. Attorneys were viewed as mediocre performers and were removed because they also lacked political support of their home state Senators, while other mediocre performing U.S. Attorneys were not removed because they had such support and removal would have resulted in a fight between the White House and the Senators. We noted that while U.S. Attorneys are Presidential appointees who may be dismissed for any lawful reason or for no reason, they may not be dismissed for an illegal or improper reason. U.S. Attorneys should make their prosecutorial decisions based on the Department's and the Administration's priorities and the law and the facts of each case, not on a fear of being removed if they lose political support. If a U.S. Attorney must maintain the confidence of home state political officials to avoid removal, regardless of the merits of the U.S. Attorney's prosecutive decisions, respect for the Justice Department's independence and integrity will be severely damaged and every U.S. Attorney's prosecutive decisions will be suspect. The longstanding tradition of integrity and independent judgments by Department prosecutors will be undermined, and confidence that the Justice Department decides who to prosecute based solely on the evidence and the law, without regard to political factors, will disappear.

The Attorney General accepted our recommendation, and appointed a counsel to conduct an investigation which is on-going. OPR and the OIG also examined allegations of politicized hiring at the Justice Department by several officials in the Office of then Attorney General Alberto Gonzalez and concluded that such officials in fact considered political and ideological affiliations of candidates for career attorney positions and for other personnel actions concerning Department attorneys in violation of the Civil Service Reform Act and Department policy. Again, the danger of such misuse of power is that the Department will be perceived as staffed by prosecutors with an ideological or political perspective that will influence the prosecutive decisions they make rather than the facts and the law.

In addition, OPR has been conducting an investigation into whether the attorneys who drafted memoranda approving the CIA enhanced interrogation techniques complied with their obligation to provide objective and

independent legal advice or instead provided the advice they knew their client wanted. OPR also conducted investigations into allegations that certain investigations and prosecutions were initiated selectively against political opponents while public officials of the President's party who engaged in similar conduct were not prosecuted. Such allegations undermine the American government's promise of a fair, unbiased, and politically blind criminal justice system and, obviously, require prompt and thorough investigations.

F. Who Gets in Trouble with OPR

The types of lawyers who tend to get in trouble with OPR are, it appears, the kinds of lawyers who tend to get in trouble wherever they work. These are some common categories that such lawyers seem to fall into: the over eager, the under eager and the uninformed Department attorney. For the over-eager attorney, or "the Zealot," winning is everything. This can be the result of believing that the outcome of a particular case is so important that corners may be cut to gain a conviction. This attorney is so aggressive that he improperly tries to gain advantage by failing to disclose information that by law must be provided to the defendant pursuant to Federal Rule of Criminal Procedure 16, the *Brady v. Maryland, 373 U.S. 83 (1963)*, Department regulations and the Federal Rules of Civil Procedure. Or he violates his duty of candor to the court by failing to disclose material information that is adverse to a position advanced by the Department attorney. Or he misstates the evidence, impugns opposing counsel, makes improper remarks to the jury or breaches plea agreements.

The under-eager attorney, or the "minimalist," does not appreciate and respect the importance of representing the United States as his client. He may fail to charge a case timely or meet discovery or other disclosure obligations because he failed to review all of the files in a timely manner. Or he may fail to obey a court order because he did not prepare the memorandum or pleading timely. In essence, he does not diligently represent his client, the United States.

There are also, unfortunately, some Department attorneys who do not know the rules and, "blissfully ignorant," fail to master the Rules of Professional Responsibility, Evidence, or Criminal or Civil Procedure in the manner required to carry out their important function. These attorneys fail to keep up with new laws or court decisions, fail to review slip opinions, and do not bother to read new Department policies such as the one dealing with disclosure of exculpatory evidence. As noted, OPR considers an attorney's experience level in evaluating misconduct allegations, but knowledge of the rules is expected and required even for attorneys lacking significant experience.

VIII. CONSEQUENCES OF A PROFESSIONAL MISCONDUCT FINDING BY OPR

In cases where OPR concludes that a Department attorney committed professional misconduct, a report is sent to the head of the office or division where the attorney works with a recommendation of a range of discipline for the component head to consider in proposing discipline. OPR is otherwise not involved in the discipline process. Discipline can range from a written reprimand, suspension without pay, up to termination of employment. At the conclusion of the discipline process, pursuant to Department policy, OPR notifies the relevant state bar of which the subject attorney is a member of its finding of misconduct. We share with the bar a copy of OPR's report upon request.

OPR is charged with providing advice to the Attorney General and Deputy Attorney General concerning the need for changes in policies and procedures which become evident during the course of OPR's investigations. OPR moreover, tracks misconduct findings in order to detect developing trends, and recommends remedial training for individual attorneys and changes in institutional training programmes to address patterns of violations. OPR also recommends changes in Department policies and procedures.

OPR reports are usually not made public. Even within the Department, they are shared on a need-to-know basis. This is because they contain sensitive information about the subject attorney and other witnesses referred to in the report who are protected by the Privacy Act. 5 U.S.C. § 552a. (The Privacy Act establishes special requirements for the Executive Branch with regard to disclosure of information on individuals it has collected pursuant to its mission.) In addition, the report may contain other sensitive law enforcement information, classified information, or information prohibited from disclosure by Federal Rule of Criminal Procedure 6 (e) which, as noted, prohibits the government from disclosing matters occurring

before a grand jury.

Occasionally, however, the subjects of a report are high-ranking public officials and the subject matter is of such importance to the public that the public's interest in disclosure outweighs the privacy interests of the subjects. Thus, the joint OIG/OPR reports I referred to regarding the U.S. Attorney removals and the Department's hiring practices were deemed to be so important in terms of restoring public confidence in the Department and the morale of its employees, that the reports were made public.

Lastly, OPR may share information with other government agencies and officials for law enforcement purposes; with individuals and agencies in order to elicit information relevant to the investigation or another pending proceeding, in a court, grand jury, regulatory or administrative proceedings; with other federal agencies when requested in connection with hiring or retention of an employee, the issuance of a security clearance, or the reporting of an investigation of an employee; with complainants to the extent necessary to inform them of the progress or results of OPR's review of their complaints; and to the subject of an OPR investigation or inquiry to further the investigation or inquiry or to give notice of the status or outcome of the matter.

PARTICIPANTS' PAPERS

ETHICS AND CODES OF CONDUCT FOR JUDGES, PROSECUTORS AND LAW ENFORCEMENT OFFICIALS: BANGLADESH PERSPECTIVE

*Md. Shah Abid Hossain**

I. INTRODUCTION

Good governance based on accountability, participation, transparency and responsiveness is a pre-requisite for development and ensuring the provision of services to the people. Human rights and human security are central to the concept of sustainable human development and therefore an important aspect of any governance programme. Rule of law and access to justice are key elements of governance and are essential for ensuring human rights. Without good governance, corruption flourishes and the benefits of public programmes do not reach to their target recipients, especially the poor.

One of the most important duties of a criminal justice system is to detect corruption and impose appropriate punishment on corrupt politicians and public officials. But, if the criminal justice system itself is corrupt, it is a grave danger to democracy. In particular, corruption in the judiciary, prosecutorial authorities and law enforcement authorities, which have the important role of maintaining the rule of law, not only decreases the capacity of a country to curb corruption, but also deteriorates the morale of the people and their trust in the justice system. The Bangladesh chapter of the international anti-corruption watchdog, Transparency International (TI) blamed three factors for the poor score of the country: absence of administrative reforms; influence on the judiciary; and insecurity and uncertainty in business and investment.

On 26 September 2007, TI released its annual Corruption Perception Index (CPI) for 2007. On a scale of 0-10, the index ranked countries in terms of the perceived degree of prevalence of political and administrative corruption. The results showed that Bangladesh scored 2.0 points and ranked 162nd of the 180 countries included in the Index in 2007. It may be recalled that Bangladesh was placed at the bottom of the list for five successive years, from 2001-2005. In 2006 Bangladesh was ranked third from the bottom. While many high-ranking countries received lower scores in 2007, Bangladesh remained steady at score of 2.0. Pointing to an apparent failure in maintaining the integrity of the legal process, TIB Executive Director Iftekharuzzaman said: "If the oversight institutions could work properly, for example, if the judiciary and police were not influenced, the position of Bangladesh could have been better in the index."

Despite impressive achievements in a variety of fields, with fledging democracy Bangladesh suffers from weak governance, poverty and limited government capacity to deliver basic services. Corruption is widespread in Bangladesh, with various forms and manifold impact on all aspects of social and economic life. Systemic corruption continues to prevail and to permeate the economy of the country in every sector and weakens its governance structures at all levels. Pervasive corruption and the need for better governance are fundamental constraints on the development of Bangladesh. That's why access to justice, including judicial and security sector reform, has emerged as a critical area of concern. In Bangladesh, an accountable, transparent and efficient judiciary and police service, based on ethical moral values, is essential for the safety and wellbeing of all citizens, national stability and longer-term growth and development.

The judiciary and law enforcement services have experienced both organizational and operational changes during the last several years in Bangladesh. These changes, coupled with a formidable and entrenched organizational culture, call for fresh approaches to managing ethics in the judiciary and police work. Unfortunately, little has been written concerning the impact of these changes on the ethical framework of the judiciary and law enforcement agencies. One of the greatest challenges facing the criminal justice system and law enforcement administrators today is the creation and maintenance of a values-based agency consisting of an ethical cadre of officers and supervisors that represent the values of society. Many

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issues arise that make the maintenance of ethical employees a difficult task.

For effective control of corruption, prevention is the best solution. That is why an entire chapter of the United Nations Convention against Corruption is dedicated to prevention of corruption, with measures directed at both the public and private sectors. These include model preventive policies, such as the establishment of anti-corruption bodies and formulation of and strict adherence to a standard set of codes of conduct, requirements for financial and other disclosures, and appropriate disciplinary measures. Transparency and accountability in matters of public finance must also be promoted, and specific requirements are established for the prevention of corruption, particularly in the critical areas of the public sector, such as the judiciary, law enforcement and public procurement.

II. SITUATION ANALYSIS

A. Socio-Economic and Political Environment

Bangladesh was born in 1971 after a short, but regionally destabilizing, war of independence with Pakistan. Following independence, Bangladesh saw political assassinations, military interventions, a polarized political system, and a series of coups during the late 1970s and early 1980s. Bangladesh is a constitutional republic with a multi-party parliamentary democratic system of government. The Head of State is the President; however executive power rests with the Prime Minister. Following a period of military rule, democracy was restored in 1991. Since then three elections have been held, in 1996, 2001 and 2008. The media, civil society, students, community, labourers' unions, lawyers and other groups were enthusiastic and advocated their support for democracy.

Among hundreds of political parties, the Bangladesh Awami League (AL), the ruling party, and the Bangladesh Nationalist Party (BNP), the main opposition party, are significant. The current government is a coalition headed by AL which returned to power through the national election in December 2008. With approximately 150 million people inhabiting some of the most productive land in the world, the country is as poor as it is luxuriously fertile. Bangladesh has a total area of 143,998 sq. km. With the exception of several city states (Singapore and Malta) Bangladesh is the most densely populated country in the world. It is three times more densely populated than India and seven times more densely populated than China. Most of the population, however, lives in rural areas, impacting on the delivery of many public services, including police services and access to justice. This is particularly difficult in more remote and inaccessible areas because of poor road infrastructure and lack of communications. The people are predominantly Muslim (Sunni) with a small percentage of Hindus and a very small percentage of Christians. Buddhists are also a tiny minority of the population. There are some ethnic groups, mostly living in Chittagong Hill Tracts.

Bangladesh is a poor nation, with the average per capita income of around US$520. It is ranked 139th in the UN Human Development Index (HDI[1]) out of 175 countries (2003 Human Development Report). More than 250,000 Bangladeshis are working abroad and about $US1.9 billion is received as remittances from their income each year.

In some other areas of human development, Bangladesh has made positive gains. Significant reduction has been achieved in infant and child mortality rates. Population growth has been sharply reduced to 1.5% and primary school enrolment has increased to 90%. Micro credit institutions, from both the public and private sectors, have not only created employment and earning opportunities for the poor and unemployed, but also social awareness and empowerment of women.

The country continues to attract foreign aid from a large number of countries and development partners such as the World Bank (WB), ADB, UNDP, UNICEF, UNESCO, WHO, USAID, the European Community (EC), the Department for International Development (DFID), the Danish International Development Agency (DANIDA), the Japan International Cooperation Agency (JICA) and the Canadian International Development Agency (CIDA). For many years foreign aid covered over 50% of the development budget of the government but has shrunk to less than 30% and is declining rapidly.

[1] The HDI captures average levels of a nation's human development, by reflecting achievements in longevity, knowledge and standard of living.

Crime and corruption are serious problems in Bangladesh and in the view of many, quite rampant. According to a World Bank report, the country's GDP growth (which increased to 4.8% in the 1990s) would have gone up by 2 to 3% and its per capita income would be doubled, if corruption had not been so widespread. Extortion and toll collection are quite common. This adds significantly to the cost of doing business and creates hardship and insecurity for many honest and hard-working people. The offices identified as the most corrupt are police stations (thana), lower Judicial Courts, public hospitals, Sub-registrars Office, Land Record Office, Thehsil Office and scheduled banks.

The perception of corruption indicates the absence of accountability and misuse of position and power as the most important manifestation of corruption mainly because of the willingness of the people to pay to reduce harassment and waste of time. It is also interesting to note that the second most frequent perception of corruption is negligence of duty. This is directly related to non-accountability and absence of monitoring system. The third most frequent perception of corruption is the engagement in outside activities avoiding the parameter laid down by rules of business or service rules.

The latest amendment of the Criminal Procedure Code Ordinance, in February 2007, separated the judiciary from the executive branch of the government, securing the framework for an independent judiciary. Undue political and executive interference is widespread in the criminal justice system in Bangladesh, especially in the lower courts. It is also characterized by prolonged judicial process and delayed delivery of justice to the all types of service recipients.

B. The Criminal Justice Sector in Bangladesh

The criminal justice sector in Bangladesh comprises the police, judiciary (including courts, prosecutors and defence counsel), traditional and non-formal conflict resolution mechanism and the prisons. In addition, a number of civil society organizations also carry out activities such as legal aid in the sector. The police and prisons are under the administrative control of the Ministry of Home Affairs (MoHA). The administration of the courts is complex and involves a number of Ministries and the Supreme Court. The formal justice system, largely inherited from the colonial era giving long passage of time now needs reform in many areas.

In the view of many individuals and groups, the criminal justice system in Bangladesh is essentially impoverished: crime is underreported and poorly investigated by the police, the trial system is slow and inadequate and the prisons are dilapidated and overcrowded. Almost 70% of detainees are awaiting trial. Some have been in pre-trial detention for years because of backlogs in the courts. It is not uncommon to have views expressed that the criminal justice system is a burden and part of the "problem" rather than the solution. Inefficiency and corruption throughout the sector are a major concern and a significant inhibitor to access. There is a growing desire from the civil society, media, ministries and international agencies to establish a more co-ordinated vision for the justice sector.

The structure, organization and primary focus of the justice system is based on a colonial "law and order maintenance" model. This concentrates on public order, control and protection of the wealthy and powerful rather than the detection, investigation and prevention of crime with the consent and cooperation of the law abiding public. Key laws pertaining to human security include *The Penal Code (1860), The Police Act 1861, The Evidence Act (1872), The Code of Criminal Procedure (CrPC 1898), The Anti-Corruption Act (1947) and the Special Powers Act (1974)*. There are a number of other Acts and Ordinances in addition to new legislation which include *The Women and Children Repression Prevention (Special Provision) Act (2000), Speedy Trial Tribunal Act (2002) and The Law and Order Disruption Crimes (Speedy Trial) Act (2002).*

The application of these laws and ordinances is the primary responsibility of Police, who are the first point of contact with the formal justice system for most of the people. In case of violation, the offence is reported to the Officer-in-Charge of the police station in the form of a First Information Report (FIR). The police officer in charge of investigating the case is known as the Investigating Officer (IO). If a *prima facie* case is made against the accused during the investigation, the IO either submits a Charge Sheet (CS) or a final report. The Police have wide discretionary powers which can lead to serious miscarriages of justice, particularly by the application of Section 54 of the CrPC which allows police to arrest anybody without warrant of arrest and the Special Powers Act (SPA).

The administration of justice is the responsibility of the judiciary, which comprises the Supreme Court at the higher level, followed by a hierarchy of civil and criminal courts at the district level; and finally, village courts in rural areas and conciliatory courts in municipal areas. Bribery, corruption, inefficiency, lack of resources, large case backlog and abuse of the system are widely reported and appear to be endemic.

The law provides accused persons with the right to be represented by counsel, to review accusatory material, to call or question witnesses, and to appeal verdicts. Cases are decided by judges rather than juries, and trials are public. In practice a public defender is rarely provided to defendants. Defendants are presumed innocent, have the right to appeal, the right to be present and to see the government's evidence.

C. Composition of Judiciary

The court system has two levels: the lower courts and the Supreme Court. Both try civil and criminal cases. The Supreme Court is divided into two divisions, the High Court and the Appellate Division and is headed by the Chief Justice. The High Court Division hears original cases mostly dealing with constitutional issues, and reviews cases from the lower courts. The Appellate Division hears appeals of judgments, decrees, orders, or sentences of the High Court.

After the separation of the judiciary from the executive in November 2007, the government appointed judicial magistrates to replace the executive magistrates who were presiding over the lower courts. The Subordinate judiciary may broadly be categorized as Civil Courts and Criminal Courts. With some exceptions civil courts have jurisdiction to try all suits of a civil nature. There are two classes of Criminal Courts in Bangladesh, namely Courts of Sessions; and Courts of Magistrates. There are two classes of Magistrate, namely: Judicial Magistrate and Executive Magistrate. The Civil Courts Act 1887 and the Criminal Procedure Code 1898 elaborate the structure and powers of the civil and criminal courts respectively. The Metropolitan Magistracy functioning in six divisional metropolitan cities of the country also deals with criminal cases.

The attorney general is the principal law officer of the government. He is also the leader of the bar and *ex-officio* chairman of the Bangladesh Bar Council. He is assisted by the additional attorney general, deputy attorney generals and assistant attorney generals. They represent the state in the Supreme Court and conduct cases in the courts on behalf of the state. The government pleader is the principal law officer of the government in the district and he is assisted by the additional and assistant government pleaders. They represent the state in the subordinate civil courts of the districts and conduct cases on behalf of the state. Similarly, the public prosecutor is another principal law officer of the government in the district on criminal issues.. He is assisted by the assistant public prosecutors. They conduct prosecution on behalf of the state in the courts of sessions; sessions level courts or tribunals in the district. The police sub-inspectors conduct prosecution on behalf of the state in the courts of the magistrates.

The report of the *Police Commission of Bangladesh (1989)*, recommended that the present system involving political appointments need to be abolished and replaced by a permanent prosecution service. Steps are being taken; however any permanent appointments will need to be transparent and objective to avoid exacerbating the existing problem.

D. Ministry of Law, Justice and Parliamentary Affairs

The responsibilities of the Ministry of Law, Justice and Parliamentary Affairs (MoLJPA) include, among others, the drafting of laws and the appointment of public prosecutors and assistant public prosecutors. MoLJPA is a key stakeholder in justice sector reform and has been active in the area.

A number of other reforms have been introduced by the Ministry of Law, Justice and Parliamentary Affairs (MoLJPA) to streamline the judicial system and reduce backlog in the courts. These include the Speedy Trial Tribunal for major cases, strengthening of alternative dispute resolution mechanisms and consideration of introducing cost penalties for unnecessary adjournments and delays. In addition, a Monitoring Cell has been established in the MoHA to oversight the investigation process and co-ordinates with MoLJPA.

E. Bangladesh Police

The Bangladesh Police is a national organization with Police Headquarters (PHQ) based in Dhaka. It

comprises nearly 125,000 personnel of which 85,000 are constables. In addition to PHQ, it has a number of branches and units including the Special Branch, Criminal Investigation Department (CID), Armed Police Battalion, Training Institutions, Metropolitan Police and Range (including Railway Police). The Range and Metropolitan Police are structured into Districts, Circles, Police Stations (Thanas) and Outposts. To curb the serious crime and terrorist activities within the country, Rapid Action Battalions are working all over the country under operational control of an Additional Inspector General of police.

Bangladesh police is entrusted to prevent crime and maintain peace and order in the society. It inherits century old tradition and heritage. The current police organization emerged, along with the new state, from the Pakistani era in 1971. The first officers of the Bangladesh Police were Bengali members of the recently disbanded East Pakistan Police. The Police-Population ratio for Bangladesh is near 1: 1200. With a vision *"To provide service to all citizens and make Bangladesh a better and safer place to live and work"* Bangladesh Police has been working relentlessly. The vision is to be achieved through a five point missions:

- To uphold the rule of law;
- To ensure safety and security of citizens;
- To prevent and detect crime;
- To bring offenders to justice; and
- To maintain peace and public order.

Significant problems exist in human security sector and access to justice in Bangladesh and these issues adversely impact on the poor and vulnerable especially women and young people. The 2007 Transparency International Household survey found law enforcement to be one of the most corrupt parts of government. Many citizens remain hesitant to report crime or visit a thana. The importance of an efficient and effective police service as an integral part of broader justice system has been recognized by all quarters. With that spirit Police Reform Programme (PRP) has been working to create a new and modern police. The programme was launched in 2005, and is being implemented by the Ministry of Home Affairs and the Bangladesh Police in partnership with UNDP, DFID and the EC. The first phase of the programme was due to end by June 2009 but due to technical reason the mandate of the programme has been extended till September 2009. PRP aimed at improving the efficiency and effectiveness of the Bangladesh Police by supporting key areas of access to justice; including crime prevention, investigations, police operations and prosecutions; human resource management and training; and future directions, strategic capacity and oversight.

The key achievements include Strategic Planning and Police internal oversight. A Strategic Plan for 2008-2010 and a range of supporting documentation have been developed; including the National Strategy for Community Policing and Crime Prevention, Information Management Strategy and National Training and Human Resource Management Plan. An internal oversight unit with more than 400 officers has been established. Since 2007, the Unit has investigated more than 17,000 cases which have contributed to the reduction in corruption through stronger internal oversight and accountability. Substantial achievements during the first phase of PRP have encouraged development partners to come forward with adequate funds for the extension of the programme for a further period of five years, 2009 to 2014.

Without providing a comprehensive analysis of corruption in Bangladesh, it is appropriate to provide some analysis of corruption in Bangladesh Police and the nexus between poor salary, formal discretionary powers, lack of accountability and police corruption. Police officers in Bangladesh however have wider formal and informal power than the average citizen and by the nature of their work they are often exposed to environments conducive to corrupt activities. These include a lack of personal and corporate accountability, poor role modelling and regular opportunity. This is compounded because there are few disincentives such as strong and ethical supervision, effective detection and clear punishment systems.

When combined with a particularly low salary and poor conditions, these additional elements of power and opportunity create a breeding ground for corruption by police officers. Earlier analysis focused on low community confidence in the police. This lack of confidence applies equally to the reporting of complaints against police themselves.

No country is free from corruption. However, countries that did enforce accountability through an all-purpose anti-corruption agency to undertake investigations anywhere in the public sector and which

increased transparency by allowing watchdog bodies to look at their activities did experience sustainable changes. The same could be applied for police. Bangladesh police is now in process of designing an effective anti-corruption strategy focusing on four main dimensions: Human Resources Management (salaries, recruitment, promotion and selection), command and control (supervision), training (professionalization) and finally detection/repression (Internal Investigation Unit, Internal Audit Unit).

F. Anti-Corruption Commission

The Anti-Corruption Commission (ACC) was established in accordance with the Anti-Corruption Commission Act 2004 and replaced the defunct Bureau of Anti-Corruption, which had suffered from ineffectiveness and lack of independence. Although the commission failed to file a single case in its first few years of existence, it was restructured to perform more effectively in February 2007. The ACC operates under the schedule of the Prevention of Corruption Act 1947, the Penal Code 1860, and the Money Laundering Prevention Act 2002. The ACC is scrutinizing more than 70,000 corruption allegations that were alleged in 2007. Public service institutions in government and private sectors have been the main targets of investigation. In association with Transparency International Bangladesh, the ACC started a year-long awareness campaign against corruption in December 2007 including seminars, symposiums and workshops related to anti-corruption.

G. The Media

The print and electronic media are significant players in highlighting and reporting law and order issues in Bangladesh. They also play a key role in monitoring trends and articulating public opinion.

The media in Bangladesh plays a vital role in maintaining accountability and transparency of public officials and agencies, and in creating awareness and reflecting public opinion. However, the challenge is to do this with responsibility with objective, factual and balanced reporting.

III. CODES OF CONDUCT AND OTHER MEASURES FOR CORRUPTION CONTROL IN BANGLADESH

The President promulgated Government Servants (Conduct) Rules, 1979 to regulate official conduct of government servant. The rules are made applicable to all government servants whether on duty or on leave within or outside Bangladesh serving in a civil capacity in respect of the government of Bangladesh. However, rules are not applicable to certain category of government servants of specific department for whom separate rules exist governing the terms and conditions of their services.

The rules designed to provide a framework for code of conduct for government servants intended to ensure safeguards against corruption, external influence on decision-making, nepotism, favoritism, victimization, etc.

The rules are very elaborate, thirty-two in number, imposing restrictions and prohibition upon the government servant in specific areas of activity. Broadly, the rules fall under three categories. First, some of the rules impose total prohibition which applies to speculative investment, approach to members of Jatiya Sangsad or other non-official person to intervene on behalf of the government servant, taking part in politics and elections, propagation of sectarian creeds, indulging in parochialism, favouritism, victimization and willful abuse of office. Similar prohibitions are there debarring a government servant from using political or other influence. A government servant is further prohibited from approaching foreign mission or aid-giving agency to secure invitation for him or herself to visit a foreign country or to elicit training facilities abroad.

The second category relates to rules requiring a government servant not to do certain things without prior permission of the government. These relate to acceptance of gifts beyond a certain limit, raising of funds, lending and borrowing, purchasing and selling of valuable property and construction of buildings. Other areas include promotion and management of companies, private trade and employment, insolvency and habitual indebtedness, communication of official documents or information to others etc. In all such cases, prior permission of the government is necessary.

The third category of rules requires declaration from the government servant through usual channel, at the time of entry into government service, the value of properties held by him or her exceeding Tk. 10,000. The rules further require submission of annual statement of assets by a government servant in the month

of December showing increase or decrease of the value of property submitted at the time of entry into service. Finally, a government servant is required to disclose his or her liquid assets when asked so by the government.

A. Codes of Conduct for Judges and Prosecutors

For Supreme Court and High Court judges:

In exercise of power under article 96(4) (a) of the constitution of the people's republic of Bangladesh, the supreme judicial council prescribes the 14 point code of conduct for all of the judges of the Appellate Division and the High Court Division of the Supreme Court of Bangladesh. The 14 point Code stipulates that any act of a judge of the Supreme Court of Bangladesh whether in official or personal capacity, which erodes the credibility and independence has to be avoided. The code of Conduct is only restatement of values of judicial life and is not meant to be exhaustive, but illustrative of what is expected of a judge. This Codes of Conducts has been in effective from the 7 May 2000 and are as following:

A judge:

- should uphold the integrity and independence of the judiciary;
- should avoid impropriety and the appearance of impropriety in all activities;
- should perform the duties of the office impartially and diligently;
- may engage in extra-judicial activities to improve the law, the legal system, and the administration of justice;
- should practice a degree of aloofness consistent with the dignity of his or her office;
- must not enter into public debate or express his or her views in public on political matters or on matters that are pending or are likely to arise for judicial determination before him or her;
- is expected to let his or her judgments speak for themselves. He or she will not give interviews to the media;
- will not accept gifts or hospitality except from his or her family, close relatives and friends;
- should not engage directly or indirectly in trade or business, either by him or herself or in association with any other person. (Publication of legal treatises or any activity in the nature of a hobby will not be construed as trade or business.);
- should not ask for, accept contributions or otherwise actively associate him or herself with the raising of any fund;
- must at all times be conscious that he or she is under the public gaze and there should be no act or omission by him or her which is unbecoming of his or her office;
- shall inform the chief justice of any embarrassment during the period of hearing a case so that the chief justice can take appropriate steps;
- should not engage in any political activities, whatsoever, in the country or abroad;
- shall disclose his or her assets and liabilities if, asked for, by the chief justice.

For subordinate judges and prosecutors:

For judges and judicial magistrates in the subordinate court and for the prosecutors though there are no such written codes of conducts and codes of ethics but judicial officers have to follow the guidelines prescribed by the Ministry of Law, Justice and Parliamentary Affairs. Both the judges and judicial magistrates should render ceaseless and unremitting efforts to dispense quality justice to the justice-seekers maintaining highest ethical conducts.

Every judge will take the initiative in maintaining proper atmosphere in the Court at the time of dispensation of justice between the parties. He or she will also see that no unethical act or no act which derogates from the dignity of the Court is committed within its precincts.

In his or her personal life, a judge will have to be truthful and ideal as well. He or she should not resort to

abuse of power in personal interest. Impartiality must be maintained by him or her in all circumstances. He or she will, maintain decency in his dealings with others. His or her wearing apparel should be decent too.

A judge will take disciplinary steps against his or her delinquent employees. He or she should keep an eye on all his employees so that the litigant people are not unnecessarily harassed at their hands.

As far as practicable, a Judge will desist from attending social functions and, in particular, he or she will refrain from those social functions through which he or she may come in contact with litigants. His or her lifestyle should be separate from those of the ordinary people of the society.

A Judge will remain above all parties and ideologies and he or she ought not to strive for eulogy and popularity. No Judge should try a cause in which either he or she or his or her relations or his or her friends are personally interested.

On no account will a judge accept gifts, presents, etc. either directly or indirectly, from the parties, or for that matter, from the lawyers to a proceeding in his or her Court.

A judge will not accept any job which runs counter to his or her dignity, honour, duty and responsibility. He or she should be on his or her guard to see 'that his or her personal or social relationships do not affect his or her impartiality in the administration of justice.

A judge will remain above all political parties in public. He or she will never participate in any political meetings, activities or campaigns. He or she will not write any articles either on politics or on any controversial issues in newspapers. A Judge will never grant personal interviews or express his or her views or give any hearing to anybody or resort to any correspondence about the matters which are being examined in his or her Court.

For prosecutors and lawyers:

The Bangladesh Bar Council approved and adopted the *Canons of Professional Conduct and Etiquette* and urges all advocates to conform to these Canons in their conduct with regard to the members of the profession, their clients, the courts and the public generally. To maintain the ethical standard the law officers and prosecutor have to abide by those canons of professional conducts.

Role of prosecutor in criminal proceedings: The office of prosecutors shall be strictly separated from judicial functions. Prosecutors shall perform an active role in criminal proceedings, including institution of prosecution and, where authorized 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. He or she 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: i) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination; ii) 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 benefits or loss of the suspect; iii) Keep professional dealings confidentially, unless the performance of duty or the needs of justice require otherwise; iv) 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 recognized by international law and, where authorized 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 inhuman 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 the responsible ones for using such methods are brought to justice.

B. Codes of Conduct for Law Enforcement Officials

According to the regulation 106 of The Police Regulation of Bengal, 1943 the Government Servants (Conduct) Rules are also applicable for police and other law enforcement officials in Bangladesh.

Presently though there is no specific codes of conduct for Bangladesh Police but PRB (Police regulation of Bengal) provides police procedural and behavioral guidelines for police personnel. Bangladesh Police is now in the process of designing of an Anti Corruption Strategy for Bangladesh Police which includes Code of Conduct and Ethics also. Police officers are required, at all times, to carry out their duties in accordance with the provisions of this draft Code. They should remember that a breach of its standards could lead to a criminal or disciplinary investigation, either by the Internal Affairs Unit or the Anti-Corruption Commission or the Bangladesh Court of Justice.

1. Primary Responsibilities for a Police Officer

The Constitution of the People's Republic of Bangladesh states that "to enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is an inalienable right of every citizen and no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law." Other rights pertaining to human security are enshrined in articles 32, 33, 35 and 42 of the Constitution. Ensuring the respect for the laws and ordinances of the country is the primary responsibility of the police. Police are expected to be the primary protectors of human rights as well as human security. Regulation 33 of the Bangladesh Police Regulations (PRB–Police Regulations Bengal 1943), enjoins all ranks, while being firm in the execution of duty, to show forbearance, civility and courtesy towards all classes.

(i) Police officers shall at all times fulfil the duty imposed upon them by law. The main purposes of the police in a democratic society governed by the Rule of Law are:
   (a) to protect and respect the individual's fundamental rights and freedoms;
   (b) to maintain public tranquillity, and Law and order in society;
   (c) to combat crime;
   (d) to provide assistance and service functions to the public.

   With the duties police officers shall protect human dignity and uphold the human rights.

(ii) Police officers shall not subject any person to torture or to inhuman or degrading treatment or punishment.

(iii) Police officers shall not knowingly or through negligently make any false, misleading or inaccurate oral or written statement or entry in any record or document used for official purpose.

2. Relations with the Public

A police officer must act in such a manner as to preserve the confidence and consideration as the duties require.

(i) General Conduct
   (a) Police officers shall not take any active part in politics;
   (b) Police officers shall not behave in a manner which brings, or likely to bring, discredit on the police service or that undermines or likely to undermine public confidence in the police, whether on or off duty.

(ii) Equality
   (a) Police officers shall act with fairness, self-control, tolerance and impartiality when carrying

out their duties regardless of age, nationality, gender or religion. They shall use appropriate language and behaviour in their dealings with members of the public, groups from within the public and their colleagues.

(b) They shall respect all individuals and their traditions, beliefs and lifestyles compatible with the rule of law.

(iii) Integrity

(a) Police officers shall not commit any act of corruption or dishonesty.

(b) Police officers shall, at all times, respect and obey the law and maintain the standards stated in this Code.

(iv) Propriety

(a) Officers shall be clean and respect the uniform when on duty whilst in uniform or in plain clothes;

(b) Police officers shall be fit to carry out their responsibilities;

(c) Police officers shall ensure that property and equipment entrusted to them as police officers are handled and maintained as required by law and the instructions of the Inspector General;

(v) Confidentiality

(a) Confidential things, in possession or control of police officers, shall be kept confidential, unless performance of duty or the needs of justice strictly require otherwise.

(vi) Use of Force

(a) Police officers, in carrying out their duties, shall as far as possible, apply non-violent methods before resorting to the use of force or firearms;

(b) A police officer shall discharge a firearm only when the officer in good faith realizes the necessity to do so in order to save life or prevent serious injury.

(c) Whenever police officers resort to the use of firearms, they shall identify themselves as such and shall give a clear warning of their intent to use firearms, with sufficient time for the warnings to be observed, unless to do so:

(d) Would unduly place any person at a risk of death or – serious injury;

(e) Would be clearly inappropriate or pointless in the circumstances of the incident.

3. Duty of Supervisors

(i) Supervisors shall ensure that their staff carries out their professional duties;

(ii) Supervisors have a particular responsibility to secure, promote and maintain professional standards and integrity by advice, remedial or other relevant and appropriate action;

4. Police Investigations

(i) Police officers shall treat all victims of crime and disorder with sensitivity and dignity. Police officers shall consider any special needs, vulnerabilities and concerns of the victims..

(ii) Police investigations shall be objective and fair, and thorough manner in accordance with the law;

(iii) Police officers shall take account of the special needs of witnesses and be guided by the Witness Protection Program for their protection and support, in particular, where the intimidation of witnesses is at risk.

5. Detained Persons

(i) Police officers shall ensure that all detainees are treated humanly.;

(ii) Police officers shall fill and keep a custody record for each detainee;

(iii) Police officers shall take every reasonable steps to protect the health and safety of individuals who are arrested or detained and shall take immediate action to secure medical aid for such person;

C. Monitoring of Implementation

1. Monitoring, Supervision and Control over the Subordinate Judiciary by the Supreme Court

According to Article 109 of the Constitution the High Court Division has superintendence and control over all courts and tribunals sub-ordinate to it. To ensure accountability and transparency of the Judicial Officers of sub-ordinate judiciary, it is essential to keep their performance under constant supervision and monitoring. With that view; the Judges of the Supreme Court regularly makes meticulous inspection to observe the subordinate courts throughout the country as per the directives made by the Chief Justice on that behalf. In addition to that the Judges may also go for surprise visit of any court throughout the country as and when it seems necessary. The inspection reports contain not only appreciation of the performance of judicial officers, but also faults, irregularities and even misconduct in respect of administrative and judicial function suggesting appropriate actions against concern judicial officers. The office of Registry of Supreme Court has submitted these reports to Chief Justice for suitable directives and orders.

2. Submission of Annual Wealth Statement of the Judicial Officers

As a part of monitoring mechanism, assets and wealth statements of the Judicial Officers are required to be collected regular1y. Although there is provision in the *Civil Rules and Orders (CRO)* for submission of assets and wealth statements by the Judicial Officers every year, it has not been in practice for years.

District Judges shall submit to the Supreme Court (High Court Division), along with the annual returns and statements, a report for the year to which these refer upon the administration of civil justice. The failure to explain discrepancies between figures given in two successive reports, which, in the absence of special reason, ought to be identical, is also a matter which leads to much unnecessary correspondence, and should be avoided.

Recently Supreme Court has decided to activate the provision of CRO in respect of assets and wealth statements of the Judicial Officers with a view to collecting and preserving assets and wealth statements of Judicial Officers in the Supreme Court for reference as and when necessary.

Conducts of the judicial officers are also overseen by the local authority which includes District judge and Chief Judicial Magistrate. Process of judging judge is also in practice in this regards. Bar council and media also played important role in this regards.

3. Supervision/Inspection of Police Activities

In the police department officers from Inspector to Inspector General are considered as supervising officers. All the units except Police Headquarters and office of the DIGs are subject to periodical and short inspections for ensuring the quality of the professional standard. By the process of supervision and inspection, the accountability of the officers is fixed. But in general, the supervision and inspections are guiding and advisory in nature. Laws guiding the police operation and powers are enumerated mainly in:

- Police Act, 1861
- Police Regulation of Bengal, 1943
- Criminal procedure Code, 1898
- Evidence Act, 1861
- Dhaka Metropolitan Police ordinance, 1976
- Chittagong Metropolitan Police ordinance, 1978
- Khulna Metropolitan Police ordinance, 1985
- Rajshahi Metropolitan Police ordinance, 1992
- The Police (Incitement of Disaffection) Act, 1922

4. Annual Confidential Report

Monitoring of ethical conduct and behaviors is done also through reflection in the Annual confidential reports. Comments and views of District Judge and in appropriate cases the High Court Division of the Supreme Court regarding the quality, honesty, integrity and performance in the ACR creates a deterrent effect in indulging bad practice and corruption. Bad comments in the ACR also play very important role for the effective monitoring and implementation of ethical conduct of police officials.

5. Parliamentary Standing Committees are also constantly Monitoring the Activities of Respective Organizations

D. Effective Measures against Corruption in the Judiciary, Prosecutorial Authorities and Law Enforcement Authorities

The violation of any of the Government Servants (Conduct) Rules are considered as misconduct. For such violation, an employee is accused of breach of discipline and subjected to punishment under "The Government Servants (Discipline and Appeal) Rules 1985". The Government Servants (Conduct) Rules are equally applicable for lower judiciary subordinate judges, prosecutors, police and other law enforcement agencies in Bangladesh. The Government Servants (Discipline and Appeal) Rules prescribe the procedure for inquiry and types of punishment to be imposed depending upon the severity of offence or offences, and also define the procedure for appeal, review and revision.

1. For Judges and Prosecutors

Reports regarding unwanted activities are taken into consideration. In the appropriate cases actions have been taken against judicial officers locally by the District Judge or Session Judge and centrally by the Supreme Court and Ministry of Law Justice and Parliament Affairs.

Usually any deviation of a judicial officer or prosecutor is reported to the local authority first. The authority then initiates internal inquiry. If the person is found guilty of misconduct or Corruption or is considered corrupt. He or she may be asked to explain about it or it may be communicated to the government. Government in consultation with the High Court Division of the Supreme Court may start departmental proceeding against the accused person. If the allegations against him or her are proved, he or she may be dismissed or forced to retire.

2. For Police Officers

In receipt of complaint against a police-officer the authority conducts internal inquiry. In appropriate cases the authority concerned frames a charge and specifies therein the penalty proposed to be imposed and communicates it to the police-officer, requiring him or her to show cause within specified time. Then he or she is asked to explain why the penalty proposed to be imposed on him or her should not be imposed. Measures are taken to punish the accused through stringent departmental proceedings and criminal cases are also initiated against the officer in appropriate cases.

3. Anti Corruption Commission (ACC)

The ACC can try any government official (judges, prosecutors and police etc.) for offences regarding corruption. Since 2007 the ACC has had a remarkable record of investigations leading to trials and convictions. The conviction on charges of corruption in high-profile cases might have a deterrent effect on lower-ranking officials.

IV. EDUCATION AND TRAINING OF CRIMINAL JUSTICE PERSONNEL IN BANGLADESH

All the government service officers are recruited through transparent competitive national level examination by the Public Service Commission and by the Judicial Service Commission for judges. The recruitment examination comprises of multiple choice questions, written examination, viva-voice and psychological testing. After the appointment as a public servant newly entrant officers are provided training in Public Administrative Training Centre on various subjects regarding office administration and management, leadership, financial management, governmental policy, codes of conducts, procedural regulations etc.

A. Legal Education for Judges and Prosecutors regarding Legal Ethics

The Judicial Administration Training Institute (JATI) in Bangladesh was established by Act No. XV of 1995 for imparting training to the members of the judicial service, the law officers of the Government, the court support staff and the advocates enlisted with the Bangladesh Bar Council in order to increase their professional efficiency and potentials.

Judicial education is a new discipline of professional education whose targets are the functionaries involved in the justice delivery system to improve their knowledge and skills and for better court administration and

case management. The curriculum of training course has been designed to enable the persons involved in administration of justice to achieve those objectives and to equip them properly to discharge their responsibility in exercising judicial powers. Besides training on important procedural and substantive civil, criminal, administrative laws and computer literacy, some cross-cutting issues like good governance, anti-corruption issues, ADR mechanisms, codes of conduct and ethics are being imparted through the training programme. The other functions of the Institute are to impart training in drafting legislative and other legal documents to trainees from abroad in co-operation with international donor agencies.

Legal ethics as a separate course is almost non-existent in our legal education curriculum. The very purpose of legal education and the legal profession could be frustrated due to the lack of ethical values. Ethical values are not divorced from social values. Whether it is to protect clients' interests, or to protect general societal interests and human welfare, or whether it is to safeguard the rights and interests of the marginalized sections of society or to protect the victims of violations of human rights, legal professionals need to be imbued with high spirits and standards of personal morality and ethics as well as compassionate understanding of social and human needs. Lawyers must rise above self-interest to uphold the interests of their clients and society; judges ought to dispense justice with caution and care; all other legal activists need to devote themselves to their work with a spirit of sacrifice and service to suffering humanity. Unfortunately, even the Bangladesh Bar Council canons of professional conduct and etiquette are not taught in our law schools. A specific course on legal ethics and morals needs to be developed and incorporated into our curriculum.

B. Education and Training for Law Enforcement Officials regarding Professional Responsibility

1. National Police Training

Police training and education facilities are scattered throughout Bangladesh. The oldest one is the Police Academy, Sardah, established by the British military in 1912. The Principal of the Police Academy is responsible for a raft of basic, refresher and specialist training for constable officers from the rank of Assistant Superintendent of Police. The four Police Training Centers (PTCs), referred to as zonal police training schools until 1992, are responsible for a narrower spectrum of training and typically concentrate on trainee recruit Constables. The remaining schools and centres, such as the Traffic Training School (TTS) and MDTS, are relatively specialized. TTS conducts training on Traffic Control and MDTS conducts training on Driving. The Detective Training School houses the Police Peacekeepers' Training School, and offers courses on human rights, prosecution and investigation. The duration of some of the courses currently offered by the various training schools and centres appear long compared to international standards. The basic training courses for Constables and Sub-Inspectors have excessive emphasis on physique, weapons and drills (more than 50%of the course) and too little on preparing the recruits for the reality of the role they will face as police officers in contemporary Bangladesh.

2. National Police Training Board (NPTB)

There was no holistic training strategy for Bangladesh Police till 2007. A regular forum named the National Police Training Board (NPTB) has been formed to bring all training specialists together to analyse and develop new responses to training needs or delivery techniques. There is little observable training curriculum design, development and evaluation capacity and virtually no expertise and resources to support widespread training material production. There are no external partnerships with training service providers, such as formal links to tertiary institutions.

The Bangladesh Police is now in the process of responding to the needs of the changed paradigm. They are now trying to modernize the police training institutes to produce people-friendly police. The Training Directorate of Police HQ has recently developed some training materials, like a Constable Handbook and In-service Training Manual, for the ranks of constables to sub-inspectors. The Training Directorate also reviewed the syllabus and methodology of basic training for ASP probationers to make the training programme comprehensive, well-designed, empirical and effective. A wide range of issues related to finer human values, social and economical trends, psychological change in human beings, social behaviour and attitudes, scientific techniques of policing, management concepts, analytical and innovative skills, loyalty to the constitution, commitment to the national goal, discipline, ethical and professional conduct, empathy for victims of crime, etc. have been incorporated.

3. Police Staff College

The Police Staff College, the apex training institution for senior police officers, emerged as a statutory organization in 2002 under the Police Staff College Act, 2002. The primary goal of the College is to enhance professionalism in policing through need-based training and to develop human resources with sound capability and integrity to modernize policing within the framework of the national development policy. The College endeavours to provide wisdom to trainees to improve managerial capability, operational and commanding skills and identification of problems and solutions in national and international scenarios.

4. Training Strategy

Capacity building through training within the Bangladesh Police is one of the major focuses of PRP activities. Based on needs assessment, the training strategy for the Bangladesh Police, "From Training Needs to Learning Approaches", has been developed and published. The strategy was shared with the Heads of Police Training Institutes in a conference. Within the training reform agenda, the Sub-Inspectors and Constables Qualification Programme review is underway.

V. PROCEDURAL REGULATIONS IN BANGLADESH

The provisions of the disciplinary rules and regulations to be applied to the government servants are:

- The Govt. Servants (Discipline and Appeal) Rules 1985;
- The Govt. Servants (Conduct) Rules 1973;
- The Public Servants (Dismissal on Conviction) Ordinance 1985; and
- The Prevention of Corruption Act 1947.

A. The Government Servants (Discipline and Appeal) Rules 1985

These rules will be applicable for all government servants (judges, prosecutors and police) except subordinate officers of the Metropolitan police; members of any other police-force below the rank of Inspector of police; subordinate officers, Riflemen and Signalmen of the Bangladesh Rifles, subordinate jail officers below the rank of Jailor of Bangladesh jails in the context of this paper.

The rules provide a broad definition of misconduct which includes conduct prejudicial to good order or service discipline or any contravention of the provisions of the conduct rules or any conduct unbecoming of an officer or gentleman. The definition of misconduct further includes (i) disobedience to lawful orders of superior officers; (ii) gross negligence of duty; (iii) flouting of government orders, circulars and directives without lawful excuse and (iv) submission of petitions before any authority containing wild, vexatious, false or frivolous accusations against a government servant.

The grounds for penalty include inefficiency, misconduct, desertion, corruption and subversion. According to this rules a government servant will be be corrupt or may reasonably be considered as corrupt if

(a) he or she is, or any of his or her dependents or any other person through him or her or on his or her behalf is in possession (for which he or she cannot reasonably account) of pecuniary resources or of property disproportionate to his or her known sources of income; or

(b) he or she has assumed a style of living beyond his or her ostensible means; or

(c) he or she has a persistent reputation of being corrupt; or

(d) he or she is engaged, or is reasonably suspected of being engaged in subversive activities, or is reasonably suspected of being associated with others engaged in subversive activities and whose retention in service is considered prejudicial to national security.

For the purpose of explanation, a person shall be presumed to have a persistent reputation of being corrupt if allegations of corruption are made against him or her during his or her tenure of service in more than two stations of posting.

Two kinds of penalties which may be imposed under these rules, namely, minor penalties and major penalties.

1. Minor Penalties
   (i) Censure;
   (ii) Withholding for a specified period, of promotion or of increment otherwise than for unfitness for promotion or financial advancement in accordance with the rules or orders pertaining to the service or post;
   (iii) Stoppage for a specified period, at an efficiency bar in the time scale, otherwise than for unfitness to cross such bar. (Recovery from pay or gratuity of the whole or any part of any pecuniary loss caused to Government by negligence or breach of orders;
   (iv) Reduction to a lower stage in the time scale.

2. Major Penalties
   (i) Reduction to a lower post or time scale.
   (ii) Compulsory retirement.
   (iii) Removal from service.
   (iv) Dismissal from service.

Under the rules, removal from service does not, but dismissal from service does, disqualify from future employment under the government or under any body corporate established by or under any law. The types of penalties, which may be imposed for specific offences, are also laid down in the rules. For inefficiency, any penalty may be imposed except censure and dismissal or any penalty except dismissal depending on types of inefficiency. Any penalty, major or minor, may be imposed for misconduct and for corruption or subversion, any major penalty except reduction to a lower post or pay. The requirement for imposition of major penalty is that no authority subordinate to that by which a government servant was appointed is competent to impose on him or her any major penalty. This requirement is based on Article 135(1) of the constitution.

The inquiry procedures prescribed under the rules are of three types: (i) the inquiry procedure in cases of subversion; (ii) the inquiry procedure calling for minor penalties; and (iii) the inquiry procedure that may lead to imposition of major penalties. Article 135(2) of the Constitution requires that no person who holds a civil post in the service of the republic shall be dismissed, or removed or reduced in rank until he or she has been given a reasonable opportunity to show cause why that action should not be taken.

Exceptions to the above constitutional requirement include imposition of a major penalty following conviction for a criminal offence or where the authority competent to impose the major penalty is satisfied that it is not reasonably practicable to give the accused government servant an opportunity to show cause or where the President is satisfied that in the interest of the security of the State it is not expedient to give the accused such an opportunity. The last mentioned exception applies under the rules for inquiry procedure in cases of subversion.

The requirement of providing reasonable opportunity to show cause applies to inquiry procedure for both major and minor penalties. There is provision for personal hearing also. After the show cause notice and personal hearing of the accused government servant, the appointing authority is required to appoint an inquiry officer. The punishment or acquittal depends on the considerations of the findings of the inquiry officer. In case of minor penalties, however, the appointing authority may, if he or she is satisfied, give his or her order without appointing an inquiry officer. In cases calling for a major penalty a second show cause notice is to be issued. In such cases, the appointing authority, if he or she thinks it appropriate, may place the accused government servant under suspension or ask him or her to go on leave.

Where the President, as the appointing authority, passes an order in a disciplinary case, no appeal lies against that order. There can, however, be a review request made to him or her by the aggrieved government servant. The President may, either on his or her motion or otherwise, revise his or her order. The limitation for both appeal and revision is three months from when the affected government servant was informed.

Finally, if there is a prosecution or legal proceeding against a government servant on the same issue, there is no bar to the disposal of the disciplinary proceedings. However, if the authority has decided to

impose any penalty, imposition of such penalty shall be stayed until the disposal of the prosecution or legal proceeding.

B. The Public Servants (Dismissal on Conviction) Ordinance 1985

Under the provisions of this ordinance, a Public Servant will be dismissed by the administrative authority when he or she commits a serious criminal offence and a sentence (capital punishment, imprisonment for life and imprisonment for more than six months and/or a fine of more than one thousand Taka) is imposed by a court of law.

C. Prevention of Corruption Act 1947

The Prevention of Corruption Act, 1947 was made for the more effective prevention of bribery and corruption. It extends to the whole of Bangladesh and applies to all citizens of Bangladesh and persons in the service of the Republic wherever they may be. For the purposes of this Act, "public servant" means a public servant as defined in section 21 of the Penal Code and includes elected members of local body and corporation. An offence punishable under Sections 161, 162, 163, 164, 165 or 165-A of the Penal Code shall be deemed to be a cognizable offence for the purposes of the Code of Criminal Procedure, 1898, notwithstanding anything to the contrary contained therein. This law treated corruption as criminal misconduct.

D. Requirement Procedure for Disqualification and Recusal of Judges and Prosecutors in Criminal Cases

1. General Disqualifications

According to the Code of Conduct for Judges regarding general disqualifications to hear a matter, a judge shall disqualify him or herself in a proceeding in which his or her impartiality might reasonably be questioned.

A judge shall be disqualified from hearing a matter/case in which:

(i) he or she served as lawyer, or a lawyer with whom the judge previously practised law served during such association as a lawyer concerning the matter, or the judge or such lawyer was a material witness;

(ii) the judge knows that, individually or as a fiduciary, the judge or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding;

(iii) the judge or the judge's spouse, or a person related either to the judge or the spouse:

- is a party to the proceeding, or an officer, director, or trustee of a party;
- is acting as a lawyer in the proceeding;
- is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; or
- is to the judge's knowledge likely to be a material witness in the proceeding; and

(iv) the judge has served in governmental employment and in such capacity participated as counsel, adviser, or material witness concerning the proceeding or has expressed an opinion concerning the merits of the particular case in controversy.

E. Impeachment and Disciplinary Procedures for Judges and Prosecutors

The Supreme Judicial Council consists of the Chief Justice of Bangladesh and the two next senior judges. The Council may inquire into the capacity or conduct of a judge upon the direction of the President and report its finding to the President. The President may make such direction where, upon any information, he or she has reason to believe that such judge may have ceased to be capable of properly performing the functions of his or her office by reason of physical or mental incapacity or may have been guilty of gross misconduct. Considering the report of the Supreme Judicial Council in which the judge is found to be incapable of performing his or her functions or guilty of gross misconduct President shall, by order remove the judge from his or her office [Article-96 (3) (4) (5) (6)].

F. Internal Regulation for Law Enforcement Officials to avoid a Bias or Conflict of Interest

1. Security Cell and Police Internal Oversight

The Security Cell is a wing of Police Headquarters. This wing collects intelligence regarding the unethical, immoral and unlawful activities of police personnel and carries out thorough investigations to punish the offenders as per provisions of the disciplinary rules applicable to government servants, in addition to regulations such as:

- The Police Act, 1861;
- PRB: Police Regulation Bengal, 1943;
- The Police Officers (Special Provisions) Ordinance 1985.

The current Police Security Cell is not sufficiently staffed, trained or resourced to provide that kind of a service to the extent that it is needed and is accordingly relegated to largely reactive response to limited complaints. It is a widely held view that the punishment system for errant police is also not working effectively. There is a perception that transfer is an all too often used 'punishment', however there is little analysis and treatment of the underpinning causes of disciplinary breaches. Findings of this nature must be used to inform more proactive strategies to prevent inappropriate behaviour from occurring or reoccurring.

With a vision to elevate the national police force to the best position in respect to integrity, dependability, professionalism and efficiency, the newly formed Bangladesh Police Internal Oversight (PIO) has set as its mission the removal of police corruption and inefficiency. All the units of Bangladesh Police fall under the surveillance of the PIO. Actions speak louder than words.

The objectives of Police Internal Oversight are:

Firstly

- Get rid of as many corrupt officials as possible;
- In the quickest probable time reduce police corruption;
- Restore discipline and the police chain of command;
- Increase police ability and efficiency;
- Build credibility and image.

Secondly

- Identify honest, efficient and dynamic officers to put the right person in the right place;
- Conduct a community impact assessment of police activities;
- Facilitate the criminal justice system;
- Support the rule of law and good governance.

2. Punishments as per PRB: Regulation 857:

Punishments are divided into major and minor types.

Major punishments include: dismissal from service; removal from service; reduction; deprivation of approved service increment; removal from any office of distinction or special emolument; and award of black marks.

Minor punishments include: warnings; censures (reprimands for misconduct); extra drills; extra fatigue duty; and confinement to quarters with or without punishment drills, extra guard, or fatigue or other duty.

3. Punishments as per the Police Officers (Special Provisions) Ordinance 1976

Section 4 Offences: Where a police-officer is guilty of misconduct; dereliction of duty; acts of cowardice and moral turpitude; corruption or having a persistent reputation of being corrupt; subversive activity or association with persons or organizations engaged in subversive activities; desertion from the service or unauthorized absence from duty without reasonable excuse; or inefficiency, the authority concerned may impose on such police officer any of the penalties mentioned in Section 5.

Section 5 Penalties: The following shall be the penalties which may be imposed under this Ordinance: dismissal from service; removal from service; discharge from service; compulsory retirement and demotion to lower rank.

VI. CONCLUSION

The life of a law enforcement official, lawyer, and a judge involves making ethical choices. Most of them are governed by written rules of law. Often the rules are broadly stated. In applying the rules, a choice must frequently be made about which different minds can legitimately reach different conclusions. At the institutional core of systems based on the rule of law is not only a strong independent judiciary, but also an effective prosecution service with well trained and adequately empowered and equipped prosecutors committed to upholding the rule of law and human rights in the administration of justice.

Bangladesh became a State Party to the UN Convention against Corruption with effect from 27 February 2007. The Government of Bangladesh places significant priority on improving human security, law and order and prevention of corruption. Prevention of corruption was a key plank in the Government's pre-election manifesto also. Meeting these pledges and improving law and order and reforming police depend to a significant degree on amending the legal framework. The legal and regulatory framework for the police and judiciary is extensive and includes laws and regulations dating back more than one hundred years as well as recent amendments and new acts. Outdated laws need to be amended and existing laws more appropriately applied.

The need for an effective Code of Conduct for regulating judicial conduct on and off the bench at all levels of the judiciary is generally agreed. The code, which should apply to the Supreme Court as well as Subordinate Courts, would inform the judge of the standards he or she is expected to rise to, create peer pressure for the judge to observe those standards, and, through wide dissemination (via print, audio and visual media), inform the public of the standards they have the right to expect of the judiciary. The code should, among other things, set out the principles or judicial ethics; explanatory comments and hypothetical problems with answers drawn from actual disciplinary actions taken; and remedial and punitive sanctions for code violations. It should cover such matters as disclosure of assets, participation in trade or business ventures, seeking or acceptance of financial benefits which are not clearly available by virtue of office, involvement in conflict of interest situations and engagement in public or media controversy. A provision should be made for a judicial committee to advise judges on difficult and/or doubtful potential ethical issues, so as to enable them, if possible, to avoid future sanctions.

The public prosecution department has not seen much change since Bangladesh gained independence. Although it is claimed that there is no longer political pressure or selection on extraneous consideration, the appointments are still under the control of the Law Ministry and not open enough for people to know the selection process. At present we have an Attorney General to protect the interest of the public. His office is in charge of defending the State interest in all matters in the Supreme Court. However, surprisingly, the other state lawyers (the public prosecutor in criminal cases and government pleaders in civil cases) have no connection whatsoever with this office. Though a political insider, the Attorney General of the UK is generally expected to differentiate between 'politics' and 'law' so as to enable him or her exercise his or her judgment independently. Here in Bangladesh, we fail to see such an attitude among the state lawyers.

Oversight and accountability need to be strengthened. The Bangladesh Police have taken important moves to strengthen internal oversight but more needs to be done. External oversight through a Police Complaints Commission and/or a Police Commission needs to be introduced, but it would require supportive legal reforms. Enhanced oversight and accountability is important to check police behaviour which is inconsistent with the rule of law and thereby undermines the reform process. Internal accountability mechanisms will also be strengthened and supplemented by professional standards, ethics, anti-corruption efforts and training. The Police Reform Programme has been supporting the Bangladesh Police to establish structures to monitor internal compliance with Bangladeshi law and international good practice and human rights standards such as the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the Universal Declaration of Human Rights, the UN Code of Conduct for law enforcement officers and the UN guidelines for the Prevention of Crime. Building political capital for reform and broader ownership of the reform agenda will be important to deliver results during the next five years.

Fighting corruption is not just law enforcement. Rather it is a reappraisal of the way we think and the way we act. No anti-corruption drive can succeed or survive without the active support or participation

of the people. It is an awareness of rights and remedies against violation of rights, an attitude of not participating in or tolerating corruption in any form, and the practice of standing against corruption in every way. The 3Rs for Fighting Corruption, launched by Anti Corruption Commission, are *REFRAIN* - Do not participate in corruption; *RESIST* - Resist corruption wherever and whenever detected; *REPORT* - If all fails, report to the authorities. Success depends on uniform support at the highest levels. In the years to come it will be the partnership of the judiciary, police and the community to work together in a climate of mutual respect, understanding and co-operation through which citizens will enjoy a truly enhanced quality of life, free from corruption and crime.

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MALDIVIAN LEGAL SYSTEM: CORRUPTION CONTROL MECHANISMS AND CODES OF CONDUCT FOR LAW ENFORCEMENT OFFICIALS

*Hussain Shameem**

I. CONSTITUTIONAL BACKGROUND

The political scenario of the Maldives has been characterized by drastic changes and democratization of the country in the past few years. A custodial death of an inmate in Maafushi Prison facility in September 2003 sparked a riot in the streets of the capital city Male'. Following these totally alien scenes in Male', both government and the opposition united to bring about democratic reforms by giving more direct power to the people and recoginizing a need for clear separation of powers. Subsequently, the reform movement got off the ground with massive reforms targeted at the legal system.

I call this the "Big Bang" theory of reforms. Much research has been conducted and reports written about the functionality and efficiency of the Maldivian legal system; hence many changes have been proposed. Among which, the most noticeable report was the report by Professor Paul Robinson, Colin S. Diver, Distinguished Professor of Law at the University of Pennsylvania Law School, which recommended a host of changes to the legal system to achieve further transparency and efficiency.

As the reform movement began in 2003, the Constitution of 1997 (hereinafter referred to as the 'Old Constitution' or 'Repealed Constitution') was in place, under which the judicial powers and the executive powers were concentrated in the President. Along with other defects, concentration of powers with the president and the need of the people for more reforms and democratic changes in the society led to the Constitution of 2008 (hereinafter referred to as "the New Constitution"). Little wonder then that the new Constitution paves the way for democratic reforms, and enshrines fundamental rights and freedoms in chapter II and elsewhere. Throughout the Constitution there is reference to rights and freedoms and requirements of justice institutions and others to protect and safeguard human rights to such an extent that it is often referred to as the "Human Rights Constitution" (it enumerates 52 fundamental rights).

This New Constitution was adopted on 7 August 2009 and replaced the Old Constitution of 1997. The new Constitution prescribes a clear separation of powers and introduces a presidential governance system with a multi-party system, a parliament with strong oversight powers, a system of local governance, and establishes a number of independent oversight bodies, such as the Civil Service Commission and the Human Rights Commission. The ratification of the new Constitution marks the culmination of one of the three tracks of the Reform Agenda introduced by the then President of the Country in June 2004.

The new Constitution also established five independent institutions. These are:

1. The Auditor General
2. The Prosecutor General
3. The Human Rights Commission
4. The Elections Commission
5. The Anti-Corruption Commission
6. The Judicial Service Commission.

II. MEASURES FOR CORRUPTION CONTROL IN THE MALDIVES

A. The Prevention and Prohibition of Corruption Act (2/2000)[1]

The Prevention and Prohibition of Corruption Act (hereinafter referred to in this section as "the Act") of 2000 (2/2000) codified the various corruption control provisions and offences relating to corruption that

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[1] http://www.agoffice.gov.mv/pdf/sublawe/Corruption.pdf

existed in five different pieces of legislation dating from 1968 to 1978, namely the following;

1. Section 2 of Law No. 2/68 (General Laws);
2. Law No. 10/78 (Law on requesting things from those who request for things from the State or related to the State and those who undertake tasks in partnership or jointly with the government and, regarding thins received from such persons);
3. Law No. 12/78 (Law on conducting business with a foreigner who has either requested something from the State or related to the State or who has undertaken tasks in partnership or jointly with the government);
4. Law No. 97/78 (Law on offences committed by government employees using position);
5. Law No. 98/78 (Law on government senior officials disobeying the laws and, acting in a manner that denies benefits to the public or the government where there is an advantage).

The Act takes a holistic approach and criminalized all the means of corrupt activities by government officials, government ventures, and public office bearers such as the members of the parliament and cabinet ministers. The Act criminalized the following:

(a) The offence of offering and accepting bribery in relation to a task undertaken by the government;
(b) The offence of offering and accepting bribery by members of the Parliament;
(c) The offence of offering and accepting bribery in the judicial sector;
(d) The offence of offering and accepting bribery in relation to a task undertaken by a member of the public;
(e) The offence of offering bribery to a person without powers to fulfill the purpose for which bribery was offered;
(f) Committing or attempting to commit a bribery offence through a person or group;
(g) Bribing to exert influence;
(h) In the event that the purpose of the bribe is not served, the act constitutes a crime;
(i) The offence of obtaining undue advantage by government employees;
(j) The offence of acting in a manner which precludes an advantage to the public or the State where a benefit exists;
(k) The offence of assigning work, procuring for the government and using government property for personal gain;
(l) Offence of hiding information and destroying evidence and documents;
(m) Offence of giving wrong information;
(n) Failure to appear for investigation;
(o) Obstructing responsibility of the investigator;
(p) Attempting to commit a crime stipulated in the Act.

The Act further states the manner of business dealings by the Chief Justice, Speaker of the Parliament and Ministers of the State and Employees of the Government. Furthermore, it stipulates the manner in which the government official shall react in the event he or she is given a gift by a person who requests something from the government.

In addition to the above, the Act gives special powers to the investigative agency to check and withhold bank accounts of the suspected person pending investigation. The Act also deals with the proceeds of corruption related crimes and states that property and money received through the commission of an offence stated in this Act and property obtained through such, whether with the person, with someone else, and where ever it is, whether sold or given to a person shall be confiscated.

B. The Anti-Corruption Commission (ACC)

The Anti-Corruption Commission (hereinafter referred to ACC) derives its powers from Article 199 (b) of the Constitution which says that "The Anti-Corruption Commission is an independent and impartial institution. It shall perform its duties and responsibilities in accordance with the Constitution and any laws enacted by the People's Majlis. The Anti-Corruption Commission shall work to prevent and combat corruption within all activities of the State without fear".

Interestingly, the Constitution mandated the ACC to provide a definition for corruption.

The five members of the ACC are presidential appointees, approved by a majority of the total membership of the Parliament from names submitted to it by the President. Members are appointed for a five year term renewable for a further term of five more years.

The responsibilities and powers of the ACC are contained in Article 202 of the Constitution. In addition, there is an Anti-Corruption Commission Act which further explains the powers and responsibilities of the ACC. ACC's main function are:

(a) to inquire into and investigate all allegations of corruption; any complaints, information, or suspicion of corruption must be investigated;

(b) to recommend further inquiries and investigations by other investigatory bodies, and to recommend prosecution of alleged offences to the Prosecutor General, where warranted;

(c) to carry out research on the prevention of corruption and to submit recommendations for improvement to relevant authorities regarding actions to be taken;

(d) to promote the values of honesty and integrity in the operations of the State, and to promote public awareness of the dangers of corruption;

(e) to perform any additional duties or functions specifically provided by law for the prevention of corruption.

C. Code of Conduct

1. Members of the Independent Institutions and the PG

Following the ratification of the New Constitution, the parliament enacted enabling legislations for the independent institutions which the Constitution created, for which there is no enabling legislations, namely:

- The Anti Corruption Commission Act
- The Judicial Service Commission Act
- The Prosecutor General's Act
- The Elections Commissions Act.

Interestingly enough, the above mentioned acts specified codes of conducts or, rather, rules relating to the code of conduct for the members of the commissions and the Prosecutor General. However, it did not make note of the officers, staff and employees working in those institutions or who falls under the ambit of such institutions. In this regard, the Prosecutor General's Act introduced matters relating to the code of conduct of the Prosecutor General but does not make reference to the code of conduct for the officers, prosecutors and staff of the Prosecutor General's Office. Similarly, the Acts relating to the Elections Commission, Judicial Service Commission and the Anti-Corruption Commissions made reference to the code of conduct for the members of such institutes, however it does not make any reference to the code of conduct of judicial officers or officers of these institutions.

In the absence of any reference to code of conducts of the officers of the independent institutions in the Constitution or relevant acts of parliament, different institutions took different measures to regulate the ethics of the officers of the respective institutions.

It should also be noted here that, even in the absence of the said codes of conduct, prosecuting an official found to be involved in an unethical behavior, which falls under the criminal provisions stipulated in the Prevention and Prohibition of Corruption Act 2000, is technically, not too problematic. However, the question arises when the official clearly acts unethically but his or her act does not constitute an offence stated in the said Act. In such events, the code of conducts could be used as a basis for administrative and/or disciplinary measures to be taken against such officials.

The members of the independent institutions as stipulated in the Constitution are selected by the President among the applicants who apply directly to the President's Office, pursuant to a public announcement. The names are then sent to the parliament for approval. Upon approval from the parliament, the president appoints the members for a five year term, except for the Auditor General who is appointed for a term of seven years.

Except from being incapacitated to serve as a member of the independent institution, pursuant to relevant Constitutional article, an appointed member of such an institution can only be removed by following the below-mentioned rule;

A member of an independent institution can be removed from office during the tenure of his term, only for the reasons specified in article (a) and in the manner specified in article (b):

(a) on the ground of misconduct, incapacity or incompetence; and

(b) a finding to that effect by a committee of the People's Majlis pursuant to article (a), and upon the approval of such finding by the People's Majlis by a majority of those present and voting, calling for the member's removal from office, such member shall be deemed removed from office.

2. The Maldives Police Service

The Maldives Police Service as the chief law enforcement agency derives its powers from the Police Act 2008. Under the Police Act, the police force is recognized as a civilian force. The Maldives Police Service has published a Code of Conduct for Police Officers.[2] Furthermore, under the Police Act 2008, the President has appointed a Police Integrity Commission, with the appointees being approved by the Parliament. The PIC consists of five members and has the jurisdiction to look into matters relating to misconduct of police officers. The Police Integrity Commission is vested with the powers to monitor the code of conduct of the police and take measures to curb any conduct that could pave way to corruption and/or misconduct. The PIC also has the power to test the integrity of the police officers, review any internal rules, regulations and procedures of the Police which may lead to corruption and/or police abuse of power and advice the Minister of Home Affairs accordingly. It also can review the disciplinary decisions and measures taken by the police internal disciplinary boards, for accordance with human rights values, good governance and best practices. The PIC is appointed for a five year term with possible renewal subject to approval from the Parliament.

The PIC was newly constituted in July 2009 and is yet to process any criminal cases for the Prosecutor General for criminal prosecution.

3. The Prosecutor General's Office

Prior to September 2008 all prosecutions were conducted from the Attorney General's Office (AGO). Lawyers from the AGO represented State in court proceedings, including all prosecutions. The PGO, as an institution was created by the Constitution and came into being from 7 September 2008. The Prosecutor General (PG) himself was appointed on 4 September 2008. The PGO derives its Constitutional independence from Article 220 that declares: "There shall be an independent and impartial Prosecutor General of the Maldives". The responsibilities and powers of the PG are contained in Articles 223 to 229, inclusive. In addition, there is a PGO's Act of Parliament.

According to Article 133(g) of the Constitution, the AG is mandated to *issue general directives to the PG on the conduct of the prosecutions*. However, article 220(c) restates the independence and the impartiality of the PG who shall be free from direction or control of any person or authority in carrying out his functions. This independence and impartiality is *subject only to the general policy directives of the AG* (noting that Article 133(g) uses the phrase "general directives" whereas article 220(c) refers to the *general policy directions*.

Under Article 223(a), the PG's responsibilities and powers include supervision of prosecution of *all* criminal offences in the Maldives. Article 224 states that: "The responsibilities and powers of the PG maybe assigned with his express instructions, to any person working under his *mandate* or to any other person". This language used in the Constitution proved problematic as it is unclear what meaning the word '*mandate*' is referring to. Historically, when the prosecution powers were exercised by the AG, the island chiefs and other government officials at the island offices were instructed by the AG to appear as prosecutors in the hearings at island courts. The island 'prosecutors', who were the island chief or other government officials, did not have any legal background. Perhaps, it is only safe to assume that the legislative intention of the word 'mandate' may have been to stop this practice and ensure that a person with a legal background pursued criminal prosecutions in all parts of the country. Furthermore, the PG's Act mandated the PG to establish island (regional) PGOs. In spite of that, it appears neither necessary (looking at the small number of cases arising from some of these regions), desirable nor financially feasible to set up PGOs in all regions. It was seen financially feasible and more practical to have mobile prosecutors who would travel around a region periodically to attend to cases in the island while the prosecutor remained stationed in the central office.

[2] http://www.police.gov.mv/download/18b593d1394b8eded8ca459005b67233.pdf

The PGO (or the prosecution service of former AGO) has been long considered as a stepping stone for fresh graduates to enter the legal field. Almost about 75% of private lawyers have had, at some time of their careers worked as a prosecutor. Currently, there are 43 prosecutors at the PGO.

D. Corruption and/or Ethical Violations at PGO

There has not been any report of corruption, abuse of power/discretion or ethical misconduct by a prosecutor in the past. This may be because of the following reasons.

1. Close monitoring: the prosecutors have a daily briefing session every morning for about 30-45 minutes, where every prosecutor will have to brief about their scheduled hearings for the day and the about the court hearings of the day before, to either the PG or the Deputy PG. At the daily briefings, prosecutors and their supervisors have fruitful discussions about complex cases scheduled for the day. This also gives the superiors an opportunity to be on top of matters as it happens.
2. Duty Officer: A senior prosecutor is appointed during the court hours, for prosecutors who appear to courts to discuss if an emergency situation arises where the prosecutor needs to make a decision. Prosecutors are given specific and very limited discretionary powers to make certain decisions.
3. Daily reporting: apart from the daily briefings, prosecutors have to report acquittal decisions made by the court to the Duty Officer upon their arrival back to office from court.

As mentioned before, Prosecutor General's Office does not have a Code of Conduct for prosecutors or the members of the secretariat of the PGO. Prosecutor General's Office has not been seen in the eyes of the public as a corrupt organization. In fact, after the 'independence' from the government, PGO or rather, the prosecution service has earned a rather unique position in the society. I believe it is time for PGO to gain visibility in the communities it serve and seize the moment to establish itself as the leading institution in delivering real change. I also believe it is important to have a code of conduct for officers of the PGO, not only to educate and inform the officers of their duties and dos and don'ts, but also to boost public confidence in the PGO and the criminal justice system as a whole.

III. THE JUDICIARY

The aforementioned Report on The Criminal Justice System of the Republic of Maldives: Proposals for Reform, by Professor Paul H Robinson, reads: "4.6 Published ethics rules and standards and procedures for impeachment – to insure that the judicial branch has the credibility with litigants and the public that is needed, it must be clear to all that the judges are beyond corruption and political influence. This cannot be done without public rules on judicial ethics and impeachment and removal that will avoid not only the judicial impropriety but also the appearance of impropriety".

A Judicial Service Commission (JSC) has been established under the New Constitution. The JSC consists of the following;

(a) the Speaker of the People's Majlis (Parliament);
(b) a Judge of the Supreme Court other than the Chief Justice, elected by the Judges of the Supreme Court;
(c) a Judge of the High Court, elected by the Judges of the High Court;
(d) a Judge of the Trial Courts, elected by the Judges of the Trial Court;
(e) a member of the People's Majlis appointed by it;
(f) a member of the general public appointed by the People's Majlis;
(g) the Chair of the Civil Service Commission;
(h) a person appointed by the President;
(i) the Attorney General;
(j) a lawyer elected from among the lawyers licensed to practice in the Maldives by themselves.

Pursuant to Article 159 of the New Constitution, the JSC is entrusted with (among other things) the responsibility and power to make rules on ethical standards of the judges. The current JSC inherited a draft Code of Conduct for Judges initially drafted by the transitional (first year of the ratification of the Constitution) Judicial Service Commission. The draft Code of Conduct is based on the Bangalore Principles on Judicial Conduct 2001.[3] The Code is in the draft stage and not being implemented country wide. Nevertheless, the

[3] http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf

document has been circulated for consultation and judges are encouraged to act accordingly. Furthermore, the JSC Act lays down an elaborate procedure for administrative actions and measures against judges behaving in an unethical manner. However, in the absence of a full fledge Code of Conduct and clear boundaries and in the event the JSC decides to proceed with the procedure laid out in JSC Act against a judge, one may argue that it would create an infringement of a constitutional right of the judge in question as the judge may argue to be in a situation where he faces disciplinary measures for actions he never knew constituted infringements. Article 61 (b) of the Constitution states that "No person may be subjected to any punishment except pursuant to a statute or pursuant to a regulation made under authority of a statute, which has been made available to the public and which defines the criminal offence and the punishment for commission of the offence".

Article 151 of the Constitution states that; "Every Judge shall devote his full time to the performance of the responsibilities of a Judge. A Judge shall perform other work only in accordance with and as specified by the statute relating to Judges".

The Constitution further states in article 152 that; "Judges shall be paid such salary and allowances in keeping with the stature of their office as determined by the People's Majlis".

Article 153 of the Constitution reads; "Every Judge shall annually submit to the Judicial Service Commission a statement of all property and monies owned by him, business interests and all assets and liabilities".

IV. EDUCATION AND TRAINING OF CRIMINAL JUSTICE PERSONNEL IN THE MALDIVES

In Maldives, there is no certain examination or training one has to go through to get listed as a lawyer. After a law degree or similar qualification, an application to the AGO is made for a practicing certificate, which if granted allows the lawyer to practice in court 'for life'. A judge does not have to go through any specific training to be nominated and appointed as a judge. Therefore, some judges and lawyers lack basic training on ethics or professional behavior for numerous reasons. On the job training is conducted for judges and prosecutors but these trainings are mostly focused on the daily functions or administration of the technical work that will be assigned to them in the future, rather than focused training on ethics or the likes.

V. PROCEDURAL REGULATIONS IN THE MALDIVES

There is no written rule in the Maldivian legal system as to recusal of judges. However, an unwritten practice is maintained by the judiciary that a judge voluntarily resign from handling the case in question if he finds that he cannot conduct a fair hearing, given the relationship he has with a person involved in the case. As for removal or impeachment of a judge, Article 154 of the Constitution states:

(a) A Judge shall not be removed from office during good behaviour and compliance with *judicial ethics*.

(b) A Judge may be removed from office only if the Judicial Service Commission finds that the person is grossly incompetent, or that the Judge is guilty of gross misconduct, and submits to the People's Majlis a resolution supporting the removal of the Judge, which is passed by a two thirds majority of the members of the People's Majlis (Parliament) present and voting.

No such procedures or a guideline has been set to disqualify prosecutors on ethical grounds.

Internally, judiciary, prosecution and the police have unwritten rules whereby a conflict of interest or possible biasness is reported as soon as the case is handed over to the official.

The prosecutors are obliged by their employment contract to register their affiliations, allegiances and/or relationships that could affect their work as prosecutors.

IV. DEFENCE LAWYERS/THE LAW SOCIETY OF THE MALDIVES?

The lawyer's community in the Maldives is represented by the Law Society of Maldives, a profession-based NGO aspiring to become a bar association. The LSM has a member base of about 80% of the lawyers in the country and also has a Disciplinary Committee to oversee the conduct of its members with regard to

their ethics and professional behaviour. However, the lack of recognition and legislative status for the LSM has resulted in LSM being unable to take disciplinary measures against its members who act unethically. In spite of that LSM has acted in an advisory role for the Attorney General in his functions as the regulator of legal profession in the Maldives. Furthermore, the ethics code for lawyers is a rudimentary document lacking proper mechanisms for effective implementation.[4] Perhaps, the LSM can play a major role in the awareness of judicial ethics to judges, prosecutors, legal community and the general public.

VII. RECENT DEVELOPMENTS

A. Auditor General's Reports

Over the past year or so, the Auditor General has produced reports and findings of his audits of some very important government ministries and government owned companies, where he has reported to have observed *"systematic, wide spread corruption and misappropriation of public funds"*. These government organizations include the former Presidential Palace, the Ministry of Atolls Development, the State Trading Organization, and the Bank Of Maldives Plc. Hence, the President has ordered the police to investigate the allegations of corruption referred to by the Auditor General in his reports. Some of these cases involves monies worth at least five million Maldivian Rufiyaa (approximately 400,000 USD) at the police minimum estimate. Furthermore, most of the alleged suspects are the top brass of politicians, the Minister of Atolls Development himself, and two politicians who won the recent parliamentary elections and are now sitting MPs with one holding the vice presidency of the Parliament.

Additionally, there are cases relating to five sitting MPs in the investigation stage and if successfully prosecuted and found guilty, may unseat them at the parliament. With the opposition holding an unstable majority at the Parliament, few seats in the parliament looks too attractive to all political parties in order to gain political ground inside the parliament.

B. Island Magistrate's Corruption Case

At the island courts of the Maldives, magistrates usually head the administration and financial sections of the courts along with the technical services of the courts. The Anti-Corruption Commission (ACC) is investigating a case involving three magistrates who alleged to have misappropriated public funds and are alleged to have paid monies to individuals for boat hiring charges for trips that he never travelled. We are yet to know the extent of this alleged corruption. However, ACC reported that the courts in question refused to provide information and co-operate with the ACC. This, I believe is a serious setback for the ACC and the fight against corruption. We are yet to know what twists this case might take, but the relevant authorities need to interfere and settle the matter sooner.

C. Presidential Commission to Investigate alleged Corruption of the Former Government

The Maldives voted in a new government in November 2008 and the new president, using his powers under Article 115 of the Constitution, established a Presidential Commission (PC) to investigate the alleged corruption of the former government. The Commission collects relevant information and forwards it to police for further investigation and finalization before submitting to the PGO for possible prosecution. The former president and his brother (an MP) and some other notable figures are under investigation by this Presidential Commission.

VIII. ISSUES/SETBACKS IN THE FIGHT AGAINST CORRUPTION

It is safe to say that the conviction rate of corruption cases is relatively high in the Maldives. However, I must note that the punishment the courts impose on the convicts are far too lenient and therefore do not serve as a deterrent for the general public. There may be two reasons for this lenient direction taken by the courts.

A. Sentencing Guidelines

Professor Paul Robinson, in his report on Maldivian Criminal Justice System, says: "the sentencing of criminal offenders ought to be guided in some way to insure uniformity in application (the sentence ought to depend upon the crime and the offender, not upon the selection of sentencing judge)".

[4] http://www.judiciary.gov.mv/Admin/Regulations/Vakaalaathu-kurumaabehey-gavaaid.pdf

There are no sentencing guidelines in the Maldives, therefore, different judges may differ in their sentences and hardly any consistency is maintained. Sensitizing the judges on the issue of corruption and the costs of it to the state may help solve some of the current problems in the sentencing.

B. The Punishments prescribed in the Prevention and Prohibition of Corruption Act 2000

The Prevention and Prohibition of Corruption Act 2000 prescribes different lengths of the following punishments:

1. Imprisonment
2. House Arrest
3. Banishment.

The courts, for some reason, have preferred banishment for the island chiefs and atoll chiefs who were prosecuted for misappropriation of public funds and other crimes relating to corruption. In addition, while ordering repayment of the monies embezzled, the court orders the payment to be made after completing his punishment, and on installment basis. There is no, or very little, effort made by the relevant authorities to recover this money once due. This practice did have a deterring effect on the general public and hence, the purpose of the Prevention and Prohibition of the Corruption Act may not have been fulfilled. Subsequently, this puts the public confidence in the criminal justice system in jeopardy.

IX. CONCLUSION

In conclusion, in the Maldives, with the ever-changing political situation and the potential pressure from the government on the criminal justice system, it is important for the criminal justice service providers to remain impartial and provide justice for the community. Hence, the importance of championing ethics is vital to attract and maintain the public confidence in the criminal justice system. Additionally, in today's globalized world, there is ample experience in other countries to learn from. We should not try to reinvent the wheel. We must learn from other countries' experiences and sharing such experiences can make a lot of difference to the way we approach whatever problems we may face in the future.

CURRENT SITUATION AND ISSUES RELATING TO ETHICS AND CODES OF CONDUCT FOR JUDGES, WITH SPECIAL REFERENCE TO THE CRIMINAL JUSTICE SYSTEM OF NEPAL

*Bishnu Prasad Upadhyaya**

I. BACKGROUND

The independence of the judiciary is a measure of a nation's devotion to democracy and the rule of law. To have an effective and competent criminal justice system, politicians and stakeholders of this system, i.e. judges, prosecutors, and law enforcement officials, should perform their functions legally and ethnically.

Among others, detection of corruption and imposing suitable punishment on corrupt public officials, and politicians is one of the pivotal duties of a criminal justice system. If judges, prosecutors and law enforcement officials are involved in corruption the criminal justice system will perish. Where the justice system fails, impunity will prevail, badly affecting society and weakening democracy. The trust of the people depends on judicial performance. Therefore, it is better to prevent such evils rather than provide remedies. So, by using various guidelines, codes of conduct, norms, and standards, the state can run the criminal justice system efficiently. These stakeholders are the main actors of the state, which must maintain the rule of law and promote good governance. If they lack in their duties, society will be victimized by corruption, impunity will increase and the morale of the people and their faith in the justice system will deferiorate.

Each and every nation stipulates legal mechanisms for its criminal justice system. The UN and other international organizations provide international norms and standards for the proper operation of criminal justice systems. Among others, judges, prosecutors and law enforcement officials are vital stakeholders of a criminal justice system. Therefore, the quality of their performance plays a prominent role. To ensure quality performances, their qualifications, selection system, training, and codes of conduct are vital.

II. INTERNATIONAL STANDARDS AND NORMS

Important international standards to address standards and norms for judges, prosecutors and law enforcement officials are outlined below.

1. UN Convention Against Corruption, 2003
   Art 11(1) and (2) opine that State Parties shall take measures to strengthen integrity and to prevent opportunities for corruption among members of judiciary and prosecutorial authorities, i.e. rules relating to conduct of members of judiciary and prosecutors.
2. Basic Principles on the Independence of the Judiciary, 1985
3. Procedures for the effective implementation of the Basic Principles on the Independence of the Judiciary, 1989
4. Bangalore Principles of Judicial Conduct, 2002
5. UN Guidelines on the Role of Prosecutors, 1990
6. UN Codes of Conduct for Law Enforcement Officials, 1979

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III. NEPALESE JUSTICE SYSTEM

The judicial system has existed since the earliest times of Nepal's history. Judges were appointed by the king and they performed their duties as per the ethical norms and customs. After the promulgation of democracy in Nepal in 1950, the concept of an independent judiciary began. An independent judiciary, separate prosecutorial system and separate responsibility of law enforcement official were introduced in the development period of the 1950s. The Nepalese criminal justice system is more or less influenced by the common law system. The criminal justice system operates through investigation, prosecution and adjudication.

A. Criminal Justice System Organizations

(i) Judiciary: Supreme Court, Appellate Court and District Court for general cases and Special Court for corruption cases.

(ii) Prosecution: Office of the Attorney General and its other subordinate offices located where Appellate and District Courts are located; Commission of Investigation of Abuse of Authority (CIAA); other authorities as prescribed by law.

(iii) Law Enforcement: Investigation authority; hierarchical organizations of police force; Revenue Investigation Authority; District Forest Office; Land Administration Office; District Administration Office; other Ministries; and other executive offices, along with the execution Branch of the District Court.

B. Corruption in Nepal

Corruption is a complex and multifaceted phenomenon with multiple causes and effects, as it takes on various forms and functions in different contexts. The phenomenon of corruption ranges from single acts prohibited by law to a way of life of an individual or groups. It is the misuse of public goods by public officials, for private gain. This private gain is achieved by ignoring prohibitions against certain acts. This is the abuse or misuse of public office and professional rights and duties for personal gain.

Corruption not only undermines ethical values and justice, it damages democratic institutions, national economies and the rule of law. Corruption facilitates other forms of serious crimes, in particular transnational organized crime, human trafficking and fiscal crime such as money laundering.

1. Current Situation

- In fiscal 2008/09 the Supreme Court had a total 18,564 cases. Among them 5,608 were decided and 12,956 are under consideration. In total, in all courts, there are total 103,651 cases, among them 44,818 were decided and 58,833 are under consideration.
- The CIAA received complaints of corruption totalling 2,732. Among them 2,135 were investigated and 597 are under investigation in fiscal 2008/09. Seventy cases were filed in the Special Court and 28 cases were recommended for departmental action by the CIAA.
- The Special Court, the only the authentic body to hear cases related to corruption, has handled 254 cases related to corruption as of fiscal 2008/09. The Special Court has disposed 102 cases and 152 cases are under consideration. Six hundred and seventy cases of corruption are under consideration in other courts except the Special Court.
- In the judiciary, there are 223 working judges, 242 officers, and 3,247 assistant staff.

2. Corruption and Efforts Made to Control it in Nepal

The criminal justice system related to corruption control in Nepal has long made efforts. Legislation on control of corruption, began in 1957 and legislation was enacted 2002. The main laws relating to corruption control are as follows

(i) Prevention of Corruption Act, 2002

This Act has defined corruption as the following activities and penalizes it with fine and imprisonment.

- Taking or giving bribes or agreeing to take bribes;
- Public servants preparing wrong documents;
- Making wrong translations;
- Breach of confidentiality of question papers or changing the result of examinations;
- Public servants indulging in illegal trade and business;

- Claiming a position which one does not hold;
- Giving a false description;
- Giving wrong reports;
- Illegal acquisition of property.

(ii) The Commission for Investigation of Abuse of Authority Act, 1991

Commission for Investigation of Abuse of Authority Act, 1991 defines the abuse of authority as improper conduct. Improper conduct denotes any of the following acts committed deliberately or through negligence by a person holding public post

- Refusal to undertake any work under one's authority or undertaking any work outside of one's authority;
- Not following mandatory procedures while making any decisions or giving instructions;
- Use of authority vested in oneself for a purpose contrary to the relevant law, decision or instruction;
- Use of discretionary power with a malafide intention or selfish desire;
- Shifting one's responsibility by sending the work to be done by oneself to other officer;
- Abuse of immunity, facility or concession associated with the post.

(iii) Anti-Money Laundering Act, 2008

This Act was recently enacted. The Act aims to prevent conversion of proceeds of crime into legal money. It establishes a department to administer the Act.

(iv) Good Governance Act, 2008

This Act aims to have good governance in the country.

(v) Public Procurement Act 2007

This Act aims to maintain competition and transparency in procurements by public bodies including government bodies and government controlled and funded bodies.

3. Institutions involved in Corruption Control

(i) Commission for the Investigation of Abuse of Authority (CIAA)

The Commission for the Investigation of Abuse of Authority, publicly known as the CIAA, is a constitutional body which serves as an investigating and prosecuting authority in corruption cases and the watchdog authority against the abuse of authority. The Interim Constitution of Nepal, 2007, provides for it in explicit terms in part 11, Article 120. According to the constitution, functions, duties and powers of the commission are as follows:

- Inquiry and investigation of improper acts or corruption by a person holding public office;
- Recommendation for departmental action or any other necessary action against the person who has abused authority by committing improper acts;
- Filing a case against a person alleged to have committed corruption.

(ii) National Vigilance Center

The National Vigilance Center (NVC) is a governmental body intending to control corruption and bring about good governance in the country. It is established under the Prevention of Corruption Act, 2002. It functions under the direct control and supervision of the Prime Minister of Nepal. The main objective of the centre is to play a preventive and vigilant role to ensure good governance by controlling delays, administrative and financial irregularities, mis-collection of public revenue and other misdeeds that exist in the various steps of the government and public sector organizations.

(iii) Special Court

This court adjudicates the corruption cases filed by the CIAA. This is the court of first instance in respect to corruption. Judges are deputed from the ordinary Appellate Court.

IV. QUALIFICATIONS FOR JUDGES

We think judges should be fair, competent, pure, disciplined, energetic, alert, courageous, and independent. A good judge should not be lazy, greedy, over smart, over confident, angry, jealous or have an evil mind. So far as the Nepalese system is concerned, we can mention the following:

A. Supreme Court Chief Justice

A judge working as a judge of Supreme Court for at least three years will be qualified for appointment as Chief Justice.

B. Supreme Court Judge

- Worked as a judge of the appellate court or in any equivalent post of the judicial service for at least seven years; or
- Worked as a gazettted first class or above of the judicial service for at least 12 years; or
- Practiced law for a minimum of 15 years as a law graduate advocate or senior advocate; or
- Is a distinguished jurist who has worked for at least 15 years in the judicial or legal field.

C. Appellate Court Judge

- Nepali citizen having a bachelor's degree in law;
- Work experience as a district judge or gazetted first class of judicial service for at least seven years;
- Practiced law as a senior advocate or advocate for at least ten years; or
- Has teaching experience or conducted research thereon, or has worked in any other field of law or justice for at least ten years.

D. District Court Judge

- Nepali citizen having a bachelor's degree in law;
- Work experience as a gazetted second class officer of judicial service for at least three years, or
- Practiced law as an advocate at for least eight years.

E. Constituent Assembly Court Judges

It shall be constituted to resolve the complaints regarding elections. On the recommendation of the Judicial Council, the Nepali Government will depute judges from among the Supreme Court judges.

Other judges of the Special Court and Tribunal should have a minimum of a bachelor's degree in law and specific experiences as prescribed by law.

V. SELECTION OF JUDGES

Judges should be individuals of integrity and ability with appropriate training or qualification in law, without discrimination on the grounds of race, sex, religion, political or other opinions. According to Nepalese legal provisions, the selection system is as follows:

1. Chief Justice: The President shall appoint the Chief Justice (CJ) on the recommendation of the Constitutional Council. Before his or her appointment, he or she has to face a parliamentary hearing.

2. Other Judges of the Supreme Court: The Chief Justice shall appoint other justice of Supreme Court on the recommendation of the Judicial Council.

3. Chief Judge and other Judges of Appellate Court: The Chief Justice shall, on the recommendation of the Judicial Council, appoint the Chief Judge and other Judges of the Appellate Court and District Court Judges.

4. District Judges: The Chief Justice shall, on the recommendation of the Judicial Council, appoint District Court Judges. In appointing a law graduate advocate to the post of District Court Judge, only a person who has passed the written and oral examination conducted by the Judicial Council shall be appointed. This provision is inactive due to lack of legal provisions.

5. Judges and Members of Other Special Courts and Tribunals: They will be selected on the recommendation of the Judicial Council by the Nepal Government.

Before appointment, the Judicial Council fulfills various procedures i.e. collecting information of eligible candidates from different concerned offices, screening, making their roster and submitting it to the meeting of the Judicial Council. The Judicial Council Act and Regulations of 1990 stipulate procedural matters to be followed.

VI. CODES OF CONDUCT FOR JUDGES

There is one Supreme Court; 16 Appellate Courts; 75 District Courts; one Special Court; one Labour Court; one Administrative Court; five Revenue Tribunals, two Debt Recovery Tribunals; and other quasi-judicial bodies which are involved in delivery of justice. Now, there are 223 judges working all over the nation in different tiers of the court system. The Interim Constitution of Nepal, 2007, the Judicial Council Act 1990 and Rules, 2000 and Codes of Conduct for Judges, 2009 are a few significant laws and norms compelling judges to work within their legal and ethical boundaries.

Delivering is a justice very respectable and honorable profession. People place a great deal of faith in judges. If any question against arises in judges' integrity, people's belief will in justice will fail. Therefore, preventive measures are more favorable than remedial treatment. For this reason the Nepalese judiciary introduced a Code of Conduct for Judges in 1999. It was first effort to regulate the behaviour of judges. Though it functioned, it couldn't meet international standards and national necessities. Therefore, a national conference of judges held in 2009 adopted a new Code of Conduct for Judges 2009, replacing old one. It is mainly based on The Bangalore Principles of Judicial Conduct 2002. The main provisions of this Code can be mentioned as following:

- Protection and promotion of the rule of law, human rights, constitutional values;
- Practical assurance of a fair, impartial and transparent justice system;
- Fair trial for protection of citizen's rights;
- Increase public faith in the justice system and place high value on the dignity of the judiciary;
- To establish a respectable system of judicial duty as a responsible position;
- The protection of personal and legal interests of judges.

A. Article 3: Independence

Principle

Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

Code of Conduct

1 A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.

2 A judge shall be independent in relation to society in general and in relation to the particular parties to a dispute, which the judge has to adjudicate.

3 A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free there from.

4 In performing judicial duties, a judge shall be independent of judicial colleagues in respect of decisions which the judge is obliged to make independently.

5 A judge shall encourage and uphold safeguards for the discharge of judicial duties in order to maintain and enhance the institutional and operational independence of the judiciary.

6 A judge shall exhibit and promote high standards of judicial conduct in order to reinforce public confidence in the judiciary which is fundamental to the maintenance of judicial independence.

7. A judge shall be fully aware from the avoidance of humanitarian effect of criticism and praise while delivering justice

B. Article 4: Impartiality

Principle

Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.

Code of Conduct

1 A judge shall perform his or her judicial duties without favor, bias, or prejudice.

2 A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession, and litigants in the impartiality of the judge and of the judiciary.

3 A judge shall, so far as is reasonable, so conduct himself or herself as to minimize the occasions on which it will be necessary for the judge to be disqualified from hearing or deciding cases.

4 A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process. Nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue.

5 A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where

5.1 The judge has actual bias or prejudice concerning a party;
5.2 The judge has prior personal knowledge of disputed evidentiary facts concerning the proceedings;
5.2 The judge previously served as a lawyer or was a material witness in the matter in controversy; or
5.3 The judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy:

Provided that disqualification of a judge shall not be required if no other judge can adjudicate the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice.

C. Article 5: Integrity

Principle

Integrity and its implementation are essential to the proper discharge of the judicial office.

Code of Conduct

1 A judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer.
2 The behaviour and conduct of a judge must reaffirm the people's faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done.

D. Article 6: Propriety

Principle

Propriety, and the appearance of propriety, is essential to the performance of all of the activities of a judge.

Code of Conduct

1 All activities of judge shall fully consistent with integrity. A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

2. As a subject of constant public scrutiny, observation, and supervision, a judge must accept personal restrictions on his or her activities that might be viewed as unnecessary burdensome by a citizen or community. In particular, a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office.

3. A judge shall, in his or her personal relations with individual members of the legal profession who practice regularly in the judge's court, avoid situations which might reasonably give rise to the suspicion or appearance of favoritism or partiality.

4 A judge shall not participate in the determination of a case in which any member of the judge's family represents a litigant as a lawyer or is associated in any manner with the case.

5 A judge shall not allow the use of the judge's residence by a member of the legal profession to receive clients or other members of the legal profession.

6 A judge, like any other citizen, is entitled to freedom of expression, belief, association, and assembly,

but in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.

7 A judge shall inform himself or herself about the judge's personal and fiduciary financial interests and shall make reasonable efforts to be informed about the financial interests of members of the judge's family.

8 A judge shall not allow the judge's family, social, or other relationships improperly to influence the judge's judicial conduct and judgment as a judge.

9 A judge shall not use or lend the prestige of the judicial office to advance the private interests of the judge, a member of the judge's family or of anyone else, nor shall a judge convey or permit others to convey the impression that anyone is in a special position improperly to influence the judge in the performance of judicial duties.

10. Confidential information acquired by a judge in the judge's judicial capacity shall not be used or disclosed by the judge for any other purpose not related to the judge's judicial duties.

11. Subject to the proper performance of judicial duties, a judge may:

11.1 Write, lecture, teach, and participate in activities concerning the law, the legal system, the administration of justice or related matters; or appear or participate in the discussion at a public program relating to such subjects in own country or out of the country.

11.2 Serve as a member of an official body, or other government commission, committee or advisory body, if such membership is not inconsistent with the perceived impartiality and political neutrality of a judge; or

11.3 Engage in other activities if such activities do not detract from the dignity of the judicial office or otherwise interfere with the performance of judicial duties.

12 A judge shall not practice law whilst the holder of judicial office. A permanent justice of Supreme Court shall not represent any client at any level of court after his/her retirement.

13 A judge may form or join associations of judges or participate in other organizations representing the interests of judges.

14 A judge and members of the judge's family, shall neither ask for, nor accept any hospitality, donation, gift, bequest, financial or physical benefits, and loan or favor in relation to anything done or to be done or omitted to be done by the judge in connection with the performance of judicial duties.

15 A judge shall not knowingly permit court staff or others subject to the judge's influence, direction or authority, to ask for, or accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done in connection with his or her duties or functions.

16 Subject to law and to any legal requirements of public disclosure, a judge may receive a token gift, award or benefit as appropriate to the occasion on which it is made provided that such gift, award or benefit might not reasonably be perceived as intended to influence the judge in the performance of judicial duties or otherwise give rise to an appearance of partiality.

E. Article 7: Equality

Principle

Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.

Code of Conduct

1 A judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, nationality, caste, disability, age, marital status, social and economic status and other like causes.

2 A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds.

3 A judge shall carry out judicial duties with appropriate consideration for all persons, such as the parties, witnesses, lawyers, court staff and judicial colleagues, without differentiation on any irrelevant ground, immaterial to the proper performance of such duties.

4 A judge shall not knowingly permit court staff or others subject to the judge's influence, direction or

control to differentiate between persons concerned, in a matter before the judge, on any irrelevant ground.

5 A judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on irrelevant grounds, except such as are legally relevant to an issue in proceedings and may be the subject of legitimate advocacy.

F. Article 8: Competency and Diligences

Principle

Competence and diligence are prerequisites to the due performance of judicial office.

Code of Conduct

1. The judicial duties of a judge take precedence over all other activities.
2. A judge shall devote the judge's professional activity to judicial duties, which include not only the performance of judicial functions and responsibilities in court and the making of decisions, but also other tasks relevant to the judicial office or the court's operations i.e. court and its operation or management, judicial instruction and research.
3. A judge shall take reasonable steps to maintain and enhance the judge's knowledge, skills and personal qualities necessary for the proper performance of judicial duties, taking advantage for this purpose of the training and other facilities which should be made available, under judicial control, to judges.
4. A judge shall keep himself or herself informed about relevant developments of international law, including international conventions and other instruments establishing human rights norms.
5. A judge shall deliver reserved decisions in written form as possible, and perform all judicial duties efficiently, fairly, and with reasonable promptness.
6. A judge shall maintain order and decorum in all proceedings before the court and be patient, dignified and courteous in relation to litigants, witnesses, lawyers and others with whom the judge deals in an official capacity. The judge shall require similar conduct of legal representatives, court staff and others subject to the judge's influence, direction or control.
7. A judge shall not engage in conduct incompatible with the diligent discharge of judicial duties.

Nepal's Code of Conduct for Judges is very comprehensive. It has adopted all modern values and norms. The main question relating to code is its' implementation that there is no mention of inequality on the basis of sexual orientation, participating in public hearings, having no right of presenting in court on behalf of parties to Supreme Court justice after their retirement can be considered drawbacks. So, we can say that to some extent it is different from the Bangalore Principles.

VII. ORGANIZATIONS INVOLVED IN MAINTAINING GOOD CONDUCT FOR JUDGES

The following institutions are involved directly and indirectly in maintaining good conduct by judges, which will help to enhance the criminal justice system.

- Parliament: to take action of impeachment against the Chief Justice and other Justices of the Supreme Court;
- Judicial Council: duties appointment, transfer, and taking disciplinary action;
- CIAA: investigation and prosecution of corruption cases;
- Judicial Service Commission: duties appointment, transfer, and taking disciplinary action against judicial officers;
- Concerned Ministries and Police Headquarters: taking action against law enforcement officials in breach of professional ethics.

Nepal is now in the process of peacekeeping and is in a transitional phase. After the second movement of the people, the desires of the people are increasing. The nation is suffering from impunity. Obviously, in this situation, to maintain the criminal justice system, conduct of judges, prosecutors, and law enforcement official must be satisfactory. We have no separate codes of conduct for law enforcement officials and other prevailing codes of conduct for judges and prosecutors are not implemented effectively.

VIII. EDUCATION AND TRAINING OF CRIMINAL JUSTICE PERSONNEL IN NEPAL

Education and training are required to impart the knowledge of jurisprudence and to enable the person to apply the knowledge in delivery of justice. Training is learning method that improves ability to perform a job. It is skill oriented and remedial in nature. Technological changes are making the job more complex and demanding. The judicial system needed to raise skill levels and make employees versatile and adaptable through training and education. So, training is an important part of HRD efforts which provides positive changes in knowledge, skills and attitudes. Training improves knowledge, skill and attitudes and enriches employees' moral and quality of performance. Training signifies the process of learning by practice the skills necessary to discharge the functions.

Only after attaining a Bachelor of Laws degree from any recognized university, along with other specified qualification and experiences, are persons eligible for appointment as judges, prosecutors, and law enforcement officials. Our LLB curriculum is developed so that students learn various subject matters along with justice and ethics. After appointment as judges they are taught about ethics and norms in the NJA. If any judge shows interest in achieving any further degree in law, they are promoted from any university of Nepal and out of the country.

(i) Kinds of Training

These are main types of training followed to achieve judicial excellence:
(a) Pre service or orientation training;
(b) Refresher training;
(c) Job training;
(d) Promotional training;
(e) Remedial training;
(f) Safety training etc.

(ii) Training Process and Features of Training

Determining training needs, specifying training objectives, making curricula and determining training methods, conducting training of trainers, selecting trainees, developing training budgets, conducting training, and evaluating training are the main training processes followed by concerned training centres and the National Judicial Academy. According to the nature of the job, various types of tools and techniques are used in training. Discussion, presentation, workshops, seminars, instruction, lectures; field visits, active participation and study tours are a few mentionable features of training which enrich the quality and skill of judges and officers.

(iii) Role of Training Institutions

The National Judicial Academy is a statutory body charged with the task of improving the justice system in Nepal through judicial education, training research, and dissemination of legal information. Much of its efforts revolve around the training and education of judges, court staff, government attorneys and private lawyers. Other institutions i.e. the Judicial Service Training Center, Administrative Staff College, National Police Academy, Forensic Science Department and National and International Training Institutions are involved to provide training to judges, prosecutors and law enforcement officials in justice related different issues.

IX. PROCEDURAL LEGAL MECHANISMS TO REGULATE JUDGES' ACTIVITIES IN NEPAL

The Interim Constitution of Nepal, 2007; the Judicial Council Act, 1990; and Rules, 2000; and Codes of Conduct for Judges, 2009 are some vital laws and norms to guid judges' activities and help them to act ethically.

The Interim Constitution of Nepal, 2007 has specified responsibility to the Judicial Council for the recommendation of appointment, evaluation, transfer and removal from the job. Article 105(2) of the constitution stipulates that a motion of impeachment may be presented before legislator parliament against the chief justice or any other judge on the ground that he or she is unable to perform their duties for reasons of incompetence, misbehaviour, failure to discharge the duties of their office in good faith, physical or mental condition, and if a two thirds majority members passes the resolution, he or she shall ipso facto cease to hold

office. The Chief Justice or judge shall not be deprived of the opportunity to defend him or herself.

According to Article 109(10) (C) The Chief Justice can remove a judge of the Appellate and District Court in accordance with a decision of the Judicial Council for reasons of incompetence; misbehaviour; failure to discharge the duties of his her office in good faith; incapacity to discharge those duties due to physical or mental reasons; or for deviation from the task of dispensing justice. Such a judge shall be given a reasonable opportunity to defend him or herself. For this purpose, the Judicial Council may constitute a committee of inquiry for recording the statement of the judge, collecting evidence and submitting its findings thereon.

Judicial misconduct stipulated in the Judicial Council Act, 1990 Section 4A, looks similar to conduct stipulated in Codes of Conduct. According to Section 9A, if any judge of an appeal District Court is found guilty of corruption, cases will be filed against him or her in appellate court on behalf of the council by the Secretary and other deputed officers of the council. We have one example of filing case in corruption. It is how under consideration by Supreme Court of Nepal.

Article 120 (2) of the Constitution stipulates that an inquiry and investigation may be conducted, or caused to be conducted by CIAA, against any official of a Constitutional Body removed from their office following an impeachment resolution on the ground of misbehaviour, any judge removed by the Judicial Council on similar charges after they are removed from office, in accordance with law. Judicial Council Rules, 2000 Rule 24 says at the time of appointment, performance evaluation and transfer of the judges, the codes-abiding attitudes of judges shall be taken into consideration.

X. CHALLENGES RELATING TO CODES OF CONDUCT FOR JUDGES

- Monitoring of Codes of Conduct: When we observe all provisions of this code, it has included all prevalent modern provisions. It lacks one thing relating to its implementation. For its effective implementation, the national judiciary should have to adopt effective mechanisms. No any single word is mentioned in this code about its implementation. Rational observers show doubts about its implementation. However, Judicial Council Rules, 2000 Rule 24 says at the time of appointment, performance evaluation and transfer of the judges, the codes-abiding attitudes of judges shall be taken into consideration. In another way, we can assume that law has recognized the implementation mechanism to some extent.
- Self Monitoring: Commitment alone is not sufficient. Compliance must be visible. Rational observers should see that these are fully applied. Judges must monitor and evaluate thier activities daily and improve if any mistakes are made.
- Who can monitor? Monitoring of implementation of codes of conduct is a challenging issue. Persons having a judicial mind or another judge are suitable personalities to monitor. The Judicial Council headed by the Chief Justice is also proper institution. Section 4B of the Judicial Council Act shifts the duty of monitoring and evaluation of judicial duties and conduct of appellate and district court judges to the chief judge of the Appeal Court and the Supreme Court judges. Monitoring and evaluation duties relating to codes of conduct also should be shifted to those judges as stipulated by law.
- Weak situation of security: In Nepal the security situation of judges, prosecutors, and judicial officers is very weak. People give unnecessary pressure on a regular basis. Power, money and muscle are used to avoid the law.
- Due to parliamentary hearings, there is increase in- unnecessary flattering of political leaders.
- Due to isolated life, to maintain life, sufficient facilities with adequate finances are needed.
- All people should be aware of the role and duty of the judiciary and its performance style.
- Knowledge and skill of judges and judicial officers should be updated through modern legal education and training.
- Misuse of discretionary power for fulfillment of their unethical desires.

XI. EXPECTED REFORM

1. Introduce separate codes of conduct for law enforcement officials and update already existing codes of conduct for judges and prosecutors;

2. Establishment of effective mechanisms to monitor, supervise and strictly implement laws, rules and codes of conduct;
3. Improvement in the selection system of judges, prosecutors and law enforcement officials from competent, highly moral, qualified, trained and experienced persons;
4. Provide sufficient professional education and training on profession-related matters with proper learning methods;
5. Civil society and bar associations can have a beneficial role in bringing transparency to judicial processes, including judicial discipline;
6. We need an effective, transparent, open, rigorously fair mechanism for immediate disciplinary proceedings;
7. Sensitize judges, prosecutors and law enforcemaent officials to the concept of self-discipline as the best discipline;
8. Strengthen institutions involved in corruption control, maintaining good conduct and training for judges, prosecutors and law enforcement officials.

XII. CONCLUSION

Legal provisions alone may not be sufficient to control corruption. Public awareness and collaboration and co-operation with the international community are also important. A strong legal regime against corruption, strong enforcement of general laws; development of a law-abiding culture; the end of impunity; improvement of the socio-economic condition of government officials and also of the general public are pre-requisites for corruption control.

Like other developing and under-developed countries, Nepal is facing different types of ethical problems in its criminal justice system. First of all, we have to update the codes of conduct of judges and prosecutors and introduce separate codes of conduct for law enforcement officials. Weak implementation mechanisms and lack of regular monitoring and evaluating systems are vital problems. If we succeed to correct the present errors, the criminal justice system will be improved to some extent.

GROUP 1

ETHICS AND CODES OF CONDUCT FOR JUDGES, PROSECUTORS AND LAW ENFORCEMENT OFFICIALS

Chairperson	Mr. Thok Prasad Shiwakoti	(Nepal)
Co-Chairpersons	Mr. Kankolongo Sylvain Muamba	(DR Congo)
	Mr. Masayuki Takahashi	(Japan)
Rapporteur	Mr. Md. Shah Abid Hossain	(Bangladesh)
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	Ms. Miho Otake	(Japan)
Members	Mr. Faris Maher Tahseen Abederaoof	(Palestine)
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	Prof. Toru Kawaharada	(UNAFEI)

I. INTRODUCTION

Group 1 started its discussion on 9 October 2009. The group elected by consensus Mr. Shiwakoti as Chairperson, Mr. Muamba and Mr. Takahashi as Co-Chairpersons, Mr. Hossain as Rapporteur, and Ms. Otake and Mr. Minh as Co-Rapporteurs. The group, which was assigned to discuss "Ethics and Codes of Conduct for Judges, Prosecutors and Law Enforcement Officials", agreed to conduct its discussion in accordance with the following agenda:

1) Current situation and issues concerning corruption or misconduct in the judiciary and prosecutorial/law enforcement authorities;
2) Legal ethics/professional responsibility and codes of conduct in the judiciary and prosecutorial/law enforcement authorities;
3) Other measures to prevent corruption and misconduct in the judiciary and prosecutorial/law enforcement authorities;
4) Appointment, Education and Training;
5) Procedural Regulations;
6) Conclusion and recommendations.

II. SUMMARY OF THE DISCUSSIONS

A. Current Situation and Issues concerning Corruption or Misconduct in the Judiciary and Prosecutorial/Law Enforcement Authorities

The discussion began with all participants sharing information about their respective countries' current situations and issues regarding the topic. Most of the participants agreed that the rule of law and access to justice are key elements of governance and are essential for ensuring human rights. Corruption in the judiciary, prosecutorial authorities and law enforcement authorities not only decreases the capacity of a country to curb corruption, but also deteriorates the morale of the people and their trust in the justice system. Many issues make maintaining an ethical workforce difficult. Regarding corruption and misconduct in the judiciary, most of the participants stated that significant problems exist in the respective countries. Inefficiency and corruption in terms of bribery throughout the sector are a major concern and a significant inhibitor to access to justice.

All the participants opined that poor salary/remuneration, abuse of discretionary powers, absence of effective monitoring systems and weak implementation of the existing codes of conduct are the main causes

of this violation. Transparency in the decision making process is also inadequate in most of the represented countries. Lack of a rule abiding culture and legal complexities aggravate the situation.

The people's perception of corruption indicates that the absence of accountability and misuse of position and power are the most important manifestation of corruption. It is also interesting to note that the second most frequent perception of corruption is negligence of duty. These are directly related to non-accountability and absence of monitoring systems and are also common indications of poor governance. The third most frequent perception of corruption is engagement in outside activities, avoiding the parameters laid down by business or service rules.

B. Legal Ethics/Professional Responsibility and Codes of Conduct in the Judiciary and Prosecutorial/ Law Enforcement Authorities

Most of the represented countries apply rules of conduct or ethics law to civil servants in general, but those same rules or laws are not applied to justices or judges of the apex court. These rules provide a framework code of conduct for government servants, intended to ensure safeguards against corruption, external influence on decision-making, nepotism, favoritism, victimization, etc. In most cases, the rules also require disclosure of assets, or the value of properties held by the public servant exceeding a certain amount. Sometimes a government servant is required to disclose his or her liquid assets when asked by the government.

There are no formal separate or specific codes for judges and prosecutors in the Democratic Republic of Congo (DRC), Japan or Vietnam. Conduct rules for government servants in general are applicable to judges and prosecutors in DRC and Vietnam. But in Japan and Nepal, these general rules are only applicable to prosecutors. Nepal has separate codes for judges, prosecutors and law enforcement officials. In Palestine, the codes for judges and prosecutors are similar. In Bangladesh, the Supreme Judicial Council prescribes a code of conduct for all of the judges of the Apex Court. Judges and judicial magistrates in the subordinate courts and for the prosecutors have to follow the written guidelines prescribed by the Ministry of Law, which is almost similar to the code of conduct for judges of the Appellate Division and the High Court Division.

In most cases, the codes stipulate that any act of a judge, whether in an official or personal capacity, which erodes judicial credibility and independence, must be avoided. The code of conduct encompasses all the basic factors of ensuring judicial independence, integrity and propriety and is merely a restatement of the values of judicial life, illustrative rather than exhaustive. In most cases, codes of conduct for law enforcement officials are prescribed in the laws and developed by the country's Ministry of Home or Interior Affairs. For law enforcement officials, the internal rules are self-monitored and supervised in most of the represented countries. But in Japan, the public safety commission and prefectural police committees monitor and supervise police activities.

Effective implementation of the codes is the main challenge in most of the countries. Japan has introduced some monitoring measures which are implemented in terms of reappointment. Every ten years, judges' performances are reviewed by the nomination advisory committee, which is comprised of judges, prosecutors, lawyers and academics. Every three years, prosecutors' qualifications must be reviewed by the review committee, comprised of Diet members, judges, lawyers and academics. In Vietnam, judges have a five-year tenure. Bangladesh, Nepal, DRC and Palestine have no such system of reappointment, but there are annual confidential performance appraisals.

In Bangladesh, High Court and Supreme Court judges have superintendence and control of all subordinate courts and tribunals. The conduct of judicial officers is also overseen by the local authority.

Integrated preventive measures should be introduced in the developing countries. The group members agreed that effective formal codes of conduct are necessary. They opined that multiple codes will be more effective and more attention should be given to implementation. They likewise agreed upon the necessity of effective guidelines for using discretionary power.

C. Other Measures to Prevent Corruption and Misconduct in the Judiciary and Prosecutorial/Law Enforcement Authorities

Judicial Officers are required to submit asset statements regularly as a part of the monitoring mechanism in most of the represented countries. Indirect appraisal of judges is also practiced.

In Japan, judges are not required to submit an annual asset statement but prosecutors are required to disclose gifts. The adequate remuneration of judges and prosecutors in Japan means that there is little motivation to acquire wealth illicitly. The group agreed that an appropriate compensation package is also required to reduce the motivation for illicit wealth acquisition.

In most of the countries, cases are assigned automatically, but prosecution chiefs may assign cases considering each prosecutor's ability and merits. Besides this, the regular transfer of personnel also provides a significant barrier to corruption.

In some countries there is provision to appoint High Court and Supreme Court judges from among practicing lawyers. In all countries, the prosecutorial authority must give written reason for a decision of non-prosecution. In addition, Japan has a Prosecution Review Commission, which consists of 11 members selected from the citizenry. It is empowered to examine the propriety of decisions made by public prosecutors, not to institute prosecutions. Besides this, people have the right to complain about abuse of authority.

In some countries there are provisions allowing the apex court, or other authorities as provided by legislation, such as the Financial and Administrative Control Bureau in Palestine, to inspect or observe the subordinate courts' activities. The Parliamentary Standing Committee has also monitored the activities of judicial officials. Comments in the controlling officers' annual confidential evaluation report create a deterrent to indulging in bad practice and corruption. Besides, these serious breaches of its standards could lead to a criminal or disciplinary investigation. Some NGOs, including Transparency International, bar councils and media also play an important role in this regard. The group agreed that a separate independent oversight committee or commission within and outside the organization would be a further effective control.

D. Appointment, Education and Training

Most of the countries have a transparent competitive national level recruitment system. In Bangladesh, candidates for the judiciary and prosecution are selected from among law graduates. In Nepal, the judicial council makes recommendations for the appointment of district judges from among judicial officials and legal practitioners. In Japan, the candidates must take the one-year legal trainee course at the Legal Research and Training Institute. Candidates in Vietnam require four years' legal experience. In Palestine, candidates also require two years' training from the bar association and five-to-ten years' legal experience. High Court and Supreme Court judges are appointed from sitting judges, legal practitioners and government officials of a legal background.

In Vietnam, internship training after appointment is long (one year), but in most countries it varies from 3 to 16 weeks. In the DRC there is very limited opportunity for legal training for judges, prosecutors and law enforcement officials. In Bangladesh and Palestine, new officers are provided training at the Judicial Administration Training Institute on various important procedural and substantive laws, both civil and criminal, including codes of conduct, good governance, anti-corruption issues and some cross-cutting issues. In Japan, judges and prosecutors have also been provided periodic on-the-job training. Other countries, with the exception of the DRC, have some periodical on-the-job training, but it is not sufficient. Adequate moral and ethical education or training is absent in most of the countries. In most countries, a police training academy provides basic and in-service training to police officers which also includes codes of conduct, human rights, and prosecution and investigation related courses.

The participants agreed that long basic and periodic on-the-job training is necessary for imparting appropriate knowledge to judicial officers, which may include numbers of case studies on corruption and misconduct cases.

E. Procedural Regulations

Every country has provisions for disqualification and recusal of judges in criminal proceedings in which the judge's impartiality might reasonably be questioned. Senior judges also may replace the judge in charge

upon a request from a defendant or prosecutor. For prosecutors, though there is no such formal regulation, in practice, they also follow a system of disqualification and recusal. In Japan the rule of criminal investigation prescribes the law enforcement official's obligation to avoid cases in which there may be a conflict of interest. But for law enforcement officials in Bangladesh there is no such recusal system. A law enforcement official must do his her duty according the law; in practice, sometimes an official will refuse to proceed.

Disciplinary procedures are the same for judges and prosecutors in Palestine, Nepal and Bangladesh. But in Japan judges cannot be removed except by public impeachment. The Impeachment Court decides whether or not to remove the judge. In Bangladesh, Supreme Court judges can only be removed by impeachment. Concerned authorities like ministries or the the Attorney General's Office can initiate action based on their service related laws. Most of the countries have their own rules and regulations against the violation of conduct rules. Depending on the nature and seriousness of the violation, the official may receive a reprimand, warning, wage reduction, demotion, removal from office or dismissal as a punishment. Corruption is treated as criminal misconduct and is deemed to be a cognizable criminal offence.

The group agreed that the procedural regulations may be developed further, making it more clear, accountable and transparent. The requirement to provide reasonable opportunity to show cause applies to inquiry procedures for both major and minor penalties. Besides the general disciplinary procedures there are some internal regulations for dealing with the matters involving law enforcement officials. Disciplinary procedures for a judge start with a request from the court which has the power to supervise the judge and the court makes the disciplinary decisions by a ruling. The facts which give cause for disciplinary action consist of violation by a judge of his or her official duties, neglect by a judge of his or her duties or misconduct which undermines public confidence in the judiciary. To ensure transparency and accountability an independent outside body may be more appropriate to handle these kinds of affairs.

III. CONCLUSION

No country in this world is absolutely free from corruption that is why it is global problem. It is a complex social, political and economic phenomenon that affects all countries. Model preventive policies require formulation and strict adherence to a standard set of codes of conduct and appropriate disciplinary measures. For effective control of corruption and misconduct the group emphasized prevention. But due to its global nature, effective control also depends largely on global co-operation. Our group discussed the issues in a comprehensive way and agreed to find a best practice solution which may be adopted in general.

Our group also agreed that the 3Rs essential for fighting corruption are:

REFRAIN: Do not participate in corruption;
RESIST: Resist corruption wherever and whenever detected; and
REPORT: If all fails, report to the authorities.

Success depends on uniform support at the highest levels. In the years to come it will be the partnership of judiciary, police and the community working together in a climate of mutual respect, understanding and co-operation through which citizens will enjoy a truly enhanced quality of life, free from corruption and crime, which is pre-requisite for a just society.

IV. RECOMMENDATIONS

1. Proper codification and regulations by the appropriate authority should be adopted regarding codes of conduct and other relevant matters/measures;
2. The codes of conduct should accommodate all the core values like independence, impartiality, integrity, propriety, equality, competence and diligence;
3. Multiple codes will be more effective. Besides general codes of conduct for government servants, it is better to have separate codes of conduct for judges, prosecutors and law enforcement officials, depending on the legal system and their job descriptions;
4. Discretionary power should be guided by the transparent guidelines and its exercise should be accountable to a proper authority like the Prosecution Review Commission in Japan. Judges/

prosecutorial authorities should make the reasons for final dispositions (judgments/non-prosecution) clear;

5. An internal independent oversight committee (like the OPR in USA) is required for monitoring strict adherence to the codes of conduct. Sometimes the internal monitoring body may include members from outside the jurisdictions. The members should not be replaced very often. Outside oversight bodies (like the inspector General's Office in the USA or a Parliamentary committee) may look after serious violations;
6. Review of performance evaluation systems is also required, by which superior officers can ensure the just functioning of the system. Job rotation and disclosing of assets ought also to be considered;
7. An effective complaint reporting system should be developed. Public officers who uncover misconduct should be obliged to report such misconduct;
8. Adequate measures should be taken for dissemination of codes of conduct among the members inside and outside the organization to sensitize the citizen as to rights and services provided by the organization. It will develop a deterrent effect against the corrupt practices;
9. The selection/recruitment of candidates should be transparent, effective and based on merit. It should be clear and equally applicable to all. A system of basic legal practitioner training, such as Japan's, may be adopted;
10. Before appointment there may be a system of information collection regarding the judicial candidate's career, including personal and professional moral or ethical behaviour, from the Bar and other institutions;
11. Besides the long initial training, periodical on the job training should be introduced. Inclusion of case studies of corruption and misconduct in the training sessions may be very useful. Adequate legal moral/ethical education and training programmes should be introduced before and after appointment;
12. Moral and ethical education should be incorporated as a separate subject within the curricula from elementary level;
13. Clear criteria for disciplinary procedures stating who and how the measures will be conducted are required. Violations should be strictly dealt with;
14. There should be a transparent and accountable information sharing system regarding the proceedings, violations, disciplinary measures taken;
15. Adequate measures to ensure judicial independence along with job-security and proper compensation should be ensured;
16. Strong political commitment is required above all for curbing corruption. Co-operation from all, including NGOs and the media, is also necessary.

GROUP 2

CODES OF CONDUCT FOR JUDGES, PROSECUTORS AND LAW ENFORCEMENT OFFICIALS

Chairperson	Mr. Hussain Shameem	(Maldives)
Co-Chairperson	Mr. Manabu Imai	(Japan)
Rapporteur	Mr. Bishnu Prasad Upadhyaya	(Nepal)
Co-Rapporteur	Mr. Yuki Mori	(Japan)
Members	Mr. Khalid Salim Fadhil	(Oman)
	Mr. Long Ta Cuu Doan	(Vietnam)
	Ms. Gereltuya Gombojav	(Mongolia)
Visiting Experts	Mr. Sunghoon Park	(UNODC)
	Ms. Judith B. Wish	(USA)
Advisers	Deputy Director Haruhiko Ukawa	(UNAFEI)
	Prof. Fumiko Akahane	(UNAFEI)
	Prof. Junichi Watanabe	(UNAFEI)
	Prof. Ayako Sakonji	(UNAFEI)

I. INTRODUCION

This Group started its discussion on 9 October 2009. The group elected, by consensus, Mr. Shameem from Maldives as its Chairperson, Mr. Imai from Japan as Co-chairperson, and Mr. Upadhyaya from Nepal and Mr. Mori from Japan as its Rapporteur and Co-rapporteur respectively.

The Group was assigned to discuss "Codes of Conduct for Judges, Prosecutors and Law Enforcement Officials". Under the above mentioned theme, the group agreed to discuss the following issues as sub-topics.

1. Current situation and issues concerning corruption or misconduct;
2. Legal ethics, professional responsibilities and codes of conduct in the judiciary and prosecutorial/law enforcement authorities;
3. Other measures to prevent corruption and misconduct in the judiciary and prosecutorial/law enforcement authorities;
4. Appointment, education and training;
5. Procedural regulations.

II. SUMMARY OF THE DISCUSSIONS

A. Current Situation And Issues Concerning Corruption or Misconduct

1. Current Situation

Members of the group took turns to introduce their countries and the situation in their countries in general, in terms of the legal system and issues relating to corruption. This was mainly a brief of the Individual Papers presented during the previous couple of weeks. The members agreed that in order to better understand the position of the represented countries, it was important to understand their legal systems.

Corruption and corrupt activities by officials are criminalized in all the countries represented and corruption is always seen by the public as a disgrace or shameful.

The first issue that the group discussed was defining corruption and the perception of corruption in different countries. Corruption was agreed to be defined as 'the abuse of entrusted power for private gain by a public official'. It was obvious from the discussion that the general public perception of corruption differs widely from country to country and from culture to culture. It was also observed that this perception has roots in the socio-political situation of the country. Therefore, the group agreed that while combating corrupt activities by judges, prosecutors and law enforcement officials, it is vital to take into consideration the many factors that could affect the official concerned, i.e. the political background of the country, financial situation, culture, etc.

The swift and speedy disposition of corruption cases was discussed as a matter of high priority. Nevertheless, while doing so, it was agreed that officials must consider, the complexity of such cases, the difficulty of collecting evidence and successfully prosecuting the accused. Therefore, speed and swift disposition must not be at the expense of collecting sufficient evidence and hence, successful prosecution.

2. Main Causes of Corruption

Low remuneration was identified as a cause of corruption. The meaning of 'low remuneration' was discussed in great depth. While members agreed that low remuneration does cause corruption, they disagreed about the degree of this cause.

The group discussed deeply the meaning of 'minimum living standard' and it was observed that the above term does not intend to give a specific standard; however, it could be interpreted as 'a living standard that is acceptable to a person of his or her stature in the society'.

Many arguments were raised about the level of remuneration and the relationship between the salary and living standards of judges, prosecutors and law enforcement officials and the national average wage. It was agreed that the salary of a judge, prosecutor/law enforcement official should rather be compared with that of a civil servant of the same rank and stature and/or should be sufficient to maintain a minimum standard of living.

The group also discussed the following issues as other major factors resulting in corruption by public officials: social and cultural values towards corruption; weak laws, and their weak implementation; more discretionary power and weak monitoring systems; and inconsistency of applicable laws.

B. Legal Ethics, Deontology, Professional Responsibilities and Codes of Conduct in the Judiciary, Prosecutorial and Law Enforcement Authorities

Legal ethics, deontology, professional responsibilities and codes of conduct vary in different countries. Different countries had different reasons to adopt or not adopt a code of conduct for officials. This has historical and social explanations.

The group then assumed and discussed a code of conduct for judges, prosecutors and law enforcement officials of an imagined new county. The pros and cons of establishing and implementing a code of conduct were widely discussed. However, for the new country, it was agreed that a code of conduct was needed to prevent and deter criminal justice officials from becoming involved in corruption and to maintain public confidence in the criminal justice system.

It was discussed that a capacity assessment of the judiciary, prosecution service and police service must be conducted before attempting to establish such a code to achieve the best possible discipline among criminal justice officials.

1. Code of Conduct for Judges

A code of conduct for judges should include all the principles stipulated in the Bangalore Principles of Judicial Conduct. However, it should be amended in a way that would suit the new country. The code of conduct should be 'localized'. The group discussed the hierarchy of the principles. Some members argued that some principles may be more important and therefore prioritized, while other members argued that only a someone with *all* the values will make a good judge.

(i) Independence

Judges must be independent in judicial work from the legislative and executive branches of government, other institutions and judicial colleagues. Additionally, a judge may be encouraged to discuss judical matters, with colleagues, but must not be influenced in any way whatsoever by his or her colleagues.

(ii) Impartiality and Integrity

A judge must maintain a high level of integrity. Judges should not be biased while executing their duty. The decision-making process must also be seen to be unbiased, impartial, just and fair.

(iii) Propriety

Judges must maintain a lifestyle becoming of judges. Judges must restrict themselves from social activities that may damage the judiciary's reputations for propriety.

(iv) Equality, Competence and Diligence

Judges must deal fairly, equally and respectfully with everyone, including but not limited to prosecutors, defence lawyers, colleagues, staff and subordinates. Judges must not, by words or by action, portray his or her opinion on a matter that may end up in his or her court. Judges must also make an effort to remain competent and diligent. Judges should be encouraged to attend training and refresher programmes.

2. Code of Conduct for Prosecutors

Prosecutors play a vital role in the administration of the criminal justice system. Prosecutors have a duty to ensure that the fundamental human rights of the citizens are observed at all times. Therefore, prosecutors should maintain ethical behaviour. The following principles can be identified as minimum standards of ethical conduct by prosecutors.

(i) Professional Conduct and Competency

Prosecutors, as practitioners of criminal law, must at all times be well informed of all recent developments in the legal framework, including a thorough knowledge of criminal procedure codes, evidentiary laws and fundamental human rights of the citizens.

(ii) Independence

As the use of prosecutorial discretion is a wide power given to prosecutors, to ensure that this discretionary power is used in a fair, consistent and legally sound manner, prosecutors must be independent from any political or other sorts of influence.

(iii) Impartiality

Prosecutors must perform their duties without favour, prejudice or fear. Prosecutors must remain calm at all times and carry out their duties impartially and objectively, according to their jurisdiction's laws and regulations.

(iv) Role in Criminal Proceedings

Prosecutors, as the representative of the public interest must ensure that the defendant receives fair treatment during the criminal proceedings. Prosecutors must also guarantee that prosecution evidence submitted to court is sufficient and has been legally obtained. As the defenders of the public interest, prosecutors must not only consider the rights of the victims, but the rights of the greater community as well.

(v) Co-operation

Prosecutors play an important part in criminal proceedings. However, the prosecutor's work shall be supplemented by the work of law enforcement officials. Therefore, the co-operation between prosecutors and the law enforcement officials must be maintained at all times. Prosecutors must also maintain a professional courteous relationship with courts, defence lawyers and all other relevant parties in the criminal justice system, to realize that justice is served fairly and in an expeditious manner to all parties involved in criminal proceedings.

3. Code of Conduct for Law Enforcement Officials (Police)

While establishing a code of conduct for police officials, the group discussed the importance which must be given to honesty, integrity and the spirit of sacrifice. Moreover, given global nature of police work, the code must comply with international best practices as each police force will have to co-operate with other international organizations in fulfilling its duties.

(i) Honesty, Integrity, Confidentiality and Spirit of Sacrifice

Police officials must be honest, maintain high integrity and be willing to, made sacrifices while fulfilling their duties. This is more relevant to police as police are the 'face' of the criminal justice system and fight crimes on a day-to-day basis. Police also receive information of a classified nature from different sources. Misuse of this police intelligence may result in major breach of public confidence in the criminal justice system.

(ii) Fairness, Tolerance, Appearance and Impairment

Police must be fair and must be able to tolerate any amount of difficulty (humiliation, violence, etc) during the performance of their duties. Police must not react to violent actions by criminal elements. On the contrary, police should remain calm at all times and maintain high level of personal conduct and good appearance. Law enforcement officials must not be under the influence of drugs and alcohol while on duty.

(iii) Use of Force, Abuse of Authority and Lawful Order

The nature of police work includes using of force against citizens. It is important to make sure that this force is only to the limit required. The police must not abuse their power in any way. Fighting corruption in the police must be the focus of this principle.

(iv) Co-operation and Partnership

As the police get involved in dealing with international crime that which causes economic and social problems, it is important for them to deal in a friendly manner with foreign police to achieve investigative success.

C. Other Measures to Prevent Corruption in the Judicial, Prosecutorial and Law Enforcement Authorities

The group agreed that implementation of the code of conduct shall play an important role in fighting corruption of public officials of the criminal justice system. Therefore, it was suggested that, during the drafting of the code of conduct, judges, prosecutors and law enforcement officials must be actively involved and widely consulted. This is to ensure ownership of the code.

Thereafter, comprehensive training must be provided to facilitate complying with the code of conduct. Training must include discussion of real-time issues and problems. Adult learning mechanisms should be employed. Specialized experts may be employed to advise judges, prosecutors and law enforcement officials on ethics and codes of conduct. Continuous training and refresher courses shall be conducted throughout the year. The public shall also be informed about the code of conduct of the criminal justice system officials. Additionally, the group agreed that along with a written code of conduct, the traditions and work culture of judges, prosecutors and law enforcement officials shall be given priority.

Mechanism: an independent committee/authority must be established within each respective organization to ensure compliance with the code of conduct.

D. Appointment, Education and Training

The group agreed that selection of judges, prosecutors and law enforcement officials should be based on merit. Integrity of the applicant should be considered too. As for education and training, the group agreed that the lecture-based education only may not be sufficient. Therefore, adult learning methods (Experience Exchange, Sharing) should be deployed. Continuous legal training on ethics and codes of conduct must also be conducted. A separate officer or officers may be employed to advise the officials continuously on the code of conduct and ethical behaviour.

E. Procedural Regulations

The group did not discuss in depth the issues of procedural regulations as it was understood that *all* the countries represented had sufficient procedural regulations stipulated in their respective constitutions and local procedural laws. Issues relating to recusal were also addressed in most jurisdictions. In countries that do not have recusal arrangements written in procedural regulations, it was observed that they had strong unwritten customs, traditions and practices that worked to avoid any possible conflict of interests. However, the effective implementation of the procedural regulations was raised as a concern and more work needs to be done on this aspect.

III. CONCLUSION AND RECOMMENDATION

Upon discussion, it was observed by the group that the international covenants and instruments that relate to codes of conduct and ethical behaviour of judges, prosecutors and law enforcement officials are merely minimum standards (as it is the nature of any international instrument). The group observed that

there are certain values that may be considered common values among the officials of the criminal justice system. However, the aspect and the mission of each organization and their values will differ and therefore have differing impacts.

Following their comprehensive discussion, the group was unanimous that a written code of conduct for judges, prosecutors and law enforcement officials was indeed important to fight corruption and unethical conduct of officials of the criminal justice system. The code should reflect the aspirations of the citizens towards criminal justice. It should also incorporate the country's traditional values and social and cultural values. It should also address the historical events that might have led to the establishment of the code of conduct. The code of conduct must be coupled with efforts to train officials, on a continuous basis, on the codes of conduct and ethical behaviour, with constant advisory support and harsh punishments in the event of violation of the code.

The work of judges, prosecutors and law enforcement officials and the decisions made by them affect the daily life of citizens. High levels of ethical behaviour, equality and fairness in performance of the duties of judges, prosecutors and law enforcement officials are not only a favorable qualities but it can considered a right of all citizens.

APPENDIX

COMMEMORATIVE PHOTOGRAPHS

- ***142nd International Training Course***
- ***Twelfth International Training Course on the Criminal Justice Response to Corruption***
- ***143rd International Training Course***

UNAFEI

The 142nd International Training Course

Left to Right:
Above:
Prof. Morgan (Australia), Mr. Ng (Singapore), Mr. Allen (UK), Prof. Higuchi

4th Row:
Mr. Takahashi (Staff), Ms. Ota (Staff), Mr. Koiwa (Staff), Mr. Sotozaki (Chef), Mr. Nishitani (Staff), Ms. Kawashima (Staff), Ms. Obayashi (JICA), Ms. Iwakata (Staff), Ms. Ono (Staff), Mr. Shirakawa (Staff), Mr. Saito (Staff), Mr. Nagata (Staff), Mr. Kojitani (Staff), Ms. Usuki (Staff)

3rd Row:
Mr. Kosaka (Staff), Ms. Rahubaddhe (Sri Lanka), Mr. Maliki (Solomon Islands), Mr. Hirate (Japan), Mr. Qawariq (Palestine), Mr. Park (Korea), Ms. Kato (Japan), Ms. Flores Ramirez (Guatemala), Mr. Buchane (Namibia), Mr. Lam (Hong Kong), Ms. Rodrigues de Moraes (Brazil), Ms. Justino da Cruz (Brazil)

2nd Row:
Mr. Upadhyaya (Nepal), Mr. Sumikawa (Japan), Mr. Telefoni (Tonga), Mr. Goda (Japan), Mr. Yamamoto (Japan), Mr. Oleskyenio (Colombia), Mr. Ngoie (DR Congo), Mr. Wakimoto (Japan), Mr. Iomea (Solomon Islands), Ms. Lawrence (Jamaica), Mr. Suda (Japan), Mr. Thapa (Nepal), Mr. Hayashi (Japan)

1st Row:
Mr. Fujiwara (Staff), Prof. Harada, Prof. Sakonji, Prof. Akahane, Prof. Oshino, Prof. Dr. Dr. h.c. Albrecht (Germany), Director Aizawa, Deputy Director Seto, Prof. Sugano, Prof. Kawaharada, Prof. Watanabe, Mr. Iida (Staff), Ms. Lord (L.A.)

The Twelfth International Training Course on the Criminal Justice Response to Corruption

Left to Right:
Above:
Mr. Soh (Singapore), Mr. Aizawa (Former Director), Prof. Sugano, Prof. Kawaharada, Prof. Sakonji, Ms. Lord (L.A.)

4th Row:
Ms. Sakai (Chef), Mr. Sotozaki (Chef), Mr. Kosaka (Staff), Ms. Usuki (Staff), Mr. Nishitani (Staff), Mr. Saito (Staff), Ms. Ota (Staff), Ms. Iwakata (Staff), Mr. Kojitani (Staff), Mr. Koiwa (Staff), Mr. Takahashi (Staff), Mr. Shirakawa (Staff), Ms. Kawashima (Staff), Ms. Shimoda (JICA)

3rd Row:
Mr. Miyazaki (Japan), Mr. Ito (Japan), Mr. Aryal (Nepal), Mr. Done (Papua New guinea), Mr. Thanh (Vietnam), Mr. Matsui (Japan), Mr. Uchida (Japan), Mr. Al Gumaei (Yemen), Mr. Ayush (Mongolia), Ms. Watanabe (Japan), Mr. Al-Zaidi (Iraq)

2nd Row:
Mr. Lafee (Palestine), Ms. Novkovic (Montenegro), Mr. Afele (Samoa), Mr. Ruffin (DR Congo), Mr. Sharif (Afghanistan), Ms. Bajalan (Iraq), Mr. Surya (Nepal), Ms. Siriwardena (Sri Lanka), Ms. Vudthithornnatirak (Thailand), Mr. Wada (Japan), Ms. Koçiaj (Albania), Ms. Tai (Vietnam)

1st Row:
Mr. Fujiwara (Staff), Prof. Akahane, Prof. Harada, Deputy Director Seto, Director Sasaki, Prof. Oshino, Prof. Watanabe, Mr. Iida (Staff), Mr. Kobayashi (Staff)

The 143rd International Training Course

Left to Right:
Above:
Ms. Wish (USA), Prof. Higuchi, Prof. Sugano

3rd Row:
Ms. Sakai (Chef), Ms. Iwakata (Staff), Mr. Nishitani (Staff), Mr. Nagata (Staff), Ms. Usuki (Staff), Ms. Ono (Staff), Mr. Saito (Staff), Mr. Shirakawa (Staff), Mr. Koiwa (Staff), Mr. Kojitani (Staff), Mr. Kosaka (Staff), Ms. Kawashima (Staff), Mr. Takahashi (Staff), Ms. Hisa (JICA)

2nd Row:
Ms. Otake (Japan), Mr. Takahashi (Japan), Mr. Mori (Japan), Mr. Shameem (Maldives), Mr. Upadhyaya (Nepal), Mr. Fadhil (Oman), Mr. Faris (Palestine), Mr. Shiwakoti (Nepal), Ms. Gereltuya (Mongolia), Mr. Abid (Bangladesh), Mr. Muamba (Democratic Republic of the Congo), Mr. Long (Vietnam), Mr. Minh (Vietnam), Mr. Imai (Japan), Mr. Hosoya (Japan)

1st Row:
Ms. Lord (LA), Mr. Fujiwara (Staff), Prof. Harada, Prof. Kawaharada, Prof Akahane, Deputy Director Ukawa, Mr. Park (Korea), Director Sasaki, Mr Maitrepierre (France), Prof. Oshino, Prof. Watanabe, Prof. Sakonji, Mr. Iida (Staff), Mr. Kobayashi (Staff)